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The Independent Review of Administrative Law: a game changer or status quo for Judicial Review?

25 March 2021

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The Independent Review of Administrative Law: a game changer or status quo for Judicial Review?

Chapter 2: Justiciability

Morag Ellis QC

Esther Drabkin-Reiter

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk

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Overview

- Terms of reference
- Legal context
- The IRAL report: findings, possible responses, recommendations
- The Government Response
- Implications for the future

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IRAL terms of reference on justiciability

"2. Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government."

Note E: Concern expressed that the distinction between "scope" (justiciable) and "exercise" (non-justiciable) of power (prerogative or statutory) has been blurred

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Legal context

- Human Rights Act 1998 – and independent review of the HRA
- *Miller; Cherry*
- *Cart*
- Defining "justiciability"
- Justiciability – not just a public law concept

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The IRAL report – findings (1)

- Triggers in the decline of non-justiciability:
  - *GCHQ, Gillick,* Human Rights Act
- Potential of Supreme Court judgment in *Miller; Cherry* to "abolish all remaining common law limits on the justiciability of the exercise of public powers"
- No new instances of non-justiciable powers or issues have been recognised by the courts
- The constitutional balance between politics and the courts

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The IRAL report – findings (2)

Reasons in favour of reforming / legislating on justiciability

- Dangers of compliance culture
- Lack of boundaries for justiciability
- Certainty

Reasons against reforming / legislating on justiciability

- Limits to government power
- Flexibility
- Public confidence
- Legal accountability

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Possible responses

- Trusting the courts to observe the boundary between non-justiciability and justiciability – the favoured option
- Legislation on what is non-justiciable:
  - A codifying or reforming clause
  - As part of a general codification of judicial review
  - Piecemeal legislation to reverse particular judgments

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Recommendations

- Legitimate for Parliament to legislate in response to particular decisions on justiciability – e.g. Fixed-Term Parliaments (Repeal) Bill; *Cart*
- However, advised against any broader attempt to set the limits of justiciability on a statutory footing
- Hope expressed that the courts would be conscious of "recent constitutional upheavals"
- Nonetheless, there should be a strong presumption of leaving questions of justiciability to judges

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The Government Response

- Adopted Panel recommendations on non-justiciability and reversing the rule in *Cart*
- Commentary focussed on practical difficulties of legislating on justiciability rather than which institution is best placed to determine its limits
- Concern raised that the erosion of non-justiciability might pull the courts towards substantive merits-based review rather than supervisory review
- Raises a threat of legislation in the future?

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Future implications – gamechanger or status quo?

- No general reform of the principle of justiciability – but reversal of the rule in *Cart*
- Veiled threat of future legislation?
- Human Rights Act 1998 as a limiting factor
- Setting a (critical) tone for future debate

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Chapter 2: Justiciability

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Judicial Review Reform and the Constitution

PAVLOS ELEFTHERIADIS
Professor of Public Law, University of Oxford &
Barrister, Francis Taylor Building

The Independent Review of Administrative Law: A Game Changer or status quo for judicial review? – **An FTB Webinar -** 25 March 2021

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TWO DOCUMENTS

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THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

Chair:

Lord Edward Faulks QC

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Ministry of Justice

Judicial Review Reform

The Government Response to the Independent Review of Administrative Law

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Background

- IRAL Review: wide consultation, modest proposals
- Government's Response: more consultation
- Joshua Rozenberg interviewed Lord Faulks on 23.03.2021
- Surprising disagreement between Lord Faulks and the Lord Chancellor, Robert Buckland QC, on what the IRAL Report **says**
  - https://rozenberg.substack.com/p/faulks-defends-judicial-review

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Faulks defends judicial review

QC says ministers are basing reforms on just a few cases

Joshua Rozenberg
Mar 23 ♡ 3

Spin?

Of no less concern, though, are the government's attempts to spin the panel's findings in support of ministers' preferred reforms. This was how the lord chancellor, Robert Buckland, summed up the inquiry's conclusions in a statement to the House of Commons:

> The report's finding — that there is a growing willingness to accept an expansion of the remit of judicial review, whether this is in terms of more decisions being considered justiciable or the way in which courts review an exercise of power and the remedies given — is a worrying one.

In an interview for the BBC Radio 4 programme *Law in Action* to be broadcast this afternoon, I asked Faulks whether that was what his inquiry had found. He replied:

> No, I don't think it really was our finding. I think we found that there were one or two cases, which we particularly pointed out, where there was considerable tension between what was legitimate to be considered by the courts and what was really a matter of politics. But those were particular cases. We did not think that there was an overall trend that you could extract from those particular cases.

Faulks defends judicial review

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THE GOVERNMENT'S CONSTITUTIONAL CASE FOR JR REFORM

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Are JR Decisions 'illegitimate'?

- Government's argument: Courts have made **illegitimate inroads into politics**
- Motivation for reform is **constitutional** not technical
- Perception of a deep problem of 'constitutional balance'
- Shown in Government's Chapter 2 : **'The Constitution and Judicial Review'**
- **Ambitious case** – almost a direct response to modest proposals by Lord Faulks

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The Government's Case for Reform

- 6 pages of argument (pp. 13-18)
- 'The Government's conception of the role of Judicial Review'
- Description of history of establishment of JR (par. 21-23)
- Par. 24: '*The Government does not perceive these historical developments to be in any way indicative of how the courts and the UK Constitution 'ought' to evolve in the future'.*

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Turning Back the Tide?

- Par. 25: '*For example, while the standard grounds of Judicial Review are default conditions that Parliament intends to apply to the exercise of any power, these are just defaults and Parliament is completely free to add to or remove from them in specific cases'*
- *Par. 26: '[I]t cannot be emphasised enough that Parliament is the primary decision-maker here and the courts should ensure they remain, as Lady Hale put it, 'the servant of Parliament'.*

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A majoritarian 'constitution'?

- Par 28: '*The question is how to ensure that the doctrine of the 'principle of legality' remains within the appropriate bounds of Judicial Review, with Parliament being the ultimate decision-maker as to how powers should be exercised*'.
- In effect: the UK has a completely flexible 'constitution', where the present majority can do anything it wants.
- Emphasis on the powers of the Executive (see by analogy Adrian Vermeule in the US)

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THE COMMON LAW CONSTITUTION

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The Government's Report makes no reference to the Common Law Constitution

- For the Government the UK is a system with a completely flexible 'constitution'
- *This is not the law*
- Several Supreme Court judgments contradict the Government's account of a flexible 'constitution'
- Legal principles limit all state powers, including those of Parliament (in effect, the constitution is higher law)
- Courts safeguard the rule of law
- Since at least *Factortame (No 2)* [1991] 1 AC 603

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The UK Constitution: *Cherry/Miller(No2)*

- *Cherry/Miller (No 2)* [2019] UKSC 41, [2020] AC 373]

39. Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context

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The UK Constitution: *Cherry/Miller(No2)*

Cherry/Miller (No 2) [2019] UKSC 41, [2020] AC 373]

- 40. The legal principles of the constitution are not confined to statutory rules, but include constitutional principles developed by the common law. [...]42. The sovereignty of Parliament would, however, be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased. That, however, would be the position if there was no legal limit upon the power to prorogue Parliament (subject to a few exceptional circumstances in which, under statute, Parliament can meet while it stands prorogued). An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty

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The UK Constitution: *Privacy International* (2019)

- *R (on the application of Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22
  - On whether Parliament can 'oust' the jurisdiction of the High Court

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The UK Constitution: *Privacy International* (2019)

- Lord Carnwath (par. 132):
- This proposition should be seen as based, not on such elusive concepts as jurisdiction (wide or narrow), ultra vires, or nullity, but rather as a natural application of the constitutional principle of the rule of law (as affirmed by section 1 of the 2005 Act), and as an essential counterpart to the power of Parliament to make law. The constitutional roles both of Parliament, as the maker of the law, and of the High Court, and ultimately of the appellate courts, as the guardians and interpreters of that law, are thus respected. The question in any case is "the level of scrutiny required by the rule of law", set on a basis which as stated in Cart is both "principled and proportionate" (para 51 per Lady Hale), or in Lord Dyson's words (para 133): "what scope of judicial review … is required to maintain the rule of law"; it being "a matter for the courts to determine what that scrutiny should be" (para 102 per Lord Clarke)

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The UK Constitution: *HS2* (2014)

R (Buckinghamshire) v Secretary of State for Transport (HS2) [2014] UKSC 3; [2014] 1 WLR 324

- 207. The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation

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The UK Constitution: *Jackson* (2005)

R (Jackson) v Attorney General [2005] UKSC 56, [2006] 1 AC 262] (Lord Steyn):

- 102. If the Attorney General is right the 1949 Act could also be used to introduce oppressive and wholly undemocratic legislation. For example, it could theoretically be used to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens. ... We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. [...] The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.

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The UK Constitution: *Jackson* (2005)

R (Jackson) v Attorney General [2005] UKSC 56, [2006] 1 AC 262] (Lord Steyn):

- In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal.

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A deep Constitutional Disagreement

- The Government appears to be endorsing a minority view in constitutional law (Sir Stephen Laws, John Finnis, Richard Ekins etc.), which on the basis of an ill-defined 'originalism' refuses to accept the American and European influences of the past 40 odd years even though these influences are firmly part of the common law and embedded in Acts of Parliament.

- The Government's theory challenges the authority of the Supreme Court to state what the constitution *is*. It suggests both a) the constitution is to be freely remade by common law and statute *and* b) parliamentary sovereignty has permanent features, which cannot be legitimately amended by common law or statute. An odd view.

- The IRAL Report did not adopt this view. Hence, the disagreement between Lord Faulks and the Lord Chancellor, highlighted by Joshua Rozenberg on Tuesday.

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- The 'orignalist' view was tested in *Cherry/Miller (2)*
- John Finnis advocated the lengthy prorogation of Parliament in the *Telegraph* (1 April 2019)
- This view lost 11-0

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THE COMMON LAW VIEW OF CHANGE

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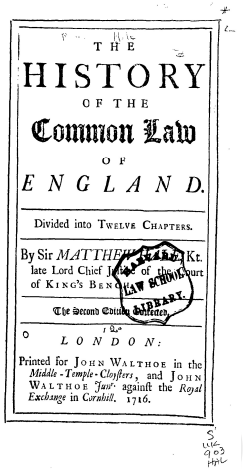
The Common Law View

- The better view speaks of the common law constitution as binding higher law. See T R S Allan, *The Sovereignty of Law* (OUP, 2013).
- Change happens all the time – Dicey has become obsolete – there is nothing surprising to this.
- No failure of legitimacy to the law being developed over time.
- Law: Interpretations!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Divided into Twelve Chapters.
By Sir MATTHEW HALE, Kt.
late Lord Chief Justice of the Court of King's Bench.
The Second Edition Corrected.
LONDON:
Printed for John Walthoe in the Middle-Temple-Cloysters, and John Walthoe Junr. against the Royal Exchange in Cornhill. 1716.

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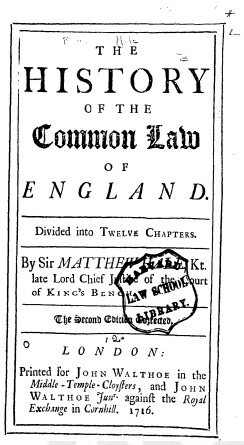
The Common Law View: Sir Matthew Hale (1609-1676)

- 'First, the common law does determine what of those customs are good and reasonable, and what unreasonable and void. Secondly, the common law gives to those customs, that it adjudges reasonable, the force and efficacy of their obligation. Thirdly, the common law determines what is that continuance of time that is sufficient to make such a custom. Fourthly, the common law does interpose and authoritatively decide the exposition, limits and extension of such customs'.
- Matthew Hale, *The History of the Common Law* 4th ed. corrected by C Runnington (London: Strahan & Woodfall, 1779) 25.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PROSPECTS FOR REFORM

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Prospects for JR Reform

- What next?
- Incremental change or constitutional battle?
- Probably the first:

> The Government does not think the time is right to propose far-reaching, radical structural changes to the system of Judicial Review.
>
> 118. Instead, the Government intends to focus on specific and discrete areas for reform such as 'Cart', ouster clauses, or doctrines such as nullity in order to renew the operation of Judicial Review. This will maintain the courts' discretion in regard to remedies, but make very clear that the courts act to apply what Parliament considers appropriate, and in circumstances where this may be ambiguous that they should strive to discern Parliament's intent.

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New Issue: Human Rights Act

Independent Human Rights Act Review

The Review will consider how the Human Rights Act is working in practice and whether any change is needed.

From:	Ministry of Justice
Published:	7 December 2020
Last updated:	16 March 2021, see all updates

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Deeper questions

- Does the Government wish to change the UK common law constitution?
- Can it?
- How do you change the unwritten constitution?
- Can a simple (and, by definition, temporary) majority in parliament bring about fundamental changes to the constitution?
- Is the weakening of the courts compatible with liberty and the rule of law?
- Can there be an unlawful amendment to the unwritten constitution?
- Probably issues for another day

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Moderating Judicial Review:

The Independent Review of Administrative Law

Charles Streeten
Francis Taylor Building

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk

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History:
Entick v Carrington
[1765] EWHC KB J98

"where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment." Lord Camden

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The Issue

"Whether, where the exercise of a public law power should be justiciable:

(i) on which grounds the courts should be able to find a decision to be unlawful;

(ii) (ii) whether those grounds should depend on the nature and subject matter of the power; and

(iii) (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful."

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Tailoring the Grounds of Review

1. Concern has been expressed to us that examples of such judicial overreach have begun to creep into the caselaw.
2. The second concern is that the current state of the law on grounds of judicial review makes it very difficult for a public body to be able to predict whether or not a proposed course of action will end up being successfully legally challenged in the courts.
3. Solutions:
    1. That a particular ground of judicial review will not apply to the exercise of a particular type of public power
    2. That a particular ground of judicial review will only apply to particular kinds of exercises of public power
    3. That the exercise of a particular type of public power will only be reviewable on certain grounds

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The Review's Conclusion

"We do not think that it would be wise for Parliament to attempt to deal with any problems that were established as arising out of the multiplicity or vagueness of grounds of review by trying to tailor the grounds of judicial review applicable to a particular exercise of public power according to the "nature and subject matter" of that power."

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Judicial Overreach

The most obvious solution to a potential problem of judicial overreach is judicial restraint.

We agree with those judges that have instead adopted "respect" as the key concept underpinning their approach to judicial review: the quality of judicial restraint that is required if the law on judicial review is to operate properly involves the courts' showing respect for the distinctive roles played by non-judicial public bodies in the life of the nation.

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Uncertainty

Uncertainty around how common law judicial review applies in concrete cases is, perhaps, inevitable. The grounds of review and the conditions on their application is developed on a case-by-case basis among many different judges with varying views as to what the law should say

The evidence we considered… did not reveal that uncertainties around the law on legitimate expectations were proving problematic.

The same cannot be said of the emergent ground of review under which the exercise of a public power stands to be set aside if it unjustifiably or disproportionately. here exists little clarity around the question of what amounts to a "constitutional right, value or principle". We hope that extra-judicial bodies (e.g. Law commission, Constitution Committee of the House of Lords are able to make a more synoptic view on the question of what amounts to a constitutional right

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Remedies

"Our only recommendation in this area is that section 31 be amended to give the courts the option of making a suspended quashing order – that is, a quashing order which will automatically take effect after a certain period of time if certain specified conditions are not met."

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Government Response – Suspended Quashing Orders

The Government believes it would be appropriate to set out in legislation factors or criteria that the court should take into account when considering whether a suspended quashing order is appropriate.

Alternatively, criteria could also be set out in legislation which must be considered by the courts, and which, if met, mandate the court to use a suspensive order unless there was an exceptional public interest in not doing so. A combination of the two may also be appropriate These approaches would provide parties with greater certainty over the outcome of Judicial Review proceedings. Appropriate considerations could include:

- whether the procedural defect can be remedied
- whether remedial action to comply with a suspended order would be particularly onerous/complex/costly
- whether the cost of compensation for remedying quashed provisions would be excessive

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Government Proposals: Prospective-Only Quashing

Prospective-only quashing of Statutory Instruments would focus remedial legislation on resolving issues related to the faulty provision, limiting the extent to which additional issues have to be rectified due to wide and retrospective quashing

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The Metaphysics of Nullity

Government proposes that Parliament to legislate to put it beyond doubt that the theory of nullity is not the law, such by:

Stating that only lack of competence, power, or jurisdiction leads to the power being null and void.

Creating a presumption against the use of nullity.

Legislating to state which other issues can be considered as going outside the scope of executive power, and others that are focused on the wrongful exercise of that legitimately held power.

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The Government's Response to The Independent Review of Administrative Law In Relation to Procedural Reforms

Craig Howell Williams QC

chw@ftbchambers.co.uk

25 March 2021

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The terms of reference for the IRAL

"Whether procedural reforms to judicial review are necessary, in general, to 'streamline the process', and, in particular: (a) on the burden and effect of disclosure in particular in relation to 'policy decisions' in Government; (b) in relation to the duty of candour, particularly as it effects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and (g) on costs and interveners."

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The Government's proposals

- Time limits
- Tracks
- Interveners
- Claims
- Other issues:
  - Costs
  - Standing
  - the duty of candour

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Time Limits

The Panel highlighted four points in relation to current system:

- CPR 54.5(1) JR claims to be filed "promptly" *and* "in any event no later than 3 months after the grounds to make the claim first arose"
- Exceptions to this rule where there are shorter periods with no promptitude test eg CPR54.5(5) re planning decisions where claims to be filed "not later than six weeks after the grounds to make the claim first arose"
- Requirement for promptitude abolished in Northern Ireland in 2018
- CPR 3.1(2) & S31 SCA 1981 allow Court to grant extension of time for JR cases, but no ability for parties to agree extension of time

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Evidence to the Panel

- A near uniform view that shortening time period would encourage weak and premature claims
- Law Society reported most approved current time limit, 30% thought it too short, with some suggesting a longer period for discussions towards settlement between parties
- Hogan Lovells sought to retain the current time limit whilst encouraging early resolution by introducing obligations on parties to demonstrate meaningful engagement; time could "stop" when pre-action correspondence starts
- Bingham Centre for the Rule of Law noted that defendants sometimes agree not to take a time point, but claimants nonetheless file to avoid risk; it recommended that parties be allowed to agree to an extension of time
- Liberty argued that the promptness test introduced unnecessary uncertainty and recommended its removal

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T: 020 7353 8415 I E: clerks@ftbchambers.co.uk I www.ftbchambers.co.uk

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The Panel conclusions

- Not in favour of shortening time period, nor of changing it
- Too difficult to legislate in a sufficiently determinative way for a longer period with a start/stop time approach dependent on meaningful engagement of parties
- Difficult to allow parties to agree to extension of time limits without creating undesirable side effects for third parties, inc Gov depts
- On the other hand there may well be merit in removing the promptness test, noting that it is rare for a court to dismiss a claim outright if it has been brought within the three month period even if it can be argued that the claimant failed to act promptly.

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The Government's response

- Agrees that test of promptness should be removed, and asks for views on that specific question
- Agrees that the current three month period should not be extended, balancing need for certainty with right to challenge decisions, but asks for views
- Accepts panel's concern that allowing parties to agree to extensions of time limits might have undesirable effects, but considers that the CPRC should look at this suggestion in more depth bearing in mind the potential significant benefit of early resolution

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Tracks

- Suggestion in reps for a “tracking system” (similar to Part 7) to allocate JR claims to different ‘tracks’ with different procedural requirements depending on the complexity of the case
- Idea not considered by panel
- Gov considers suggestion to have potential for greater efficiency
  - But recognises that the Court can currently expedite very important cases
  - And that the factors for allocation might be problematic
- So, it asks for views:
  - on whether the CPRC should be asked to consider viability, and
  - on what factors might be used in such a system

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Interveners

The panel highlighted 3 points in relation to the current system:

- CPR 54.17 gives court power to grant permission for new parties: (a) to file evidence or (b) to make representations at the JR hearing, whether in support of, or in opposition to the claim. Called “interveners”
- Legal authorities on application of CPR 54.17 are sparse but they indicate that Court considers:
  - knowledge and expertise
  - whether or not assistance to the Court
  - Not simply repeating case of main parties
- Since 2000 a significant increase in interventions (eg Miller in SC)

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The panel's conclusions

- Noted that CPR 54 is silent as to criteria for permitting interveners
- Criticised judges for failure to explain when, why and who etc will be permitted
- Noted an increase in interventions a result of "unfettered judicial discretion"
- Concerned about a policy of drift by the Courts
- Concerned also about intervention being used as a lobbying tactic undermining integrity of court process
- The Panel recommended that criteria should be developed and published, perhaps in Administrative Court Guidance

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The Government's response

- Considers that the proposal for guidance has merit, but not appropriate to be taken forward in primary legislation or rules of court; to be considered separately
- Considers that it might assist (re cost and case length) if there was a duty on parties to identify to the Court organisations or groups with which the challenger was affiliated.
- The Gov asks: "Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?"

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Claims – Replies to acknowledgement of service

- Panel noted that CPR 54 makes no provision for replies to acknowledgements of service
- It noted PEBA's concern that it is not clear whether replies and evidence are considered by judges or whether permission is required to adduce further evidence (7.2.5 of Admin Ct Guide saying only a "matter for the judge")
- It was concerned about inconsistency and uncertainty
- The Government agrees with the Panel's recommendation that CPRs should be amended to provide for the right for claimants to file a reply within seven days of receipt of the acknowledgement of service, and asks for views

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Claims – other proposals (not from Panel)

- To amend CPRs so that defendant is only obliged to submit summary grounds of resistance where: (i) the PAP is not followed; or (ii) the claimant has raised (without sufficient notice) new grounds not foreshadowed in the PAP correspondence
- To amend the time limit for service of detailed grounds of defence and evidence (CPR54.14) to 56 days
- Gov considers these proposals better link the requirements on the defendant to the conduct of claimant. Current rules impose disproportionate burden on defendant where claimant has not complied with PAP
- Gov also considers more time for submitting detailed grounds will give public authorities more time to appropriately consider the merits of a case, and provide better argued submissions to assist Court

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T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk

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Claims – other proposals (not from Panel)

- Gov noted that the Panel concluded that the PAP procedure operates as "a significant means of avoiding the need to make claims and for valid cases to be considered and settled by defendants, as well as identifying claims which were not arguable."
- Gov considers it likely that more clarity as to PAP stage could reduce the need for JR claims to be brought and invites feedback on
    - (a) what issues are currently being faced in relation to the PAP and
    - (b) how to best clarify this

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Other issues – not taken forward

- **Terms of reference** included: costs, standing and duty of candour
- **Re Costs**, Panel acknowledged concerns re high costs of litigation, but accepted reps (inc from ALBA) that it was not equipped to carry out research and evaluation required for the task
- **Re standing**, Panel: referred to s31(3) SCA 1981 and requirement for claimant to have "sufficient interest"; considered relevant case law; accepted concern about abuse (ie JR becomes "politics by another means"); acknowledged difficult distinctions to be made where sections of society are affected by decisions; acknowledged significant constitutional implications if sought to restrict rights to those "directly affected" and did not support any statutory change; preferring to trust the Courts to do more and distinguish between "public spirited" groups that enable challenges to the legality of an act or decision to take place and those applications which seek to involve the courts in a general policy review of decisions that an elected government is entitled to make
- Gov response no comments

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The duty of candour – the Panel's consideration

- Case law requiring defendants to set out facts relevant to claimant's case and reasoning behind its decision-making process, but:
  - Some recent cases suggesting duty extends to documents, and
  - Treasury Solicitor's Guidance: "The duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge."
- Evidence re significant practical burden on defendants (inc Gov departments) to search for and disclose documents
- Evidence re concern about use of PAP process to obtain information (ie fishing expeditions)
- Panel agreed a need to clarify the scope of the duty of candour, although disagreeing how this might be done, particularly re documents disclosure, and recommended some "revisiting of the Guidance".
- Gov response made no comments

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Thank You

Craig Howell Williams QC

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The Independent Review of Administrative Law: a game changer or status quo for Judicial Review?

25 March 2021

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk