BINGHAM CENTRE FOR THE RULE OF LAW

Judicial Review and Courts Bill: A Rule of Law Analysis

Dr Ronan Cormacain, 26 October 2021

BICL
British Institute of International and Comparative Law

Executive Summary

This Report analyses clauses 1 and 2 of the Judicial Review and Courts Bill.

Clause 1 allows a court in judicial review proceedings to make a quashing order which is either suspended, or only has prospective effect. The fact that, under the Bill when enacted, the detail of the law on quashing orders will now be clearly set out and accessible promotes the Rule of Law. The ability to suspend a quashing order, or make it take effect prospectively, is to be welcomed as it gives greater flexibility to courts in granting a remedy. Judges have the power to grant a remedy which recognises that voiding an official action could cause administrative or practical inconvenience.

However, the presumption in favour of suspension or prospective only effect in the new section 29A(9) does not promote the Rule of Law. Although the power to suspend quashing orders or make them prospective ought to exist, it should only be exercised in exceptional circumstances, not as the default. The presumption ought to be reversed. The starting point should be that an unlawful action has no effect, and only in exceptional circumstances should the quashing order be suspended or have prospective only effect.

Clause 2 reverses the existing law so that what are known as "*Cart* judicial reviews" are no longer possible. It does so by creating an "ouster clause", ousting the inherent common law jurisdiction of the High Court so that a decision of the statutory Upper Tribunal cannot be reviewed by any court. The clause contains every possible measure to ensure that the ouster clause is judge-proof. It is not a blanket ouster clause which ousts the jurisdiction of the courts in all circumstances: a decision of the Upper Tribunal can be reviewed in a number of circumstances. However it purports to immunise decisions from review where the argument is that the Upper Tribunal has committed an error of law.

Ouster clauses should generally be rejected as they undermine the principle of legality, that we are all bound by the law. Clause 2 allows the Upper Tribunal to make a decision which contains an error of law, and for there to be no way to appeal against that decision. This undermines the basic common law principle of legality which flows from our commitment to the Rule of Law. Clause 2 should therefore be deleted from the Bill.

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Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. The project is being led by Dr Ronan Cormacain.

This Report has been written by Dr Ronan Cormacain with assistance from Dr Jan van Zyl Smit and Murray Hunt.

Table of Contents

Introduction

Clauses 1 and 2 of the Judicial Review and Courts Bill make changes to the law on judicial review.

Clause 1 legislates for quashing orders – the power of a court to quash an unlawful act of a public authority. Clause 1 gives the court flexibility to temporarily suspend that quashing order, or to ensure it only has prospective effect. However, it goes further than merely providing the courts with such a power: there is to be a presumption in favour of limiting the effect of a quashing order.

Clause 2 introduces an ouster clause in respect of decisions of the Upper Tribunal. This means that some decisions of the Upper Tribunal will now be final and cannot be appealed to any other court. Clause 2 would abolish what is known as *Cart* judicial review. The Upper Tribunal deals with a host of appeals from various tribunals.

The context is the importance of scrutiny and accountability mechanisms to hold public authorities to account. The late Sir David Amess MP knew the importance of this when (in speaking about a citizens charter) he applauded a measure "if it meant that the ordinary citizen was able to gain redress from the public services for any disappointment".[1] The context may have been different, but he was of course entirely correct, and anything which helps the citizen to correct mistakes made by the state is to be welcomed.

Explanation of the legal background

Judicial review

Judicial review is the modern name for the centuries old common law supervisory jurisdiction of the superior courts to ensure that decisions of public authorities, including statutory tribunals, respect the limits on their powers imposed by law. The existence of the courts' common law jurisdiction makes it possible for a person to go to court and argue that a decision or action of the state was unlawful. The court can rule that the decision or action was unlawful if it was illegal, irrational, tainted by procedural impropriety or a disproportionate interference with a fundamental right. It is one of the most fundamental checks and balances within the UK constitution to ensure that public authorities act fairly and in accordance with the law. It also gives individuals a route to challenge officialdom where officialdom may have overstepped its powers. As David Davis MP said on 25 October 2021

> Judicial review is a cornerstone of British democracy. It empowers everyday people to challenge decisions made by public bodies. Whether it be central government or local authorities, rule makers are held accountable by ordinary people. This is a small, but important, check on the balance of powers in our democracy[2].

Some of the framework rules for judicial review are set out in the Senior Courts Act 1981, but it is important to appreciate that the courts' power of judicial review is not something judges have been given by Parliament but an inherent common law jurisdiction dating back centuries to when courts first began holding power to account. Therefore, much of the content of these rules are spread across these different cases.

Remedies available in judicial review

If the court finds that the decision or action was unlawful it will make a declaration to that effect if it is just and convenient to do so.[3] It also has the power to make three specific orders

- Mandatory order – orders the state to do something

[1] Hansard, House of Commons, Volume 98, Friday 15 November 1991.
[2] David Davis, "Be warned: this government is robbing you of your right to challenge the state" The Guardian, 25 October 2021.
[3] Section 31(2), Senior Courts Act 1981.

- Prohibiting order – prohibits the state from doing something
- Quashing order – rules that a thing done by the state is void and has no legal effect

A declaration is simply a formal statement setting out the legal state of affairs. It is non-executory, in the sense that it does not command anyone to do anything, it simply declares what the legal position is.

A quashing order is different as it is executory - it orders something concrete and has legal consequences. A quashing order rules that a decision was void and therefore has no effect. Rather than simply declaring (for example) that a planning decision was unlawful, a quashing order would quash that decision meaning it has no continuing effect and has never had any effect from the moment it was made.

The long established default position in judicial review cases is that, where unlawfulness has been established (eg because a public authority has acted beyond its powers), a declaration is insufficient, and one of the specific orders must be given. This is referred to as the presumption in favour of relief. According to Lord Bingham, speaking in a judicial capacity, under the Rule of Law

> The discretion of the court to do other than quash the relevant order or action where such excessive power is shown is very narrow.[4]

Professor Jeff King agrees with the default approach that substantial orders for relief are much better than a declaration only, but recognises that in exceptional cases it might be justifiable to depart from that presumption.

> That is why the pragmatic approach of the courts, occasionally issuing declarations in lieu of quashing orders (with attendant justification), is defensible in principle as well as evident in practice.[5]

This is intuitively correct - if something is unlawful, it ought to be invalid. However, there may be some unusual cases where the court may feel that a quashing order ought not to be made. The court has the discretion to do this. For example, if a quashing order would cause great administrative uncertainty over a range of public authority actions, or if it would cause chaos with many individuals, the court may instead simply make a declaration.

Alternatively, it may make a quashing order, but suspend its operation, allowing the public authority some time to 'fix' the legal problem itself. This means that the order is made, but there is a delay before it comes into effect. For example, if it a quashing order meant that the rules on entitlement to a social security benefit would be void, the court may suspend the quashing order to allow the government time to make new rules which do not break the law.

Quashing orders give teeth to the court's powers to vindicate the rights of citizens.

The ability to suspend a quashing order is helpful as it makes a more nuanced remedy available. This avoids the binary choice between (a) simply refusing a remedy or (b) imposing a remedy which causes administrative and practical problems.

The detail of these rules on how quashing orders are to take effect is not set out in legislation. Instead, it is set out in the common law, that is, in the individual cases the judges have decided over the decades.

Ouster clauses

An ouster clause is a clause in legislation which seeks to 'oust' the jurisdiction of the courts. The desired effect is that the subject matter of the ouster clause cannot be challenged in the courts. If given effect by the court, this would mean that the decision or action of an official in relation to that subject matter is final and cannot be challenged legally.

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[4] *Berkeley v Secretary of State (No. 1)* [2001] 2 AC 603

[5] J. King, 'Miller/Cherry and Remedies for Ultra Vires Delegated Legislation', U.K. Const. L. Blog (19th Sept. 2019) (available at https://ukconstitutionallaw.org/)

The Rule of Law objections to ouster clauses within Parliament have often been made clear. For example, in the Justice and Security (Northern Ireland) Bill in 2007, the Constitution Committee of the House of Lords objected to an ouster clause, stating that 'the Rule of Law is diminished if an aggrieved citizen is barred from challenging an allegedly unlawful decision taken by a public authority'.[6]

It is reasonable to say that ouster clauses are at odds with the Rule of Law. The orthodox view is therefore that courts will only give effect to them if the statutory language introducing them is absolutely clear. The courts have said that

> It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.[7]

In reality, courts are adept at reading even very clear words which purport to establish an ouster clause as not actually having the effect of creating an ouster clause.[8]

Cart judicial reviews

The Tribunals, Courts and Enforcement Act 2007 contained an ouster clause relating to decisions of the Upper Tribunal. The Upper Tribunal deals with appeals from the Administrative Appeals Chamber, the Immigration and Asylum Chamber, the Lands Chamber and the Tax and Chancery Chamber.

In the case of *Cart*, the Court of Appeal stated that

> the supervisory jurisdiction of the High Court, well known to Parliament as one of the great historic artefacts of the common law, runs to statutory tribunals both in their old and in their new incarnation unless ousted by the plainest possible statutory language. There is no such language in [the 2007 Act].[9]

The Supreme Court confirmed this approach. This has led to what are known as *Cart* judicial reviews, whereby a decision of the Upper Tribunal can be judicially reviewed.

There has been an on-going debate about how effective *Cart* judicial reviews are in catching errors of law made by the Upper Tribunal. The Independent Review of Administrative Law Panel found that there were errors of law in only 0.22% of cases.[10] The Public Law Project have questioned the empirical evidence for this and suggested that *Cart* judicial reviews are much more effective than this.[11] Mikołaj Barczentewicz carried out his own survey and suggests that the actual figure is between 2.3% and 9.2%.[12] It is difficult to know what the true figure is, but it would appear that the 0.22% figure is a significant underestimate.

Summary of legal effect of clauses 1 and 2

Context – recent proposals to change the law on judicial review

This Bill is the culmination of recent efforts to change the law on judicial review.

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[6] Constitution Committee, 'Justice and Security (Northern Ireland) Bill, 4th Report of Session 2006-07' (2007) HL Paper 54 3.
[7] *Pyx Granite Co v Ministry of Housing and Local Government*[1960] AC 260, 286.
[8] *Privacy International v Investigatory Powers Tribunal* [2019] UKSC 22.
[9] *R (Cart) v The Upper Tribunal* [2010] EWCA Civ 859 at [20]
[10] See paragraph 3.41 onwards in its report.
[11] J. Tomlinson and A. Pickup, 'Putting the *Cart* before the horse? The Confused Empirical Basis for Reform of *Cart* Judicial Reviews', U.K. Const. L. Blog (29th Mar. 2021) (available at https://ukconstitutionallaw.org/)
[12] M. Barczentewicz, 'Should Cart Judicial Reviews be Abolished? Empirically Based Response', U.K. Const. L. Blog (5th May 2021) (available at https://ukconstitutionallaw.org/))

The Conservative Party Manifesto 2019 made a commitment to update administrative law to find the correct balance between the rights of individuals and effective government.

The government established the Independent Review of Administrative Law (IRAL) to ask whether judicial review was being abused by creating needless delays and allowing for political matters to be litigated through the courts. There was concern by many in the legal community that this review would lead to the courts being side-lined and the executive being granted too much power without enough accountability.[13]

The recommendations made by IRAL were practical and incremental, and did not contain the radical proposals that some had feared.[14] The Panel was against codifying the grounds of judicial review. It thought that ouster clauses were only appropriate in very limited circumstances, but that what are known as *Cart* judicial reviews should be reversed. It saw merit in developing powers to blunt the harshness of quashing orders. Although it had a mixed reception within the legal community, as stated by Joe Tomlinson and Alison Pickup "the Report has rightly drawn broad support from across the political spectrum".[15]

In response, the Government said it would introduce legislation to reverse the law on *Cart* judicial reviews.[16] It said that it would seek to widen ouster clauses to other areas (although accepting that they would be rare). It also said that it would legislate for modifying quashing orders so that they could be suspended or have limited effect. The proposals announced by the Government appeared to be more radical than those envisaged by the Independent Panel.

Dominic Raab MP, the new Lord Chancellor recently suggested that there may be more reforms to come on judicial review.[17] His view was that judicial review meant that public money was being squandered as courts are overturning government decisions. However, as Joshua Rozenberg recently put it, commenting upon a decision of Transport Secretary Grant Shapps on road-building at Stonehenge 'If Shapps had got it right the first time, taxpayers' money would not have been squandered.'[18] Rather than a Minister complaining about a court rectifying unlawful decisions, it would be better to make lawful decisions in the first place.

Clause 1 – quashing orders

Clause 1 of the Bill deals with quashing orders. It takes most of the legal rules spread out in the case law and codifies them – meaning that it puts them into legislation. That legislation is the Senior Courts Act 1981.

Clause 1 inserts a new section 29A into that Act, which sits alongside the other rules on judicial review. Judges are declared to have the power to:

- Suspend a quashing order (it won't take effect until a particular date)[19]
- Limit any retrospective effect (it won't affect things done before the quashing order)[20]

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[13] See for example a series of papers by Professor Mark Elliot, including The Judicial Review Review I: The Reform Agenda and its Potential Scope (August 2020, available at https://publiclawforeveryone.com/

[14] The full report is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf

[15] J. Tomlinson and A. Pickup, 'Putting the *Cart* before the horse? The Confused Empirical Basis for Reform of *Cart* Judicial Reviews', U.K. Const. L. Blog (29th Mar. 2021) (available at https://ukconstitutionallaw.org/)

[16] Full response is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004881/jr-reform-government-response.pdf

[17] 'Dominic Raab: I'll overhaul the Human Rights Act to stop Strasbourg dictating to us', *The Daily Telegraph* (16 October 2021)

[18] Joshua Rozenberg, 'Reviewing Judicial Review: How far will Raab go?' *A Lawyer writes*, 17 October 2021.

[19] Section 29A(1)(a).

[20] Section 29A(1)(b).

Although the case law on this is not absolutely certain, it is reasonable to argue that courts already have this power. Suspension operates like a time lock on the unlawful action, meaning the court can delay the effect of its ruling, giving the public authority time to sort out its mistake. Limiting the retrospective effect ensures that the remedy only has effect from the date it is made, rather than affecting things already done. If the court suspends the quashing order, or makes it prospective only, then things done before suspension, or things done in the past, will be treated as if they are valid.[21]

The inserted section 29A(8) sets out a list of factors for judges to consider when they are making decisions about quashing orders. The list comprises the sorts of things that judges would normally consider when they are exercising their discretion to grant a remedy in judicial review, including:

- Nature of the defect
- Detriment to good administration if order quashed
- Interests of those who would benefit from the quashing
- Interests of those who would benefit if the action not quashed
- Actions taken, or undertakings given, by a person with responsibility for the defective act

There is an interesting contrast here with analogous proposals in the Environment Bill. The factors listed for courts to consider in that Bill include

> the likelihood that the grant of a remedy would cause—
>
> > (i) substantial hardship to, or substantial prejudice to the rights of, any person other than the authority[22]

In that Bill, the court is only obliged to consider the harm suffered by persons if the remedy was granted. That is quite one-sided. However, in the Judicial Review and Courts Bill, the court has a much more balanced list, including those who would benefit if the act was quashed, and those who relied upon the act.

The new section 29A(9) sets up a default position that the court must suspend a quashing order, or limit the retrospective effect of a quashing order, unless it sees a good reason not to. It reads:

> If—
>
> > (a) the court is to make a quashing order, and
> >
> > (b) it appears to the court that an order including provision under subsection (1) would, as a matter of substance, offer adequate redress in relation to the relevant defect,
>
> the court must exercise the powers in that subsection accordingly unless it sees good reason not to do so.

Clause 2 – abolishing Cart judicial reviews / introducing an ouster clause

Clause 2 seeks to reverse the decision in *Cart* and create an ouster clause which would make the decision of the Upper Tribunal final. It does so by inserting a new section 11A into the Tribunals, Courts and Enforcement Act 2007.

The new section 11A(2) states that

> The decision is final, and not liable to be questioned or set aside in any other court.

This is classic language attempting to establish an ouster clause. However, this language generally does not work as courts have ruled since 1968 in the landmark case of *Anisminic v Foreign Compensation Commission*[23] that it only applies to lawful decisions, not to decisions which, since they

[21] Section 29A(5).
[22] Clause 39(9)(b).
[23] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

are unlawful, are not actually "decisions". The new section 11A(7) seeks to thwart this longstanding line of judicial authority by stating that

> "decision" includes any purported decision.

Although it is impossible to predict what a court would do, this language is extremely clear, and directly counters previous judicial arguments on similar ouster clauses that they don't apply to purported decisions. If this wasn't clear and certain enough already, the new section 11A(3) goes even further and states that Upper Tribunal can't be reviewed even if it has made an error, and that no application for a judicial review can be made in respect of the decision of the Upper Tribunal.

The net effect of these provisions is to make it as plain as it could possibly be that the Government's intention in bringing forward the Bill is to oust the jurisdiction of the courts over decisions of the Upper Tribunal.

Having gone as far as it could to make it crystal clear that this is designed as a judge-proof ouster clause, the inserted section 11A then takes several steps back and restricts the width of the ouster clause. There are a number of exceptions where the ouster clause won't apply.

Firstly, it won't apply if the issue to be determined is whether there was a valid application to the Upper Tribunal for permission to appeal.[24]

Secondly, it won't apply if the issue is whether the Upper Tribunal was properly constituted (for example, if it had the wrong number of members sitting, or some similar procedural defect).[25]

Thirdly, it won't apply if the issue is whether the Upper Tribunal has acted in bad faith (for example, that a member of the Tribunal gave a decision for a personal reason, rather than for a proper legal reason).[26]

Fourthly, it won't apply if the issue is whether there was a fundamental breach of the principles of natural justice.[27] This would cover, for example, an argument that the Upper Tribunal didn't give the applicant a proper opportunity to make their case, or only heard one side of the argument.

Finally, there is an exemption to protect the power of the devolved jurisdictions to make their own laws. If the subject matter of the appeal is a law which the devolved legislatures have the power to make, then the ouster clause will not apply.[28] Therefore, the ouster clause only applies in respect of matters which only the Westminster Parliament can legislate for (for example, immigration law).

The net effect of clause 2 is therefore slightly paradoxical. It is the clearest and most determined attempt in the statute book to oust the jurisdiction of the courts. But at the same time, it allows for the continued existence of the judicial review jurisdiction on a number of grounds. The ouster clause clearly seeks to prevent courts from reviewing decisions of the Upper Tribunal on the basis that the Upper Tribunal has made an error of law in deciding a particular case. This is a critical Rule of Law problem, and would undermine the fundamental principle that the courts have clearly articulated in decisions such as *Anisminic v Foreign Compensation Commission*.[29]

[24] Section 11A(4)(a).
[25] Section 11A(4)(b).
[26] Section 11A(4)(c)(i).
[27] Section 11A(4)(c)(ii).
[28] Section 11A(5).
[29] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

Codifying the law on quashing orders - accessibility and certainty of law

The Rule of Law requires that laws are accessible,[30] and this includes that laws be written in an intelligible manner.[31] It also requires that laws are fixed and certain.[32]

Clause 1 satisfies these requirements. It is clear and well-written. It takes legal principles which are scattered across multiple cases and puts them together as a coherent whole. This makes the law more accessible. The law will be much easier to find as it is alongside some of the other rules on judicial review.

There will no longer be a question mark over the power of judges to issue suspended quashing orders.[33] The law will have greater certainty than before as the exact powers will be set out. The list of factors for judges to consider in deciding whether or not to suspend a quashing order is fair and balanced: it allows for consideration of the interests of the state, the interests of those who would benefit from suspension and those who would suffer from suspension. Jonathan Morgan has argued that clause 1 makes a 'beneficial clarification' of the law.[34]

The detail of the legal effect of suspending a quashing order or limiting its retrospective effect is admirably clear in clause 1. Quashing orders may be subject to conditions, so for example a court could include a condition that a public authority must do a particular thing in order to correct their legally defective actions. It is made abundantly clear that if the quashing order is suspended, the defective action remains valid until the quashing takes effect.

There are some who have argued that the power to suspend a quashing order gives too much power to the courts, or that it will deny access to justice if an unlawful action won't be automatically quashed.[35] This is a risk. It should be rare that a quashing order will be suspended, or only have prospective effects. Clause 1 does not set out any hurdles to be overcome before a quashing order will be quashed or made prospective only.

In general, clause 1 advances the Rule of Law by clarifying the detail on quashing orders and is to be welcomed. For reasons set out in the next section, however, the presumption should be reversed in order to make it clear that the normal approach will be a straightforward quashing order, rather than one which is suspended or only has prospective effect.

Presumption limiting effectiveness of a quashing order

The principle of legality

The Rule of Law requires compliance with the law, that means that everyone in the state (including public authorities) must act in accordance with the law.[36] The Venice Commission checklist goes on to ask

- Does the law provide for clear and specific sanctions for non-obedience of the law?[37]
- Is there effective access to courts?[38]

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[30] Venice Commission on the Rule of Law, Benchmark B1.
[31] Benchmark B3(i).
[32] Tom Bingham, *The Rule of Law* (Penguin 2011).
[33] There has been a debate over the extent of judicial powers in this regard, see *Regina (Liberty) v Home Secretary* [2018] EWHC 975 (Admin) and *Ahmed v HM Treasury (No 2)* [2010] UKSC 5.
[34] J. Morgan, 'In Praise of Flexibility: Clause 1 of the Judicial Review and Courts Bill (2021)', U.K. Const. L. Blog (23rd Sept. 2021) (available at https://ukconstitutionallaw.org/)
[35] T. Hickman, 'Quashing Orders and the Judicial Review and Courts Act', U.K. Const. L. Blog (26 July 2021) (available at https://ukconstitutionallaw.org/), L. Graham, 'Suspended and prospective quashing orders: The current picture', U.K. Const. L. Blog (7 June 2021) (available at https://ukconstitutionallaw.org/).
[36] Venice Commission on the Rule of Law, Benchmark A2.
[37] Benchmark A7 for these two bullet points.

- Are judicial decisions effective?[39]

Judicial review is a fundamental way that these Rule of Law principles are vindicated – if the state doesn't comply with the law, an individual can bring a case to court to force the state to comply with the law. The current law on remedies in judicial review also vindicates these principles – the default approach is that if the state does something unlawful, then that decision will be quashed, and have no legal effect. People generally don't bring cases to court for declarations, they bring cases to court to right a wrong, for a tangible result, to actually achieve something. If I am injured in a car crash, I bring a court case so that a court can rule I am not at fault AND so the judge will award me damages.

As ever, there is nuance, and it is possible that there would be some instances where it would be appropriate for an unlawful action to retain its validity in some way. This was the outcome in the *Gallagher* case, where the Supreme Court held that ruling a statutory instrument void would introduce a discrepancy in the statutory scheme.[40] This is very much the exception, but it is a course of action open to a judge in making a decision on the remedy to be awarded in judicial review.

However, the new section 29A(9) in clause 1 of the Bill flips this principle on its head. The new default position will be that, where a court issues a quashing order, it must suspend it, or limit any retrospective effect, unless there is a good reason not to. This undermines the Rule of Law because judicial decisions are not effective.

Consider a hypothetical case where a homelessness charity challenges a decision on availability of social security benefits. The default remedy will be prospective only, meaning that those who have missed out on their benefits in the past due to an unlawful action will not be entitled to backpay of those benefits. The remedy will help people in the future, but will do nothing to help those who have already suffered. What is the point in going to court when the remedy granted will be of zero help to the applicant?

Dominic Raab MP has argued that

> we quite rightly have judicial checks on the executive. But it's got to be done in a constructive and sensible way which allows the government to deliver the projects that it's tasked and mandated by parliament to do [and ensures that] taxpayers' money is not being squandered because projects are being harpooned.[41]

This argument is self-contradictory as it states two quite different things. Firstly, that there ought to be judicial checks on government. Secondly, that government be allowed to do things it has been mandated by parliament to do. The whole point of judicial review is to stop the state from acting unlawfully. But the Lord Chancellor's argument seems to be that, even though the state is acting unlawfully, it ought to be allowed to continue to act unlawfully. A presumption in favour of suspending a quashing order is precisely that – permission for the state to continue to act unlawfully. In most cases, the "constructive and sensible" thing to do with a government decision which is unlawful is to rule that it has no effect.

Professor Tom Hickman has called section 29A(9) 'muddled' and suggested it would be best to omit it altogether.[42] Jonathan Morgan, whilst welcoming clause 1 generally, also argues that section 29A(9) is wrong.[43] Liberty has said that it is "entirely opposed to any presumption in favour of

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[38] Benchmark E2(a).
[39] Benchmark E2(d).
[40] Re *Gallagher's Application for Judicial Review* [2019] UKSC 3
[41] 'Dominic Raab: I'll overhaul the Human Rights Act to stop Strasbourg dictating to us', *The Daily Telegraph* (16 October 2021), My emphasis.
[42] T. Hickman, 'Quashing Orders and the Judicial Review and Courts Act', U.K. Const. L. Blog (26 July 2021) (available at https://ukconstitutionallaw.org/)
[43] J. Morgan, *ibid*.

suspending a quashing order".[44] The Public Law Project's conclusion is that clause 1 "should be amended to remove the presumption and make clear that remedies should only be restricted in this way in exceptional circumstances".[45]

Creating a further barrier to getting an effective remedy is wrong in principle. There are already substantial hurdles to citizens bringing a successful judicial review: they have to show standing, get past the preliminary hearing, have the money to pay large legal fees, bring the case very promptly, and then show that public authority has acted unlawfully. After all that, it is unfair to place another hurdle in their way. Section 29A(9) means that even after clearing all these hurdles and the court ruling that the public authority is in the wrong, the presumption is that the effect of a quashing order will be limited.

It undermines the principle of legality if the default is that an unlawful action is still valid and a quashing order ought normally be suspended, or only have prospective effect. The presumption in section 29A(9) ought to be reversed so that it is in favour of quashing orders taking effect immediately.

The presumption against retrospectivity

One aspect of the proposed section 29A(1)(b) deserves particular mention. It allows the court, in making a quashing order, to include provision 'removing, or limiting any retrospective effect of the quashing'.

The Rule of Law requires that law generally takes effect prospectively, rather than going back in time.[46] On the face of it, the new section 29A(1)(b) may appear attractive from a Rule of Law perspective, especially when combined with the presumption in favour of it in the inserted section 29A(9). However, on closer inspection, this attractiveness disappears for two reasons. Firstly, if a decision was unlawful when it was made, then it has always been unlawful and the court in declaring that decision void is not retrospectively changing anything, merely pointing out that the unlawful action should never have been done. Secondly, and in the alternative view that a court is actually retrospectively changing something in making a quashing order, retrospective actions are acceptable when they are curative – i.e. there to fix a problem which has arisen. Curative retrospective laws are generally regarded as a valid exception to the normal presumption against retrospectivity.[47]

All judicial decisions are in a sense retrospective as they give a judgement about some past event and seek to correct it. The principle against retrospectivity does not justify preventing a remedy against an unlawful action merely because the unlawful action happened in the past. There is little point in going to court about a problem if the court isn't actually empowered to effectively fix the problem.

Making a remedy retrospective is in accordance with the Rule of Law. It should be rare that a quashing order be prospective only.

There is an additional minor point on prospectivity set out in clause 1(4). This is that the amendments made by this Bill only have effect in relation to proceedings commenced after this Bill comes into force. This is a welcome provision as it ensures that the Bill doesn't retrospectively change the rules applying to existing cases. This may result in some uncertainty in existing cases, as it will not be entirely clear, under the existing case law, what the rule is on suspension of quashing orders. However, this will only have a temporary effect, and new cases will be able to take advantage of the clarity set out in the new rules in the Bill.

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[44] Liberty, "Liberty's Briefing on the Judicial Review and Courts Bill for Second Reading in the House of Commons" (October 2021).
[45] Public Law Project, "Judicial Review and Courts Bill: PLP Briefing for House of Commons Second Reading" (October 2021).
[46] Tom Bingham, *The Rule of Law* (Penguin 2011). Venice Commission, Benchmark B6.
[47] See for example Lon Fuller, *The Morality of the Law* (1969) who gives examples of curative retrospective laws.

Overturning Cart judicial reviews – the Upper Tribunal ouster clause

Ouster clauses undermine the Rule of Law. The application of an ouster clause is in direct contradiction to the principle of legality that everyone is subject to the law and the principle that we are all entitled to have our rights vindicated by a court. If an ouster clause is effective, the state isn't subject to law, and there is no access to justice as there is no way for a citizen to enforce their legal rights. The net effect of an ouster clause is that, no matter how wrong a decision is, it cannot be appealed to a court.

Contrary to some expectations, the Independent Panel did not recommend a wholesale acceptance of ouster clauses. Instead they stated that 'the Panel considers that there should be highly cogent reasons for taking such an exceptional course'.[48] In response, the Government accepted that there should be no general framework for ouster clauses, but that the need for them should be considered separately in each individual piece of legislation.[49] It drew a distinction between 3 situations (1) there is an excess of jurisdiction of a body (2) there is an abuse of that jurisdiction, for example a breach of the rules of natural justice, and (3) some other error of law. The suggestion was that it would be legitimate, in highly unusual circumstances, to enact an ouster clause. Although not explicit, the Government response implies that ousting jurisdiction in circumstance (3) is more legitimate than in the other circumstances.

Clause 2 is the first outworking of the policy set out by the Government. As set out in its original proposals, the plan is to develop more ouster clauses in the future. This clause may therefore be the shape of things to come.

Clause 2 seeks to bring about a situation in which the Upper Tribunal could make a clear error of law, with no possibility of this being remedied by judicial review. Errors of law may not arise very often, but even on the government's figures, they do still happen, and they may have serious consequences if they go unremedied. It is more important that there is a mechanism to fix mistakes, than that it sometimes slows things down to go through a process that finds there was no mistake to fix.

Including an ouster clause, even one that is not a blanket ousting of jurisdiction, undermines the Rule of Law. Despite the safeguards and exceptions set out in clause 2, this ouster clause still prevents a court from correcting an error of law made by the Upper Tribunal. This clause therefore ought to be removed from the Bill.

[48] 'The Independent Review of Administrative Law' (2021) CP 407.
[49] 'Judicial Review Reform Consultation – The Government Response' (Ministry of Justice 2021) CP 477.

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