BINGHAM CENTRE FOR THE RULE OF LAW

Judicial Review and Courts Bill, Clauses 1 and 2 (Consideration of Lords Amendments): A Rule of Law Analysis

Dr Ronan Cormacain, 20 April 2022

BIICL
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 Consideration of Lords amendments in the House of Commons (21 April 2022). It supplements our previous Reports 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 clause previously contained a presumption that a quashing order would be suspended or made prospective only. The House of Lords removed this presumption. Following constructive debate, this presumption has now been dropped. We welcome this as the presumption had the potential to undermine the Rule of Law.

Clause 2 originally sought to establish an "ouster clause" for certain decisions of the Upper Tribunal, meaning that those decisions could not be challenged in court. Clause 2 reversed what are known as *Cart* judicial reviews. Even though clause 2 contained some safeguards, it retained the bald proposition that even if a decision is made in error, it cannot be challenged.

Clause 2 was amended in the House of Lords. The amendment was a compromise which meant that decisions of the Upper Tribunal could be appealed to the High Court, but that the decision of the High Court would be final (save for a few exceptional cases where the court certifies that there is a point of law of general public importance). This compromise meant that the jurisdiction of the courts was not ousted, but there were limits on how many appeals could be made. It would be better for the Rule of Law if clause 2 was removed completely, but in the absence of this, the House of Lords amendment helps protect the Rule of Law.

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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.

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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 Reports analysing these clauses from a Rule of Law perspective on 26 October 2021[1] and 29 March 2022.[2] This is a supplementary Report which focuses only on Commons Consideration of Lords amendments to these Clauses, due to be debated on Thursday 21 April 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. It was reassuring that Lord Wolfson, in Committee Stage stated that "The Government and I recognise the importance of judicial review to good government".[3]

A quashing order "quashes" or cancels a decision that the court in a judicial review has found to be unlawful.

The Rule of Law requires that laws are accessible,[4] and this includes that laws be written in an intelligible manner.[5] It also requires that laws are fixed and certain.[6]

Clause 1 satisfies Rule of Law requirements of accessibility,[7] intelligibility[8] and certainty.[9] 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.

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.

Removal of the presumption in favour of suspending a quashing order

The previous iteration of the Bill contained a presumption in favour of suspending a quashing order, or making it prospective only. In our previous report we recommended that this presumption be

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[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] R Cormacain, *Judicial Review and Courts Bill (Report Stage, House of Lords): A Rule of Law Analysis* (Bingham Centre for the Rule of Law, 29 March 2022), available at https://binghamcentre.biicl.org/publications/judicial-review-and-courts-bill-clauses-1-and-2-report-stage-house-of-lords-a-rule-of-law-analysis

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

[4] Venice Commission on the Rule of Law, Benchmark B1.

[5] Benchmark B3(i).

[6] Tom Bingham, *The Rule of Law* (Penguin 2011).

[7] Venice Commission on the Rule of Law, Benchmark B1.

[8] Benchmark B3(i).

[9] Tom Bingham, *The Rule of Law* (Penguin 2011).

[10] Hansard, House of Lords, Vol 819, 21 February 2022, Col 60.

[11] Hansard, House of Lords Vol 818, 7 February 2022, Col 1373

removed as it undermined the principle of legality. The House of Lords voted to remove this presumption. Following constructive debate, this presumption will not be reinserted into the Bill.

We welcome the Government's decision to not include the presumption in favour of suspending a quashing order or making it prospective only.

What does clause 2 do?

Original clause 2 – the ouster clause

As originally set out, Clause 2 was an "ouster clause", meaning that it sought 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 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.

Clause 2 is the legislative drafters' way of saying "this is really, really an ouster clause!". It is a legislative attempt to overturn what are known as *Cart* judicial reviews (after the legal case of *Cart)*.

The Appendix explains the legal background to ouster clauses and *Cart* judicial reviews.

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, (2) it is the job of the courts to sift out unmeritorious cases anyway and (3) it is not an excessive drain on judicial resources to sift out unmeritorious cases.

The House of Lords compromise – retain supervisory jurisdiction but limit rights of appeal

Lords Etherton, Pannick and Ponsonby tabled a compromise amendment which was passed by the House of Lords. The amendment 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.

We recommend MPs vote in favour of the Etherton amendment. By preserving the High Court's supervisory jurisdiction, this compromise amendment would meet the Rule of Law concerns with clause 2.

How does the ouster clause undermine the Rule of Law?

In spite of the welcome safeguards included in the original version of clause 2, at heart, it 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".[12] To repeat: e**ven if the Upper Tribunal has made an error of law, that legal error cannot be rectified by a higher court exercising its supervisory jurisdiction**.

[12] Clause 2, the inserted section 11A(3)(a).

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.[13]

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.[14] 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.

The Government's version of 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 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.

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.[15] 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

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[13] Hansard, House of Lords, Vol 819, 21 February 2022 Col 111.
[14] 'Judicial Review Reform Consultation – The Government Response' (Ministry of Justice 2021) CP 477.
[15] 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

and dislike of the idea that the Government should be able to do what it wants without anyone checking up on it.

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.

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'.[16]

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.[17]

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.[18]

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].[19]

The Supreme Court confirmed that the ouster clause was ineffective and did not oust the supervisory jurisdiction of the High Court.[20] 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.

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[16] Constitution Committee, 'Justice and Security (Northern Ireland) Bill, 4th Report of Session 2006-07' (2007) HL Paper 54 3.
[17] *Pyx Granite Co v Ministry of Housing and Local Government*[1960] AC 260, 286.
[18] *Privacy International v Investigatory Powers Tribunal* [2019] UKSC 22.
[19] *R (Cart) v The Upper Tribunal* [2010] EWCA Civ 859 at [20]
[20] *R (Cart) v The Upper Tribunal* [2011] UKSC 28

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.[21] The Public Law Project have questioned the empirical evidence of this and suggested that Cart judicial reviews are much more effective than this.[22] Mikołaj Barczentewicz carried out his own survey and suggests that the actual figure is between 2.3% and 9.2%.[23] 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.[24] 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".[25] 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.[26] He suggested that this would lead to two *Cart* judicial reviews per year per judge, not an inordinate drain on judicial resources.

[21] See paragraph 3.41 onwards in its report.
[22] 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/)
[23] M. Barczentewicz, 'Should Cart Judicial Reviews be Abolished? Empirically Based Response', U.K. Const. L. Blog (5th May 2021) (available at https://ukconstitutionallaw.org/))
[24] Hansard, House of Lords, Vol 819, 21 February 2022 Col 101.
[25] Hansard, House of Lords, Vol 819, 21 February 2022 Col 102.
[26] Hansard, House of Lords, Vol 819, 21 February 2022 Col 106.

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