
THE INDEPENDENT PANEL'S REPORT ON JUDICIAL REVIEW (CP 407) AND THE GOVERNMENT'S CONSULTATION DOCUMENT ON JUDICIAL REVIEW REFORM (CP 408)

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[A] INTRODUCTION

Judicial review (JR) is the process through which individuals or groups may challenge in the courts the lawfulness of action and decisions, including inaction and non-decisions, by public bodies exercising public powers. JR is the fail-safe legal device when there are no other rights of appeal or legal challenge available. In England and Wales it is a process created and developed incrementally through the common law: that is, judicially determined law, with some statutory accretions. In the UK, JR is a basic realization of the rule of law: government and governors must act within their legal limits. Limits are set by Parliament in legislation and the common law. While legislation as an embodiment of the Crown in Parliament is superior to the common law, legislation is interpreted in accordance with the traditions and principles of the common law. A key ingredient of the rule of law is an independent and effective judiciary and access to justice. In a democracy there will be tensions between the executive, the legislature and the courts in pursuit of their constitutional duties. The executive may not have the powers in law it believes it has. Parliament may believe that the courts have not interpreted legislation in a manner it predicted. It will have to try again in new legislation. The tensions are normal and constructive where there is mutual respect between the branches of the state. As it has been famously expressed by Nolan LJ:

The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is (*M v Home Office* (1992) at 314).¹

¹ This was based on formulations made by counsel in the case.

JR has become a significant and ubiquitous feature of our public life (Ministry of Justice 2021a: paragraph 19 on figures on growth of JR).² Barely a news bulletin is aired without reference to a topical JR challenge. Two cases brought by Gina Miller concerning the Government's decision to leave the European Union (EU) (under Article 50 Treaty on European Union: *R (Miller) v Secretary of State for Exiting the EU* (2017) (*Miller No 1*)) and Boris Johnson's prorogation of Parliament at a crucial stage of the Brexit process in 2019 (*R (Miller) v The Prime Minister* (2019) (*Miller No 2*)) brought sensational media coverage and prominence to JR. The cases also attracted vitriolic newspaper assaults on the senior judiciary from the Brexit-supporting media. In both cases the Government was defeated.

Shortly after the Supreme Court decision in *Miller No 2* on prorogation, Parliament was dissolved, and a general election was called for December 2019. The Conservative manifesto highlighted, in a section entitled 'Protect our Democracy' the need to look at 'the broader aspects of our constitution: the relationship between the Government, Parliament and the courts'. Among the sundry topics included was JR.

We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays. In our first year we will set up a Constitution, Democracy & Rights Commission that will examine these issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates (Conservative Party 2019: 48).

'Restore' suggests something was lost.

[B] THE INDEPENDENT PANEL'S REPORT

Reviews of administrative law and JR go back in one way or another to the Donoughmore Report of 1932 (Committee on Ministers' Powers 1932) and have been regularly conducted since the 1950s, in recent years leading to significant reforms. Clashes between the senior judiciary and ministers of both major parties have been common.

A Commission has not been established. An 'independent' panel (IP) was appointed under former Conservative minister and lawyer Lord Faulks to examine JR and to make recommendations. The review has now reported (Ministry of Justice 2021a: the 'Panel Report') and this has been published together with the submissions to the panel although several government departments refused to release their submissions under the

² On numbers of applications, see: paragraphs 4.33ff. The facts reveal the paucity of success against departments in such claims (paragraph 4.55).

Freedom of Information Act 2000 (Constitution Unit 2021).³ A further review is being conducted on the Human Rights Act 1998 (HRA) under former Lord Justice Sir Peter Gross, a commercial lawyer.⁴ From the start greater transparency was promised for the latter which is to report in ‘summer 2021’. Both panels have a UK context in which to operate and not simply an English and Welsh context.⁵

The Prime Minister sees a problem with JR (describing the results of the *Miller* cases as ‘perverse’: Cowburn 2020). JR has its role in protecting the individual against an arrogant Government acting unlawfully. But for too many years, opponents claim, JR has drifted increasingly into merits review of political decisions, expanded over-generously the common law bases of JR and generally allowed the judicial arena to be used to upset political decisions by those who have lost in the political arena—law is resorted to when the case in politics is lost, they argue. JR has become ‘politics by another means’, a phenomenon of which the courts have been aware and have frequently warned against encouraging (see Lord Reed’s evidence to the panel: Reed 2020).⁶ By ‘merits’ one means the intrinsic and substantive nature of a decision and its policy content together with its essential objective. JR is concerned with legal errors in the way a decision was formulated and made, legal errors in its substance and in its impact and effects.

JR has reflected changes brought about by the UK’s membership of the Council of Europe and European Convention on Human Rights (ECHR) and the latter’s incorporation into UK law by the HRA, and by the UK’s membership of the EU. The review of the HRA by Sir Peter Gross does not include departure from the ECHR or repeal of the HRA. The UK’s commitment to the ECHR is a key feature of the UK’s Withdrawal Agreement (2019) with the EU and EU–UK Trade and Cooperation Agreement 2020. The UK completed its departure from the EU on 31 December 2020, but the influence of principles of review shaped by the European Court of Justice is likely to be present in our common law and statute book for the foreseeable future. The growth of subtlety in domestic JR occurred in the period of membership of the EU (Birkinshaw 2020a: chapters 4 and 14).

³ A synopsis of departments’ views is contained on the Gov.UK Judicial Review [Reform Consultation](#) page.

⁴ See: [Independent Human Rights Act Review](#).

⁵ See [Terms of Reference](#). These include to ‘consider public law control of all UK wide and England & Wales powers (but not Wales only powers) that are currently subject to it whether they be statutory, non-statutory, or prerogative powers’. The panel ruled out delegated or transferred powers: chapter 5.

⁶ The phrasing of ‘politics by another means’ is taken from case law: *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* (2019) [326]; *R (Wilson) v The Prime Minister* (2019) [56].

The subjects in the terms of reference for the review ranged from the appropriate constitutional sphere of JR, the limits of justiciability, what subjects are appropriate for courts to review, the bases of jurisdiction (the competence to make a decision in question tied in with the amenability of public law decisions to JR by the courts (Gov.UK 2020: paragraph 1.1)), grounds of review and remedies, and possible codification of grounds for JR principles by legislation ‘and a democratic process’. In-depth analyses were not possible even in the largest area of JR applications, immigration.

The task set for the Faulks panel was hopelessly ambitious in terms of subject matter and timescale.⁷ The panel was established on 31 July 2020 and had six months to investigate, examine, reflect, draft and report. There were 238 submissions, the overwhelming majority from lawyers. Government departments in particular were targeted for evidence, a factor which drew some criticism although their experience is clearly important (Panel Report: paragraph 16). The panel had some sympathy with the views of the UK Administrative Justice Institute that the period of time allotted was ‘inadequate given the complexity, scope, and importance of the issues’ (paragraph 1).

In the event, the suggestions for reforms from the panel were measured and modest given the dimension of the terms of reference. The major issues referred to above on justiciability, jurisdiction and codification were not subject to recommendations for reform. Indeed, the panel recommended restraint on the part of the Government. While the panel expressed some sympathies for the concerns raised by the Government, it is fair to state that it saw an effective JR as a precursor to effective executive accountability and, I add, effective executive action and governance (paragraph 40). What public good, one may ask, will emerge from any Government if its actions were to be based on lies, bullying, bluff or abuse and a compliant judiciary? Codification might make JR more explicable to the general public but ‘On balance, little significant advantage would be obtained by statutory codification, as the grounds for review are well established and accessibly stated in the leading textbooks’ (Panel Report: paragraph 1.43).

In relation to justiciability, the panel recognized the question-raising subjects, usually common law prerogative powers, that were not subject, as the panel put it, to judicial challenge *per se*—e.g. conferral of honours, approval of appointment of ministers—and those subjects that are not determinable by judicial decision. In the latter case, questions may

⁷ Faulks was a controversial choice as chair because he had expressed outspoken views on the role of judges abusing their position, including in *Miller No 2*. Membership comprised senior academic and practising lawyers.

involve choices between one policy and another which judges are ill-equipped to consider on, for example, national security, economic policy. One might pause to ask whether the decision in *Council of Civil Service Unions v Minister for the Civil Service* (1984) (*GCHQ*) did in fact open the door to JR of the prerogative, as the panel suggests (paragraph 2.5).⁸ The courts had highlighted in litigation from the mid-1980s limits in the nature of a challenge to a prerogative so that irrationality was unlikely to be a suitable ground of challenge (*GCHQ*, per Lord Diplock). While the zone of judicial immunity in relation to the prerogative has receded, the prerogative had not, the panel believed, become a part of open season. ‘[W]e think this view of the law overstates the position – at least so far as the common law of judicial review is concerned – in that there are still some powers that are non-reviewable on any ground’ (paragraph 2.17). Pausing to reflect on this statement, is it correct to state that there are today non-reviewable prerogative powers? The Government through its Bill repealing the Fixed-term Parliaments Act 2011 specifically sought to make dissolution inviolable in the courts, but this is clearly one area where the courts would not intervene because dissolution leads to an election and a new Parliament. But can one safely say that conferral of honours through corruption, waging an oppressive war of persecution or engaging in treaties contrary to international law would never be justiciable? One can foresee the judicial reluctance to intervene in such matters of high policy and the reasons for such caution, but surely never say never is advisable?

The panel acknowledged the concerns that have been expressed about the expansion of JR since the 1960s. Evidence from some quarters suggested corrections are called for. The subject of JR reform by legislation is a legitimate subject for Parliament to consider. Ultimately, it is for Parliament to reflect the public weal. As a statement of principle, that is unexceptional. But, as a practical reality, one might accept that statement more graciously if Parliament were a grand inquest of the nation and not a party-political assembly, the lower chamber of which is under the control of an executive determined to steamroller its way to its ideological success. One wonders whether the apologists for Parliament would be so sanguine if Mr Corbyn had been successful in 2019 and had embarked on an agenda to reform the fiscal advantages of public schools, the system for awarding honours (peerages in particular), taxation, the press and so much else. No doubt JR would then have been added to the list of reforms

⁸ The case law on prerogative goes back to the 17th century, but a question involving prerogative disbursement of public funding and a successful challenge occurred in *R v Criminal Injuries Compensation Board ex parte Lain* (1967).

when these policies were challenged through JR by political opponents. That turn of events may well come under future electoral lotteries. The judge you dislike today may be your friend in the future.

Parliament can legislate on any matter it chooses, and there is no reason for JR to be immune from its scrutiny. But a root and branch reform of JR by the political chamber and the temporary ascendancy of one particular political creed resembles too closely setting chickens to guard against foxes.

To the panel's credit, they were not prepared to remove the advances made by JR in almost 60 years by reverting to an individual rights basis for JR. Such a move would wipe away the public's interest in good government and good governance. Do we not all have an interest in lawful government, protecting Parliament's proper role as in *Miller Nos 1 & 2* (paragraph 2.27)? Advances in the 1980s⁹ meant the absence of an issue affecting an individual's rights in many prerogative powers no longer defeated a valid claim for JR. Although it is worth noting that, even in *Miller No 1* there were interested individuals' rights which the court was asked to protect. Prior to the advances in the range of interests protected by JR:

many exercises of the prerogative powers might have remained non-reviewable even after GCHQ because the exercise of those powers could not be said to have altered someone's 'rights or obligations' or have deprived someone of a 'benefit or advantage' that they had a legitimate expectation of enjoying (paragraph 2.27).

Authorization of unlawful expenditure, for instance on foreign aid, would not have been regarded as reviewable (this was statutory: *R v Secretary of State for Foreign and Commonwealth Affairs* (1995) at 402). Few, the panel believes, would regret the 'general reorientation' of the law from individual entitlement towards ensuring the legality of government action (paragraph 2.43).

The HRA has also modified the constitutional distribution of powers. Arguable allegations that an individual's ECHR rights have been infringed will make the claim justiciable even if traditionally it would be treated as a preserve of the executive.¹⁰ ECHR breach allegations may involve assessment of the merits of government policy to assess whether they are ECHR compliant (*Huang v Secretary of State for the Home Department*

⁹ The panel pays special regard to the decision in *Gillick v West Norfolk and Wisbech AHA* (1986) which concerned a departmental memorandum of guidance allegedly containing advice 'erroneous in law'.

¹⁰ *R (Lord Carlile) v Secretary of State for the Home Department* (2015) [28]-[29]. This was particularly striking in *R (Gentle) v The Prime Minister* (2008), concerning Article 2 ECHR on the right to life and the alleged waging of an illegal war in Iraq. Applications in both cases were unsuccessful.

(2007) [11]-[13]). The HRA was passed by Parliament into law. The courts are simply effecting the will of Parliament. Any reform of justiciability would necessitate a substantial reform of the HRA.

The panel clearly has misgivings about the *Miller* cases. But even these ‘novel’ cases which fomented the present investigation are unlikely ‘to have wider ramifications given the unique political circumstances which provided the backdrop for those cases being brought’ (paragraph 2.37). This commentator is not so convinced that *Miller No 2* was ‘novel’ (Birkinshaw 2020b).

Although there were cases where justiciability should have been more keenly argued by Government (paragraph 2.45) – the panel includes *R (Evans) v Attorney General* (2015) which concerned a successful review of the Attorney General’s decision to prevent disclosure of information that the Upper Tribunal had found was disclosable under the Freedom of Information Act, a decision which was certainly eyebrow raising—the panel sided with the ‘overwhelming majority of submissions from those outside the government [who] did not favour legislative intervention on the issue of non-justiciability in any form’ (paragraph 2.58). They favoured allowing the courts to take the lead in this area and ‘trust in the courts to properly observe the boundary between what sorts of exercises of public power (and issues in relation to the exercise of that power) should be regarded as justiciable and what sorts should be regarded as non-justiciable’ (paragraph 2.68).

Relying on Sir Stephen Sedley’s observations in his submission:

The Panel may find itself urged to treat one or more recent cases as evidence of a need for systemic reform. I would respectfully counsel caution about leaping from the particular to the general. For example, I am among those who doubt the conclusions of the *Evans* case; but to treat the outcome of the case by itself as evidence of dysfunction in the system of public law is to invite a cure worse than the disease (paragraph 2.70).

No general or far-reaching legislation on justiciability should be passed (paragraph 2.96). Parliament’s role should be confined to specific cases: the panel refers to the Fixed-term Parliaments Act 2011 (Repeal) Bill which excludes JR of a prerogative dissolution restored by that Bill. Issues emerging from specific case law should not promote ‘*general*’ (my emphasis) legislative reform (2.97). Parliament’s approach should reflect ‘a strong presumption in favour of leaving questions of justiciability to the judges’ (2.100).

Where a subject is justiciable, the panel was asked to consider whether there should be tailoring of the grounds of review that can be invoked to set aside the exercise of a particular public power and altering the remedies that are available where the exercise of a particular public power has been the subject of a successful application for JR. This is related to the ‘growth’ of grounds for review from the 1984 *locus classicus* of Lord Diplock in the GCHQ litigation as illegality, irrationality and procedural impropriety, adding the possibility of future adoption of proportionality. Clearly, the Government would wish to see the grounds curtailed. The grounds over time have become more substantive, for example review of fact and not simply a point of law, systematic unfairness and not simply a breach of natural justice in a judicial or ‘quasi-judicial forum’, legitimate expectation, proportionality in certain circumstances, breaching constitutional rights, failure to publish adequate policy-related materials, consultation rights, lack of transparency and so on.¹¹ The consequence, it is claimed, is uncertainty for officials and ministers and interference with effective public administration.

The panel advised against such tailoring, although the courts themselves had particularized grounds and remedies on specific occasions (paragraph 3.14). Another obstacle lies in the fact that such an attempt to tailor the grounds of JR is unlikely to be effective. Constraining the judges in this manner could be counter-productive, as the history of attempts to prevent the courts examining questions of law by what are known generically as ouster clauses has shown.

JR, it is argued, has moved beyond supervision of legality to merits calculation and reassessment. Judges have begun to make the decisions that Parliament has bestowed upon the executive, it is argued, and not simply correct technical errors of law. The panel saw the solution lying in judicial restraint by the judges themselves. Judicial restraint is as important in the UK constitution as judicial vigilance. This, I add, depends upon that mutual respect which the branches of government must show each other, as Nolan LJ outlined in the quote above (page 501). The panel indicate a tendency to exaggerate judicial overreach, and recent examples of caution in the face of national security include the *Begum* case (*Begum v Secretary of State for the Home Department* (2021)), while, in the area of liability of public bodies in negligence, the Supreme Court thwarted any temptation to move away from long-established principles of private law (*Poole BC v GN* (2019)).

¹¹ See *R (Litvinenko) v Secretary of State for the Home Department* (2014) and the irrationality of the Home Secretary’s reasons not to hold an inquiry into the sensational death in London of former KGB (Federal Security Service) operative Alexander Litvinenko.

On uncertainty, the panel pointed out that legitimate expectation is accused of being overly confused in some submissions, proportionality’s existence is limited to human rights law (which is a little over-simplified), and ‘constitutional rights’, although frequently invoked in litigation, are hopelessly vague in UK law (paragraph 3.32). These concepts may ‘work themselves pure’ in case law (as suggested by Lord Reed cited in paragraph 3.33), but perhaps the time and resources of the Law Commission or House of Lords Constitutional Committee could assist here in a more synoptic analysis of what constitutional rights are, the panel suggested (paragraph 3.34)? A good starting point would surely be the ECHR and common law case law?

The panel made some specific recommendations. One such was reversal of the Supreme Court’s judgment in *Cart* (a child maintenance case) concerning the Upper Tribunal’s power to refuse to grant an applicant permission to appeal against a decision of a First-tier Tribunal (*R (Cart) v Upper Tribunal* (2011)). Such a refusal, even though containing an error of law, cannot be appealed. The only possible challenge was a JR. The court ruled that such decisions are reviewable on more limited grounds than would usually be the case. Otherwise, an error would not be corrected. *Cart* reviews are the largest ground of application to the High Court for JR (on average 779 cases each year from 2015–2019). The choice was between a restricted form of review, a very wide (post *Anisminic* below) form, or an in-between. Too restricted a test of review ‘might still leave serious errors of law affecting large numbers of people uncorrected’. Post *Anisminic* would be too broad (*Cart* [44]). The court opted for an in-between form of review. The largest category of *Cart* JRs concerns detention of foreign nationals. Examining the available statistics, the panel reasoned that the paucity of findings of an error of law and its correction in *Cart* reviews (0.22 per cent of all applications for a *Cart* JR since 2012) ‘we have concluded that the continued expenditure of judicial resources on considering applications for a *Cart* JR cannot be defended, and that the practice of making and considering such applications should be discontinued’ (paragraph 3.48). Money is important, but there are still individuals who have suffered an error and who are without remedy. Is this not appropriate for a right of appeal to the Court of Appeal?

The panel also recommended amending section 31 of the Senior Courts Act 1981 to give courts power to issue a suspended quashing order—a quashing order which will automatically take effect after a certain period of time if certain specified conditions are not met. This would be in *addition* to existing quashing orders. The order would operate prospectively and not retrospectively. Such a recommendation, if accepted, would remedy

the shortcoming recognized by the Supreme Court early in its career in *Ahmed v HM Treasury No 2* (2010) (which concerned financial freezing orders against suspected terrorists).

The panel advised against reform of the law of nullity. This involves a finding that an error of law renders a decision null and void *ab initio*. Prior to the decision in *Anisminic Ltd v Foreign Compensation Commission* (1968), there was a distinction between errors within and errors outside jurisdiction. In the latter case, an error rendered a decision null and void *ab initio*. Post *Anisminic*, all errors of law rendered a decision null and void. This had significant consequences where government through Parliament wished to exclude JR in a statute. Basically, an error of law outside jurisdiction meant that such an attempt was not possible.¹² The panel believed the better route would be to give the courts the freedom to decide whether or not to treat an unlawful exercise of public power as having been null and void *ab initio* (paragraph 3.64). The courts would have a discretion to issue suspended quashing orders in response to the unlawful exercise of public power. This would have particular advantage in:

high-profile constitutional cases where it would be desirable for the courts explicitly to acknowledge the supremacy of Parliament in resolving disagreements between the courts and the executive over the proper use of public power, and cases such as *Hurley and Moore* [2020] where it is possible for a public body, if given the time to do so, to cure a defect that has rendered its initial exercise of public power unlawful (paragraph 3.64).

This would be without prejudice to collateral challenges which are dependent on a finding of null and void *ab initio*. Collateral challenges are raised in proceedings where an individual is a defendant in a criminal charge or involved in a civil action.

In a lengthy chapter on procedure, the panel felt ill-equipped to make suggestions in relation to costs for JR applications. On the law of standing or *locus standi*, the temptation to legislate should again be resisted (paragraph 4.98). Standing refers to the interest an applicant has to show in an application to bring a JR. JR is often applied for by public interest groups or individuals who do not have a private law right involved. This is a public interest application to test the legality of action. The rule of law may be violated by such illegality as well as by a breach of an individual's rights. The panel make the following important point:

¹² Confirmed in *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491. See Jowell & Rose 2018–2019: 1. For a more flexible approach by the courts to ouster clauses, which the courts will control and determine under the rule of law, see Lord Carnwath in *Privacy International* at [144].

We do, however, hope that the courts will be astute to distinguish between ‘public spirited’ groups that enable challenges to the legality of an act or decision to take place and those applications which seek to involve the courts in a general policy review of decisions that an elected government is entitled to make (paragraph 4.100).

Intervention rights for those who had not brought the JR application had been allowed to drift since 2000. The panel therefore recommends that criteria for permitting intervention should be developed and published, perhaps in the Guidance for the Administrative Court’ (paragraph 4.108).

Some clarification was required on the duty of candour which exists on both sides to disclose relevant information including information that undermines its own case, although the panel’s views were divided (paragraph 4.113). The duty of candour exists because public authorities are not engaged in private law ‘ordinary’ litigation defending private interests. Authorities are ‘engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law’ (paragraph 4.113) (see *Hoareau* at [20]). A ‘more proportionate approach to the duty without undermining the fundamental importance of candour in judicial review proceedings’ was recommended (paragraph 4.132).

In relation to time limits, the panel believed that the practice in Northern Ireland which had dropped the qualifying requirement of acting ‘promptly’ within the three-month limitation could well be followed (paragraph 4.148). Clear improvement in this area was difficult to suggest and the panel would not favour any ‘tightening of the current time limits for bringing claims for judicial review’ (paragraph 4.149). The standard period is three months, but there are variations in, for example, procurement, planning, post inquiries and *Cart* reviews. More needs to be done to make the procedures for bringing JR accessible to ordinary individuals (paragraph 4.173).

The panel’s terms of reference included UK-wide matters, and it has been explained above how it interpreted this instruction. The panel agreed with submissions received which advised that it would be ‘highly undesirable’ were statutory intervention to result in a ‘dual’ or ‘two-tier’ system within the UK’ (paragraph 5.48) (or more?). The submissions on devolved matters were all against a reduction in JR.

The panel’s emphasis on the importance of Parliament as a means of redress and accountability is rightly spelt out in the report. I have no doubt that our constitution works best when the three branches work constructively together. But you cannot have more than one interpreter of the law. Before looking at the Lord Chancellor’s response to the report

(Ministry of Justice 2021b: the Response) it must be recalled that both *Miller Nos 1 & 2* had as a central concern the protection of the constitutional role of Parliament both in relation to fundamental constitutional change in the UK and Parliament's role as an engine of accountability and as supreme legislator.

[C] THE CONSULTATION PAPER

The Response from the Lord Chancellor commenced with tendentious interpretations of what the panel had reported. A drift into a more substantive form of review for well over 50 years (common law process) was summed up as an interference with the merits of political decision-making and the Government should 'strive to create and uphold a system which avoids drawing the courts into deciding on merit or moral values issues which lie more appropriately with the executive or Parliament' (paragraph 2). This is a crude statement both of the panel's comments and what has in fact occurred. The concept of legality has expanded, as we have seen, but outside human rights the courts have been careful not to infringe on the merits of decisions. Even in one of the high-water marks of intervention, *Evans v Attorney General* (2015), the court was concerned about the brusque setting-aside of the Upper Tribunal's judgment by a member of the executive, and its reasons for intervention were spelt out. It did not say 'We don't like this decision' and therefore set it aside.

The Lord Chancellor was interested in reforms beyond those recommended by the panel. The independent panel had not given him what he wanted, so let's try again seems to be the message. This appears to be what he meant by 'iterative'. If lawyers cannot give him the answer he wants, what about the butcher, the baker the candle-stick maker? Specifically, he wanted to look more roundly at ouster clauses, to 'clarify' the law on nullity and to investigate prospective remedies beyond suspended quashing orders. It is quite clear he has 'broader reforms' in mind (paragraph 6). 'This does not mean we think there needs to be a radical restructuring of JR *at this point*' (paragraph 32, emphasis added). But note the warning that if JR continued on its present road 'The Government would then need to consider whether proposing legislation on these and other broader constitutional questions was needed' (paragraph 46). This approach is mindful of the role of the courts in developing the application of the rule of law through JR, he claimed, but seeks Parliament's involvement in areas where the Government disagrees with the direction of the evolution of JR. Thoughts are prompted of the duty on the Lord Chancellor under the Constitutional Reform Act 2005 and the Chancellor's existing constitutional role in relation to the rule of

law (section 1) and the duty of the Chancellor to uphold and defend the ‘continued independence of the judiciary’ (section 3). It’s all very simple: the judges have been overstepping their mark, they have been interfering in executive discretion, Parliament can make whatever laws it wants, and the judges will have to follow these.

His aim was ‘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’ (paragraph 3). The image is presented by the Government spokesperson of a major crisis in justice and the constitutional order. Justice has to be restored. Really! The overwhelming impression from the evidence submitted to the panel suggests that the courts were simply applying the law to Government to ensure the executive operated within its legal parameters and that justice was done.

The common law has evolved, developed incrementally over time. But history, claims the Chancellor, does not tell us how to live in the future. Certainly, to be a slave to history is to be a fool, but to be ignorant of history, Cicero reminded us, is to remain a child. JR ‘spurred on by judges’ (paragraph 24) is a ‘default position’ which Parliament may remove, replace or add to at its will. ‘Parliament can create a body with plenary powers which is not subject to review on the ground that the decision is unreasonable or involved the taking into account of irrelevant consideration’ (sic) (paragraph 25). This is the Chancellor’s interpretation of *Axa General Insurance v Lord Advocate* (2011).¹³ One can see the emergence in time of the Prime Minister’s Tribunal. It has been tried before—it was called Star Chamber—and was established by statute!

How, it is asked, is legality kept within appropriate bounds of JR ensuring that Parliament remains in overall control (paragraph 28)? The Chancellor’s Response finds it impossible to distinguish between reviewing a discretion, whether conferred by statute or prerogative,

¹³ Where the Supreme Court ruled that the Scottish Parliament could be reviewed if it acted out of its devolved competence or in breach of human rights, but the Scottish Parliament, as an elected body, was not appropriate for irrational or unreasonable review. Note Lord Hope sending out a warning for government more generally: ‘It is not entirely unthinkable that a government which has [political domination] may seek to use it 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].

because of illegality, and reviewing such a discretion because a judge happens to disagree with the outcome on moral grounds (paragraph 30). Courts are there to deal with specific questions not to judge merits which are ultimately for the people's assembly (paragraph 31). It seems that any legal critique of discretion exercised by ministers is an assault on the merits. Such reasoning is beyond simplistic! It should be remembered that the people's assembly comprises two chambers. While the elected chamber is the more powerful body, the upper chamber is unelected and comprises an amalgam of hereditary and appointed members, most of the latter placed there by prime ministerial patronage. Nonetheless, its inherent small 'c' conservatism often acts as a brake on political ideologies from both the left and right.

There is clear concern about the question of nullity and a finding of illegality that renders a decision null and void *ab initio* (paragraph 40ff). This has been addressed above. The courts' rulings have rendered virtually all ouster clauses ineffective to prevent JR. It is clear that the courts have made a constitutional stand on this to maintain their monopoly on the final interpretation of law and legality. And let's not forget, judicial remedies in JR are at the court's discretion.

The recommendations to reverse *Cart* and to introduce suspended quashing orders were accepted. But now the Chancellor has in his sights prospective only remedies more widely beyond quashing orders (paragraph 61). To the statement that such a reform would be a discretionary power for the court to order if it saw fit to do so, and the Government would not compel remedies to be granted with prospective effect only should be added the following. Within a few lines the Chancellor writes that the Government considers, alternatively, a 'requirement' for prospective only remedies as well as suspended quashing orders in certain circumstances could be developed (paragraph 66). 'Requirement' seems mandatory.

In its further consultation document published on 18 March 2021, the Lord Chancellor writes that legislation may provide that, for challenges to statutory instruments, 'there is a presumption, or a mandatory requirement for any remedy to be prospective *only*' (my emphasis) and legislating for suspended quashing orders to be presumed or *required*.

The Government considers that legal certainty, and hence the rule of law, may be best served by only prospectively invalidating such provisions (paragraph 68). What about the individual who suffers harm as a consequence of unlawful government action, but who is told 'Sorry, because this happened to you in the past there is nothing that can be done'. It will be better tomorrow. Ombudspersons observe! Because of

their scrutiny, Parliament-focused solutions are more appropriate where statutory instruments are impugned, the Response asserts. This is setting back administrative law to *Local Government Board v Arlidge* in 1915!

Clarification of nullity, the Chancellor continues, is required (paragraph 75). This makes it sensible for Parliament to legislate to put it beyond doubt that this theory is not the law. It has been the law since 1968 and has been successively maintained by the House of Lords and Supreme Court. Surely *prospective* thinking applies here? While Parliament may be all powerful, a reform here would usually take future effect after enactment on an appointed date. The Lord Chancellor makes it sound as if reform will have retrospective effect so that decisions of the top courts were null and void *ab initio*. Oh, what a tangled web we weave!

Nullity has two chief disadvantages, the Chancellor urges. Firstly, it is contrary to legal certainty, and therefore against the rule of law, in that it leads to a situation whereby an apparently valid legal act is actually null and void from the outset. But surely that’s the point: one doesn’t know it’s legally invalid until it’s legally tested. Secondly, to argue that a court has no remedial discretion when an act is a nullity is simply not true. Courts may decide not to quash a measure but to issue a declaration of right as in *Anisminic*. Or they may at their discretion give no remedy at all depending upon the circumstances (Woolf & Ors 2018: 18.047ff). And what about the individual who *has been* detained under a prospectively unlawful measure? There is a very selective vision of the rule of law in operation here.

The way out of this conundrum, created by the courts the Chancellor states, is to re-establish the void/voidable distinction in JR (paragraph 80). There were more fairy tales and legal complexities concocted around this distinction than imaginable. *Anisminic* made the vista much simpler. As Baroness Hale said in *Cart*, such an approach would ‘turn back the clocks’ [40]. All legal errors made the decision void.

More specifically, this would mean that when faced with an error the court should err on the side of concluding that the error does not lead to the decision-maker having acted outside their competence – as opposed to acting in breach of duty – i.e. a presumption in favour of concluding that a flawed decision is voidable and not a nullity (Ministry of Justice 2021b: paragraph 80.b).

What he envisages is a distinction between what the French call *l’inexistence*, *incompetence* and *détournement de pouvoir*. But French law, where JR is a constitutional principle,¹⁴ has not been dogged by attempts

¹⁴ See n°93-335 DC; n°96-373 DC.

to oust the jurisdiction of the courts¹⁵ and *droit administratif* also awards damages for *illégalité per se* whereas English law does not. The void/voidable distinction is not of significance, although legal certainty means that remedies (quashing) may be prospective in French law.

The Response continues that only the ‘purported use of power that the Government does not have would lead to a nullity, while the wrongful exercise of a power would lead to the decision being voidable’ (paragraph 81). Most public law grounds of review would subsequently render a decision voidable in which case a remedy would be prospective (paragraph 81). Where a decision-maker has competence, no error however egregious can deprive one of that power (paragraph 81.iii). Even ‘egregious errors’ will render a decision voidable. One presumes this would not affect liability in, for example, misfeasance in public office? However, in such a case the court may issue a retrospective quashing order at its discretion, although we were informed above on the limits on retrospective remedies, in particular in relation to statutory instruments. Only lack of power/competence would render a decision void.

This goes against the counsel of the expert panel. On ouster clauses, despite the panel’s recommendations, the Chancellor appears to wish to avoid mere guidance on their use and to legislate on ouster clauses (paragraphs 91-94). Toasts will be offered in the Inns of Court at the prospect of legal complexity! The reason for change:

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 (paragraph 86).

The appearance is selective application, but might it be like Topsy—they ‘just grew’?

The Government had not conducted an economic impact as yet on its suggestions (paragraph 110). Nor did the measures involve direct discrimination, but removal of *Cart* may open up claims of indirect discrimination given the dominance of immigration cases. The figures show *Cart* successes to be minimal (paragraph 113) but, as indicated above, for the individuals the outcome is crucial.

¹⁵ Attempts in the distant past were rebuffed by the Conseil d’État: *Conseil d’État, 17 février 1950, Ministre de l’agriculture c/ Dame Lamotte CE, 7 février 1947, d’Aillières, n°79128*. I am grateful to Thomas Perroud for his assistance on these points.

[D] CONCLUSION

Make no mistake, these suggestions, which go against the panel’s conclusions, are not minimal, so the Government pronouncement that it does not think ‘the time is right to propose far-reaching, radical structural changes to the system of Judicial Review’ (paragraph 117) carries with it the prospect of future radical change after further ‘iteration’.

The Chancellor’s parting sentiment that the respective constitutional roles of Parliament, the executive and the courts must be respected (paragraph 119-120) smacks of cynicism. An executive with a huge Commons majority will always be prone to arrogance in office and a desire to be rid of anything brooking its ideological ambitions. There is no respect for anything showing independence or integrity. Today the courts, tomorrow the Lords. And then?

This is a strange and ill-considered Response to a generally sensible and balanced review. The expert IP did not give the Government what it wanted. Let’s try another audience. Before reporting on what that further audience had to say, the Government announced a Judicial Review Bill in the May 2021 Queen’s Speech. This would ‘protect the judiciary from being drawn into political questions’ and protect ‘individuals’ rights’. Its object is to confine JR, but its content is subject to the consultation following the IP’s report.

The Government appears to wish to squeeze JR into a ball covering minor legal technicalities, more to confine judges than to control unlawful erring by ministers and officials. Is this befitting for a court conducting JR, namely the High Court with an unlimited jurisdiction? The Government’s reported ambitions even mounted to replacing the Supreme Court (the *Miller* malefactor) with a body under a new name (the Upper Court of Appeal was mooted) and structure, a move that would be perceived as an ‘act of spite’, the President of the Supreme Court believed in evidence to the Lords Constitution Committee (Slingo 2021). It would be an act of ‘national self-harm’ (Constitution Committee 2021). It would, in my words, be an egregious insult to the senior judiciary in the UK.

References

- Birkinshaw, P (2020a) *European Public Law: The Achievement and the Brexit Challenge* 3rd edn Alphen aan den Rijn: Wolters Kluwer.
- Birkinshaw, P (2020b) ‘Brexit’s Challenge to the UK’s Unwritten Constitution’ (2020) *European Public Law* 29.

- Committee on Ministers' Powers (1932) *Report* Earl of Donoughmore (chair) (The Donoughmore Report) Cmd 4060 London: HMSO.
- Conservative Party (2019) [Conservative and Unionist Party Manifesto 2019: Get Brexit Done – Unleash Britain's Potential](#).
- Constitution Committee (2021) [Corrected Oral Evidence: Annual Evidence Session with the President and Deputy President of the Supreme Court](#) London: House of Lords 17 March.
- Constitution Unit (2021) 77 March [Monarch](#).
- Cowburn, Ashley (2020) 'Boris Johnson Told to Keep "Populist Hands" off Judiciary after Reports He Wants Overhaul of How Government Is Challenged in Court' *The Independent* 25 July.
- Gov.UK (2020) [Terms of Reference – Independent Review of Administrative Law](#) London: Gov.UK.
- Jowell, J & D Rose (2018–2019) 'Beyond Anisminic: The Rule of Law and Ouster Clauses after Privacy International' 10 UK *Supreme Court Yearbook*.
- Ministry of Justice (2021a) [The Independent Review of Administrative Law](#) (The Panel Report), Lord Edward Faulks QC (chair) CP 407 London: Ministry of Justice.
- Ministry of Justice (2021b) [Judicial Review Reform: The Government Response to the Independent Review of Administrative Law](#) CP 408 London: Ministry of Justice.
- Reed, Rt Hon Lord (2020) 'Response to a Call for Evidence Produced by the Independent Review of Administrative Law Panel' October.
- Slingo, J (2021) '“Act of Spite”: Lord Reed Decries Proposals to Change Supreme Court's Name' *Law Society Gazette* 18 March.
- Woolf, H, J Jowell & Ors (2018) *De Smith's Judicial Review* 8th edn London: Sweet & Maxwell.

Legislation Cited

Constitutional Reform Act 2005

European Convention on Human Rights

European Union (Withdrawal Agreement) Act 2020

EU–UK Trade and Cooperation Agreement 2020

Fixed-term Parliaments Act 2011

Fixed-term Parliaments Act 2011 (Repeal) Bill

Freedom of Information Act 2000

Human Rights Act 1998

Senior Courts Act 1981

Case Cited

Ahmed v HM Treasury No 2 [2010] UKSC 2 and 5

Anisminic Ltd v Foreign Compensation Commission [1968] UKHL 6

Axa General Insurance v Lord Advocate [2011] UKSC 46

Begum v Secretary of State for the Home Department [2021] UKSC 7

Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9

Gillick v West Norfolk and Wisbech AHA [1986] 1 AC 112

Huang v Secretary of State for the Home Department [2007] UKHL 11

Local Government Board v Arlidge [1915] AC 120

M v Home Office [1992] QB 270, 314

Poole BC v GN [2019] UKSC 25

R v Criminal Injuries Compensation Board ex parte Lain [1967] 2 QB 864

R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd [1995] 1 WLR 386

R (Cart) v Upper Tribunal [2011] UKSC 28

R (Evans) v Attorney General [2015] UKSC 21

R (Gentle) v The Prime Minister [2008] UKHL 20

R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs [2019] EWHC 221 (Admin)

R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills [2012] EWHC 201 (Admin)

R (Litvinenko) v Secretary of State for the Home Department [2014] EWHC 194 (Admin)

R (Lord Carlile) v Secretary of State for the Home Department [2015] AC 945

R (Miller) v Secretary of State for Exiting the EU [2017] UKSC 5 (*Miller No 1*)

R (Miller) v The Prime Minister [2019] UKSC 41 (*Miller No 2*)

R (Privacy International) v Investigatory Powers Tribunal [2020] AC 491

R (Wilson) v The Prime Minister [2019] EWCA Civ 30