BINGHAM CENTRE FOR THE RULE OF LAW

Judicial Review and Courts Bill, Clauses 1 and 2 (Report Stage, House of Lords): A Rule of Law Analysis

Dr Ronan Cormacain, 29 March 2022

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British Institute of International and Comparative Law

Executive Summary

This Report analyses Clauses 1 and 2 of the Judicial Review and Courts Bill in advance of Report Stage in the House of Lords. It supplements our previous Report on these clauses.

Clause 1 allows a court in judicial review proceedings to make a quashing order which is either suspended, or only has prospective effect.

In general, Clause 1 promotes the Rule of Law by clearly setting out the law in an accessible way and granting judges the power to grant an effective and nuanced remedy in a judicial review case.

The only Rule of Law fly in the Clause 1 ointment is that it includes a presumption that quashing orders will be suspended or made prospective only. This diminishes the ability of courts to grant effective remedies and undermines the principle of legality.

The amendment to leave out this presumption would promote the Rule of Law.

Clause 2 seeks to establish an "ouster clause" for certain decisions of the Upper Tribunal, meaning that those decisions of the Upper Tribunal cannot be challenged in a court. Clause 2 reverses what are known as *Cart* judicial reviews.

Clause 2 does contain exceptions which mitigate the extent to which the ouster clause undermines the Rule of Law, but it retains the bald proposition that, even if a decision is made in error, it cannot be challenged.

The amendment to leave out Clause 2 would remove these Rule of Law concerns, as would the amendment that would retain the High Court's supervisory jurisdiction but limit subsequent rights of appeal.

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Introduction

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

We previously published a Report analysing these clauses from a Rule of Law perspective on 26 October 2021.[1] This is a supplementary Report which focuses on how those clauses could be amended to address Rule of Law concerns at Lords Report Stage on 31 March 2022.

Clause 1 reforms and partially codifies the law on what are termed quashing orders. A quashing order allows a court, in a judicial review hearing, to quash an unlawful action of a public authority.

Clause 2 introduces an ouster clause in respect of certain decisions of the Upper Tribunal. This would mean that some decisions of the Upper Tribunal would be final and cannot be reviewed by any other court. Clause 2 would remove what are known as *Cart* judicial reviews.

What does Clause 1 do?

Clause 1 deals with quashing orders in judicial review cases. Judicial review is the centuries old procedure for a person to go to court and argue that a decision of a public authority was unlawful. The appendix to this Report summarises the law on judicial review. It was reassuring that Lord Wolfson, in Committee Stage stated that "The Government and I recognise the importance of judicial review to good government".[2] It is absolutely central to the Rule of Law because it provides the means by which bodies with limited powers (which might be administrators, ministers, or statutory tribunals) are subjected to legal control. It is also crucial to ensuring that Parliament's will is given effect, because it provides the means by which the limits Parliament has imposed on statutory powers can be enforced.

A quashing order "quashes" or cancels a decision that the court in a judicial review has found to be unlawful. Previously the law on when a quashing order may be suspended was contained in the common law, that is the cases decided by judges over the centuries. Clause 1 reforms and partially codifies that law and puts it on a statutory basis. It does so by inserting a new section 29A into the Senior Courts Act 1981.

Clause 1 provides for the following:

- A quashing order may be:
    - suspended (so that it won't take effect until a particular date),
    - made prospective only (so that it won't affect the validity of anything done before the date of the order).
- A suspended / prospective only quashing order may be made subject to conditions.
- If a quashing order is suspended or made prospective only, the unlawful decision is valid up until that point.

There are a range of matters to which a court must have regard when exercising its powers to suspend a quashing order, all set out in the new section 29A(8). 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 in the decision
- 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 or decision not quashed
- Actions taken, or undertakings given, by a person with responsibility for the defective act

[1] R Cormacain, *Judicial Review and Courts Bill: A Rule of Law Analysis* (Bingham Centre for the Rule of Law, 26 October 2021), available at https://binghamcentre.biicl.org/publications/the-judicial-review-and-courts-bill-a-rule-of-law-analysis

[2] Hansard, House of Lords, Vol 819, 21 February 2022, Col 66.

There is a presumption in favour of suspending or making a quashing order prospective only in the new section 29A(9).

How does Clause 1 enhance the Rule of Law? – Accessibility and certainty

The Rule of Law requires that laws are accessible,[3] and this includes that laws be written in an intelligible manner.[4] It also requires that laws are fixed and certain.[5]

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 on the effect of quashing orders will be much easier to find as it is alongside the other rules on judicial review.

There will no longer be a question mark over the power of judges to issue suspended quashing orders.[6] The law will have greater certainty than before as the exact powers are 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.[7]

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.[8] This is a risk. It should be rare that a quashing order will be suspended, or only have prospective effects.

Lord Brown welcomed Clause 1 in these terms

> Clause 1 and the powers that it confers on the judiciary valuably would add to the judges' discretion, their powers to do justice not just to the claimant in a particular case but on a wider basis.[9]

Lord Faulks, who chaired the Independent Review of Administrative Law which preceded this Bill is in favour of Clause 1 and the flexibility it gave to courts.[10] Former Chair of the Bar Council for England and Wales Lord Sandhurst is also in favour of Clause 1 arguing that "a suspended quashing order will have more teeth than a declaration"[11] and that is a sensible power for judges to have.

In general, Clause 1 advances the Rule of Law by clarifying the law on the effect of quashing orders and to this extent is to be welcomed.

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[3] Venice Commission on the Rule of Law, Benchmark B1.
[4] Benchmark B3(i).
[5] Tom Bingham, *The Rule of Law* (Penguin 2011).
[6] 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.
[7] 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/)
[8] 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/).
[9] Hansard, House of Lords, Vol 819, 21 February 2022, Col 57.
[10] Hansard, House of Lords, Vol 819, 21 February 2022, Col 60.
[11] Hansard, House of Lords Vol 818, 7 February 2022, Col 1373

How does Clause 1 undermine the Rule of Law? – Legality and remedies

There is, however, one provision in Clause 1 which undermines the Rule of Law: the presumption that a quashing order should be suspended or made prospective only.

The new section 29A(9) contains this presumption. It states that: if it appears to a court that suspending or making the quashing order prospective only would offer adequate redress, it must do so, unless it sees good reason not to. The starting point will therefore be that a quashing order will be suspended or have prospective effect only.

It is important to recall that quashing orders only apply to unlawful actions of a public authority. What follows will therefore only apply if the public authority has acted unlawfully, irrationally or unfairly.

The principle of legality and the need for effective remedies

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.[12] The Venice Commission Rule of Law Checklist goes on to ask

- Does the law provide for clear and specific sanctions for non-obedience of the law?[13]
- Is there effective access to courts?[14]
- Are judicial decisions effective?[15]

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. Citizens 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.

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.[16] This is very much the exception, but it is a course of action already open to a judge in making a decision on the remedy to be awarded in judicial review.

However, the new statutory presumption section 29A(9) in Clause 1 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 it will weaken the effectiveness of judicial decisions in a wide range of cases.

This Bill was preceded by the Independent Review of Administrative Law (IRAL) chaired by Lord Faulks.[17] IRAL recommended that there be legislative provision for quashing orders to be suspended, which this Bill implements. But it did not suggest that there be any presumption in favour of suspension. Instead, it recommended that this be a matter for judicial discretion, saying

> it would be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded[18]

To introduce this presumption is to legislate for something not recommending by IRAL.

Dominic Raab, the Secretary of State for Justice, has argued that

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[12] Venice Commission on the Rule of Law, Benchmark A2.
[13] Benchmark A7 for these two bullet points.
[14] Benchmark E2(a).
[15] Benchmark E2(d).
[16] *Re Gallagher's Application for Judicial Review* [2019] UKSC 3
[17] Published March 2021, full report available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf
[18] IRAL Report, paragraph 3.69.

> 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.[19]

This argument is flawed as a justification for the presumption because 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 Secretary of State'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 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.[20] Jonathan Morgan, whilst welcoming Clause 1 generally, also argues that section 29A(9) is wrong.[21] Liberty has said that it is "entirely opposed to any presumption in favour of suspending a quashing order".[22] The Public Law Project's conclusion is that this presumption will "weaken the accountability of public decision-makers, including this and future governments, and undermines the rule of law." [23]

During the debate on this Bill in the House of Lords, although seeing some merits of Clause 1 in general terms, Baroness Jones objected to the presumption and the Government trying to set suspension / prospective only as the "default position".[24] Lord Anderson equated it with the Government attempting "to tilt the playing field against those who seek to hold public authorities to account for their unlawful actions".[25]

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, obtain permission, 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.

Former Supreme Court judge Lord Hope was particularly forthright in his condemnation of this presumption:

> It is not necessary, it is bad legislation and it is extremely dangerous. It is not a remedial tool at all; the Government are trying to create something in their own interest, as has been pointed out already, and make it as difficult and dangerous as possible for judges to use this tool. It should certainly not be legislated for in this form.[26]

Lord Judge expressed his objection very pithily "why are we giving a presumption which is in favour of the wrongdoer?".[27]

It undermines the principle of legality if the default is that an unlawful action is still valid and a quashing order ought normally to be suspended, or only have prospective effect. Section

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[19] 'Dominic Raab: I'll overhaul the Human Rights Act to stop Strasbourg dictating to us', *The Daily Telegraph* (16 October 2021)
[20] T. Hickman, 'Quashing Orders and the Judicial Review and Courts Act', U.K. Const. L. Blog (26 July 2021) (available at https://ukconstitutionallaw.org/)
[21] J. Morgan, *ibid*.
[22] Liberty, "Liberty's Briefing on the Judicial Review and Courts Bill for Second Reading in the House of Commons" (October 2021).
[23] Public Law Project "Public Law Project House of Lords Committee Stage briefing on the Judicial Review and Courts Bill" (February 2022). Available at https://publiclawproject.org.uk/content/uploads/2022/02/220222-JR-Bill-HL-Committee-Stage-FINAL-T.pdf
[24] Hansard, House of Lords, Vol 819, 21 February 2022, Col 58.
[25] Hansard, House of Lords, Vol 819, 21 February 2022, Col 83.
[26] Hansard, House of Lords, Vol 819, 21 February 2022, Col 87.
[27] Hansard, House of Lords, Vol 819, 21 February 2022, Col 90.

29A(9) ought to be deleted so that the presumption is in favour of quashing orders taking effect immediately.

Amendment which would remedy Rule of Law concerns on Clause 1

Leaving out section 29A(9) presumption

The following amendment has been tabled by Lords Anderson, Etherton, Pannick and Ponsonby.

> Page 2, leave out lines 24 to 32

This would have the effect of omitting the new section 29A(9) and (10) of the Senior Courts Act 1981.

This amendment would fully remedy the Rule of Law concerns about Clause 1. It is a minor amendment which removes the presumption in favour of suspending / making quashing orders prospective only, and leaves the rest of the Clause 1 in place. A public authority would be free to argue in favour of suspending or making a quashing order prospective only, and the court would be free to weigh up all factors in making a decision on that point.

What does Clause 2 do?

Clause 2 is an "ouster clause", meaning that it seeks to oust the supervisory jurisdiction of the courts – that is, the power of the courts to judicially review the decisions of bodies with limited powers to makes sure that they have not exceeded the limits of those powers. In this particular instance, the ouster relates to certain decisions of the Upper Tribunal, so that the higher courts cannot review those decisions of the Upper Tribunal to make sure they have not gone wrong in a way which makes their decision unlawful. 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. Clause 2 works by amending the legislation governing the Upper Tribunal – the Tribunals, Courts and Enforcement Act 2007.

Clause 2 declares that decisions of the Upper Tribunal about permission to appeal are final. The new section 11A of the 2007 Act will now state:

> (2) The decision is final, and not liable to be questioned or set aside in any other court.

The courts have been historically reluctant give effect to ouster clauses, and require very clear language before they will do so. Clause 2 addresses this reluctance with very clear and express language. This includes the following provisions of Clause 2

> (3) In particular—
>
> > (a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;
> >
> > (b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision

This wording makes it clear that the Government's intention is that even a legal error of the Upper Tribunal cannot be challenged, and that no judicial review may be brought in respect of decisions of the Upper Tribunal.

The definition provision in Clause 2 provides that

> "decision" includes any purported decision;

This is another way of seeking to copper-fasten the ouster clause. The courts have previously said that ouster clauses only apply in relation to lawful decisions, not unlawful decisions, and that an unlawful decision is therefore only a "purported" decision. This new definition provision seeks to block that argument by saying that even a purported decision cannot be challenged in the courts.

Clause 2 is the legislative drafters' way of saying "this is really, <u>really</u> an ouster clause!".

Cart judicial reviews

Parliament has previously legislated to restrict the scope for recourse to court following certain decisions of the Upper Tribunal. But in the case of *Cart*, the Court of Appeal stated that this did not create an effective ouster clause:

> 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].[28]

The Supreme Court confirmed that the ouster clause was ineffective and did not oust the supervisory jurisdiction of the High Court.[29] This has led to the procedure known as the *Cart* judicial review, whereby a decision of the Upper Tribunal refusing permission to appeal can be judicially reviewed by the High Court.

Clause 2 seeks to reverse this decision, and end *Cart* judicial reviews.

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 Panel for IRAL found that there were errors of law in only 0.22% of cases.[30] The Public Law Project have questioned the empirical evidence of this and suggested that Cart judicial reviews are much more effective than this.[31] Mikołaj Barczentewicz carried out his own survey and suggests that the actual figure is between 2.3% and 9.2%.[32] It is difficult to know what the true figure is, but it would appear that the 0.22% figure is an underestimate.

As regards the nature of *Cart* judicial reviews, there is again some disagreement. Lord Faulks at Committee Stage indicated that there were rather too many of them, with very little wheat but lots of chaff.[33] On the other hand, Lord Falconer argued that *Cart* judicial reviews "have been of some considerable importance, particularly in relation to human trafficking, duress and asylum status".[34] Lord Etherton stated that, on the figures provided to him by the Ministry of Justice, 99% of *Cart* judicial reviews were dealt with on the papers, rather than by an oral hearing.[35] He suggested that this would lead to two *Cart* judicial reviews per year per judge, not an inordinate drain on judicial resources.

It is quite difficult to reach a conclusion on the numbers and importance of cases subject to Cart judicial review. The essence of the case for Clause 2 would appear to be that there are lots and lots of unmeritorious cases, and the solution is therefore to prohibit all cases. The counter-arguments are: (1) this will automatically prohibit the meritorious cases and (2) it is the job of the courts to sift out unmeritorious cases anyway.

Exceptions in Clause 2

There are a number of exceptions in Clause 2 – questions on which a decision is not final, and over which the supervisory jurisdiction of the courts is not ousted. The ouster will not apply if the question to be reviewed is:

- was there a valid application to the Upper Tribunal for permission to appeal?[36]
- was the Upper Tribunal properly constituted (for example, if it had the wrong number of members sitting, or some similar procedural defect)?[37]

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[28] *R (Cart) v The Upper Tribunal* [2010] EWCA Civ 859 at [20]
[29] *R (Cart) v The Upper Tribunal* [2011] UKSC 28
[30] See paragraph 3.41 onwards in its report.
[31] 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/)
[32] M. Barczentewicz, 'Should Cart Judicial Reviews be Abolished? Empirically Based Response', U.K. Const. L. Blog (5th May 2021) (available at https://ukconstitutionallaw.org/))
[33] Hansard, House of Lords, Vol 819, 21 February 2022 Col 101.
[34] Hansard, House of Lords, Vol 819, 21 February 2022 Col 102.
[35] Hansard, House of Lords, Vol 819, 21 February 2022 Col 106.
[36] Section 11A(4)(a).

- has the Upper Tribunal 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)?[38]
- was there a fundamental breach of the principles of natural justice?[39] 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.[40] Therefore, the ouster clause only applies in respect of matters for which only the Westminster Parliament can legislate (for example, immigration law).

These exceptions to the ouster clause are to be welcomed: they do mitigate some of the damage caused by this clause to the Rule of Law.

How does Clause 2 undermine the Rule of Law?

However, in spite of the welcome exceptions set out above, at heart, Clause 2 remains an ouster clause. The language used in the Clause contains the precise words that make it objectionable – the decision of the Upper Tribunal is final, and cannot be challenged even if it has "exceeded its powers by reason of any error made in reaching the decision".[41] **Even if the Upper Tribunal has made an error of law, that legal error cannot be rectified by a higher court exercising its supervisory jurisdiction**.

Such ouster clauses, preventing judicial control of the legality of decisions by bodies with limited powers, undermine the Rule of Law. The application of such 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. As Lord Marks put it at Committee stage, ouster clauses which shield the Government from such review

> hand power to the Executive to act contrary to law and outside the limits of what the law permits the Executive to do. In that way, they are inimical to the rule of law.[42]

In its response to IRAL, 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.[43] 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 implied 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. The current clause limits judicial review of a statutory tribunal which functions in a similar way to a court and includes senior judges. Use of the same formulation in a future statute to immunise an administrative or executive decision-maker from judicial review would be extremely problematic from a Rule of Law perspective.

The ouster clause introduced by clause 2 is a partial ouster, subject to a number of exceptions. However, including such an ouster clause still undermines the Rule of Law, because it still prevents a court from correcting an error of law made by the Upper Tribunal, which is a statutorily created Tribunal with limited powers.

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[37] Section 11A(4)(b).
[38] Section 11A(4)(c)(i).
[39] Section 11A(4)(c)(ii).
[40] Section 11A(5).
[41] Clause 2, the inserted section 11A(3)(a).
[42] Hansard, House of Lords, Vol 819, 21 February 2022 Col 111.
[43] 'Judicial Review Reform Consultation – The Government Response' (Ministry of Justice 2021) CP 477.

What is the view of the public on the role of the courts?

The ouster clause in Clause 2 relates to a statutory tribunal but it creates a dangerous precedent which might be followed in future to attempt to protect the Government itself from judicial control for legality. Recent evidence suggests that such restrictions on the role of the courts in holding the Government to account would be contrary to widely held views about the legitimate role of courts in a democracy.

The Constitution Unit at University College London published a detailed report in January 2022 entitled *What kind of democracy to people want?*, the result of an extensive survey of the public.[44] Some of the results of that survey touch directly upon the issues raised by Clause 2. There were two questions relating to trust in the courts. In response to the question of who is most trusted to act in the best interests of the public, the courts came out top, followed by the civil service, then Parliament, then the Prime Minister. When asked who did the public trust most, the most trusted where the Government's scientific advisers, with judges in second place, well ahead of officials and the Government, with newspapers in bottom place.

There were then a series of questions on whether there should be a check on key decisions that Parliament or the Government has decided. Depending upon the subject matter of the decision, between 28% and 40% of the public thought that the courts should be able to decide if a legal right has been violated. On the reverse side, between only 6% and 18% thought that the courts should have no role, and that this should be a matter for the Government or Parliament alone.

Extrapolating from these survey results, there is strong evidence that the public do not think that decisions of the Government should be immune from judicial oversight. The Rule of Law principle that people should have access to courts resonates with the public support for the integrity of the courts and dislike of the idea that the Government should be able to do what it wants without anyone checking up on it.

Amendments which would remedy Rule of Law concerns on Clause 2

Leave out Clause 2

Lord Ponsonby has tabled an amendment proposing to leave out Clause 2.

Removing this clause altogether would certainly remedy the Rule of Law concerns around it.

Retain supervisory jurisdiction but limit rights of appeal

Lords Etherton, Pannick and Ponsonby have proposed a compromise amendment that would retain the High Court's supervisory jurisdiction over permission decisions of the Upper Tribunal, but would restrict appeals against the High Court's exercise of its judicial review jurisdiction. A permission decision of the Upper Tribunal would not be final, but a judicial review of that Tribunal's decision by the High Court (or the Court of Session in Scotland) would, in most circumstances, be final.

Importantly, this means that there would be a route for a claimant if there has been an error of law made by the Upper Tribunal – that error can still be corrected by a higher court. Judicial review to control for legality would therefore be kept. But the appeal route would stop at the High Court, save for the possibility of an appeal to the Supreme Court if there is a point of law of general public importance.

By preserving the High Court's supervisory jurisdiction, this compromise amendment would also meet the Rule of Law concerns with clause 2.

If this amendment is made, it may be necessary to make an additional tweak to preserve the right of the devolved jurisdictions to legislate in respect of devolved matters. This would be along the lines set out in the governments version of section 11A(5) – that these changes to the rights of appeal don't apply in respect of matters where the devolved jurisdictions have the right to set the law.

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[44] Alan Renwick, Ben Lauderdale, Meg Russell, James Cleaver *What kind of a democracy do people want? Results of survey of the UK population, First Report of the Democracy in the UK after Brexit project* (Constitution Unit, UCL, January 2022). Available at https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/report_1_final_digital.pdf

Appendix – Legal Background

Judicial review

Judicial review is the centuries old procedure 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 disproportionate. 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 is absolutely central to the Rule of Law because it provides the means by which bodies with limited powers (which might be administrators, ministers, or statutory tribunals) are subjected to legal control. It also gives individuals a route to challenge officialdom where officialdom may have overstepped its powers.

The framework rules for judicial review are set out in the Senior Courts Act 1981, but much of the detail has been established by the courts over the years and is to be found in the case law.

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.[45] It also has the power to make three specific orders

- Mandatory order – orders the state to do something
- 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.

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.[46]

Professor Jeff King agrees with the default approach that substantial orders for relief are much better than a declaration only.

> 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.[47]

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

[45] Section 31(2), Senior Courts Act 1981.
[46] *Berkeley v Secretary of State (No. 1)* [2001] 2 AC 603
[47] J. King, 'Miller/Cherry and Remedies for Ultra Vires Delegated Legislation', U.K. Const. L. Blog (19th Sept. 2019) (available at https://ukconstitutionallaw.org/)

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 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.

At present, 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 supervisory jurisdiction of the courts – that is, their power to judicially review decisions for legality. It means that the subject matter of the ouster clause cannot be challenged in the courts. This means that the decision or action of an official in relation to that subject matter is final and cannot be challenged legally.

The objections to ouster clauses have been made clear. For example, in the Justice and Security (Northern Ireland) Bill, 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'.[48]

It is reasonable to say that ouster clauses which prevent errors of law from being corrected are at odds with the Rule of Law. The orthodox view is that courts will, however, give effect to them, provided that 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.[49]

In reality, since the landmark judgment of the House of Lords in the 1960s in *Anisminic v Foreign Compensation Commission*, courts have proved 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, in order to preserve judicial control over illegality.[50]

[48] Constitution Committee, 'Justice and Security (Northern Ireland) Bill, 4th Report of Session 2006-07' (2007) HL Paper 54 3.
[49] *Pyx Granite Co v Ministry of Housing and Local Government*[1960] AC 260, 286.
[50] *Privacy International v Investigatory Powers Tribunal* [2019] UKSC 22.

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