

Partial Codification of Administrative Law: What are the Rule of Law Opportunities and Risks of the IRAL's Remit? Part Two

Dr Jan van Zyl Smit

This piece is [cross-posted](#) with the kind permission of the [UK Constitutional Law Association blog](#), with the piece originally appearing on 21st October 2020.

This is Part Two of a post examining the Rule of Law opportunities and risks arising from the IRAL's remit, in light of comparative experience from the codification of administrative law in other common law jurisdictions. In [Part One](#), we considered the implications for some of the constituent principles of the Rule of Law under two headings: 1. Access to Justice and 2. Legal Certainty and Accessibility. In Part Two, we move on to consider the implications for the Rule of Law principle of government under law.

Government under law

The starkest of the Rule of Law risks we are now facing, as [Mark Elliott](#) and others have warned, arises from the terms of reference inviting the IRAL panel to consider the need for legislation dealing with the 'amenability' of decisions to judicial review, and also 'justiciability'. The language used in relation to justiciability is particularly wide. It refers not merely to non-justiciability of certain *issues* that courts may encounter, a topic familiar to judges and administrative lawyers, but also 'subjects/areas where the issue of the justiciability/non-justiciability of the *exercise of a public law power and/or function*' should be considered (our emphasis).

This can be translated into simpler language: the IRAL has been asked to consider placing certain Executive powers beyond judicial scrutiny, and therefore above the law. Strong hints have been given that the Government particularly wishes the panel to consider the justiciability of prerogative powers, which are mentioned several times in the terms of reference.

Interestingly, footnote D to the terms of reference asks the panel to 'focus its consideration of the justiciability of prerogative powers' on a particular subset ('prerogative executive powers'). The accompanying reference to para 3.34 of the [Cabinet Manual](#) distinguishes these powers from the personal or constitutional prerogatives of the Sovereign, including the prerogative to prorogue Parliament. This suggests, somewhat surprisingly, that the IRAL panel will not be reviewing the prorogation prerogative, despite the fact that the chair of IRAL, Lord Faulks QC, [strongly criticised](#) the UK Supreme Court for reviewing the Prime Minister's prorogation advice in its famous '*Miller II*' [case](#) last year. The explanation may be that the Government was reluctant to order an examination of powers which are in law exercised by the Queen.

Our purpose is not to add to speculation about which Executive powers the IRAL panel is being encouraged to immunise from judicial scrutiny, but to place this problematic assignment in a wider constitutional and comparative context.

Our first observation about the constitutional context is purely UK-specific. If the IRAL panel is to consider prerogative powers, why is the inquiry restricted to whether and to what extent courts may review those powers? Instead, why not also consider

whether some of prerogative powers themselves should be reformed and placed on a statutory footing? Doing so would undoubtedly contribute to the democratic legitimisation of those powers, and reduce the need to refer to the distant historical past when disputes arise, as the courts were forced to do in both *Miller I* (a challenge to the prerogative of foreign relations and whether it had been circumscribed by the European Communities Act 1972) and *Miller II*.

Our second observation relates to comparative experiences with administrative law codification and attempts to curtail judicial review. The US, Australia and South Africa all have written constitutions which entrench the separation of powers in various ways, and the US and South Africa also have entrenched bills of rights. These constitutional provisions act as an important safety-net, which is absent in the UK. In South Africa, the ANC-majority Parliament in 2000 amended the Promotion of Administrative Justice Bill to restrict judicial review of various powers. However, the courts had other tools available to keep judicial review alive in the excluded categories. They have applied a wide range of judicial review grounds by relying on a [constitutional 'principle of legality' which is understood to be part of the Rule of Law](#), and reinforced by the explicit reference to the Rule of Law in section 1 of the South African constitution. Australian courts have faced similar difficulties arising from the fact that the ADJRA 1977 does not apply to certain Executive decisions. They have been able to apply at least some judicial review grounds - such as 'procedural fairness' - to such decisions on the basis that review for 'jurisdictional error' is constitutionally protected, notably in *Re Refugee Review Tribunal, ex parte Aala*, a leading case on the review of asylum decisions.

By contrast, in the UK, the IRAL raises the spectre of the Asylum and Immigration Bill 2004 which initially included proposals to exclude review of asylum decisions from the courts entirely. It could be argued that UK judges are resourceful in protecting access to courts and could find their way around even the clearest of ousters. However, unlike their Australian counterparts they would not have an entrenched constitutional provision to support them. In the worst case, the change could severely undermine the ability of the courts to uphold the Rule of Law in cases which the codification sought to exclude from justiciability.

UK courts would then face a dilemma. On the one hand, they could submit to the codification's restriction of their jurisdiction to review decisions which have been labelled 'non-justiciable', even if the nature of some of those decisions does not make them unsuitable for judicial review (asylum decisions are a good example as they have long been reviewed by courts). On the other hand, a bold court might proceed to review such decisions by finding an interpretative way around the non-justiciability provision. However, doing so would probably expose the court to severe public criticism from some quarters, even to the extent of undermining its legitimacy. In this way, the mixed public message sent by a restrictive codification could hamper the ability of courts to play their part in upholding the Rule of Law.

The Government's narrative on the IRAL and its implications for the Rule of Law

There is much more which could be said about the framing of the IRAL and the consequences it may hold for the Rule of Law. Our last remarks are confined to the public narrative established by the Government so far. Particularly relevant is the [public announcement](#) on the establishment of the IRAL, issued on 31 July 2020. This document, including quotes from the Lord Chancellor, Robert Buckland QC MP, and the panel chair, Lord Faulks QC, may be expected to have a much wider readership than the IRAL terms of reference and the call for evidence which the IRAL panel has issued.

It is striking that the IRAL announcement makes no reference to the fact that judicial review involves determining the *lawfulness* of Government actions. Instead, it describes judicial review, as a 'precious check on government power', 'protecting citizens from an overbearing state' and embodying the 'rights of citizens to challenge executive decisions'. Ironically, given the Government's stated aim to prevent judicial review from being used to 'conduct politics by another means' this presents judicial review as a rather political contest, a David and Goliath battle between the individual and the monolithic state. In fact, a judicial review

claimant is not contending that the state, as a whole, is their adversary. Rather, the argument is that a particular decision-maker within the state has exceeded the powers granted to them by the law (also established by the state). Judicial review claimants are not plucky individuals seeking our sympathy, and entitled to a remedy only when they are morally deserving.

This narrative paves the way for the idea that many claimants are *not* morally deserving, and that their cases present an obstacle to 'effective government', as the terms of reference put it. The terms of reference also pointedly ask only about 'trends in judicial review ... in particular in relation to the policies and decision making of the Government'. To do so is to consider only one variable in a complex picture. What about trends in Government policies and decisions? What about the adequacy or otherwise of non-judicial mechanisms of administrative justice, which we discussed in Part One? And in relation to the fraught years of Brexit, the situation in the House of Commons is surely relevant for understanding why some 'political' cases ended up before the courts. In a period of minority Government, and latterly with an opposition that could sometimes unite to pass Bills on extending the exit negotiations, but not to support a vote of no confidence, it is understandable that those with constitutional concerns would turn to the courts to advance their claims.

These are deep waters, which the IRAL public narrative appears to ignore, while implying that judicial review is the only problematic area of administrative law worth attending to. In doing so, it compounds the risks for the Rule of Law, while neglecting the Rule of Law opportunities in the area of access to justice that codification exercises elsewhere have attempted to embrace.

The authors are grateful to the UKCLA blog editors for their feedback, and to Sir Jeffrey Jowell QC, Cora Hoexter and Ronan Cormacain for their comments on an earlier draft. The usual disclaimer applies.

Dr Jan van Zyl Smit is Senior Research Fellow at the Bingham Centre for the Rule of Law, British Institute of International and Comparative Law.

Aradhya Sethia is a PhD candidate at the University of Cambridge and recently completed a Summer Fellowship at the Bingham Centre in a programme supported by the Bonavero Institute of Human Rights, University of Oxford.

(Suggested citation: J. van Zyl Smit and A. Sethia, 'Partial Codification of Administrative Law: What are the Rule of Law Opportunities and Risks of the IRAL's Remit? Part Two', U.K. Const. L. Blog (21st Oct. 2020) (available at <https://ukconstitutionalaw.org/>))

URL: <https://binghamcentre.biicl.org/comments/107/partial-codification-of-administrative-law-what-are-the-rule-of-law-opportunities-and-risks-of-the-irals-remit-part-two>