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17 September 2020

Independent Review of Administrative Law
Ministry of Justice
102 Petty France
London SW1H 9AJ

Dear Lord Faulks and colleagues,

Call for Evidence: Response

I write with some general reflections on your inquiry. There seem to be two major questions. First, does judicial review work as it ought to (or does it prevent "authorities [carrying] on the business of government)"? Secondly, to extent that there is a problem, what should be done?

I am concerned that over-generalisation at the first stage (diagnosis of the problem) will lead to the proposal of over-general "solutions" which will not solve the problem but may make things worse.

The first question (does administrative law today work properly?) is difficult to answer. It would require an exhaustive analysis of judicial review jurisprudence over several decades (both empirical and doctrinal). But even with such monumental labours performed, evaluating whether the law has gone "too far" still requires deeply contentions value-judgements. The truth is likely to be nuanced. Any system of administrative law worth having will lie somewhere between two poles (equal and opposite *reductiones ad absurdum*). At one extreme we would have no judicial review at all; citizens would then have no way of challenging unlawful actions, including those manifestly violating statutory requirements or exceeding limits on authority. This would destroy the Rule of Law and remove Parliament's ability to confer *limited* powers on public authorities. Nobody is arguing for judicial review to be abolished like this (or I hope not). At the opposite end, but equally unacceptable, would be "merits appeals" to the court, permitting judges to substitute their own view of the "correct" substantive decisions that public authorities should reach. This really would be a tyranny of the judges, who would act as a court of appeal on all government policy. Again I hope (although with slightly less confidence) that nobody is seriously advocating this.

Between these extremes is a wide spectrum of possible judicial approaches, more or less activist or abstentionist. (Professor Harlow has used the metaphor of traffic lights to characterise these positions.) Inevitably, different judges in different cases take different positions. Thus, to generalise is dangerous. But a fairly safe observation is that courts have edged towards more intrusive review over the past half century. Most administrative lawyers would accept that that has been the direction of travel. However that shift does not of itself demonstrate that the courts have gone too far. Nobody could seriously argue that English law has collapsed the distinction between reviewing the legality of government decisions and reviewing their merits and substance.

Perhaps that crucial distinction is less clear than it was classically (but it has always been difficult to draw with absolute certainty). No doubt some particular cases are questionable. Sometimes the courts can and do go too far. Perhaps some whole areas (such as immigration and asylum) need reform. Yet I do not think it is possible to say that administrative law as a whole strikes the wrong balance. If one tries to sum up its general principles (as would be necessary to codify the grounds of review) they seem balanced and sensible.

How those unobjectionable abstract principles are applied in particular cases is much more contentious. But it would be too glib to draw up a list of cases that one thinks wrong (too activist, or indeed too deferential) and claim, tendentiously, that "therefore" administrative law has gone too far (or not far enough).

Having failed to answer the first question, I move to the second. I do not think that any of the contemplated systemic "macro" reforms to administrative law will work. Indeed, with respect I therefore think the Independent Review is misconceived. The proper response to particular cases with questionable outcomes / reasoning should equally come on a case-by-case basis.

Any administrative lawyer could think of cases which seem too close to one of the extremes identified above (i.e. courts being too activist or too deferential). For example, I have previously criticised *Smith v Ministry of Defence* [2013] UKSC 41 (relevant here, although in form a decision about common law negligence and the Human Rights Act). The majority in *Smith* failed to accept the inappropriateness of judicial second-guessing of decisions about military training, equipment and preparedness for war—and the potentially damaging impact on decisionmakers faced with such scrutiny. I also think the construction of s.53 of the Freedom of Information Act 2000 in *R (Evans) v Attorney-General* [2015] UKSC 21 (the Prince of Wales' letters case) clearly exceeded the proper limits on a court reading down statutory language. I was also astonished by the decision in *Cherry v Advocate General for Scotland* [2019] UKSC 41 (i.e. *Miller II*). The Supreme Court gave no convincing reason for ignoring long-settled understandings about the limits of judicial review, in quashing a quintessentially non-justiciable prorogation of Parliament. (It is doubly unfortunate that such a transformation of constitutional principle was announced in such a politically divisive case that its calm discussion has essentially been impossible.)

Strongly though I believe that these decisions were wrong (and no doubt there are others), it is unconvincing to conclude from such examples that administrative law *as a whole* is seriously defective—so that the entire process should be made more restrictive (for example through tightening rules on standing, time limits, or costs). That would genuinely risk throwing out the baby with the bathwater. (One can question whether blunt procedural filters would keep out such cases in future—a personally affected "figurehead" in the Gina Miller mould can be found to surmount standing rules designed to exclude pressure groups; and as the *Miller / Cherry* case also shows, some campaign groups have the resources to bring expensive multi-jurisdictional challenges at great speed; it is the poorest groups in society that would be most disadvantaged by procedural restrictions).

Nor would restating the heads of judicial review in a statute provide effective limits on judicial power. How could the restatement be done save in abstract terms? But how could such broad heads of review constrain judicial decisions? I predict it would make little difference. The immense time and energy that would be consumed in trying to codify the common law accurately and exhaustively would ultimately be pointless.

Much the better course is for Parliament, if and when it disagrees with the courts, to take rapid and decisive action on the *particular* issue to reverse the court's decision.

A famous example is the War Damages Act 1965 being used to overturn *Burmah Oil Co v Lord Advocate* [1965] AC 75. Or Parliament may hasten to confer legal authority when courts decide that existing law is not an extensive or explicit enough basis for government action (compare *HM Treasury v Ahmed* [2010] UKSC 2 and the Terrorist Asset-Freezing (Temporary Provisions) Act 2010; or *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 and the European Union (Notification of Withdrawal) Act 2017).

Such statutory reversals of judicial decisions are controversial, especially when retroactive (as both the 1965 and 2010 Acts were). Yet the constitutional propriety of such legislation cannot seriously be doubted. First and most obviously Parliament's sovereignty permits it to reverse any rule of common law, even retrospectively. Secondly, to the extent that judicial review of statutory bodies still depends ultimately on the *ultra vires* theory (i.e. the court enforcing the (implied) limits of statutory powers), it is not only permissible but positively desirable that Parliament should reverse judicial decisions which (in Parliament's view) have misconstrued the scope, limits or conditions of a power. The *ultra vires* theory would no longer be even a fig leaf, but utter pretence, were Parliament no longer permitted to reverse erroneous judicial attempts to locate the intentions of Parliament (i.e. when it enacted the earlier statute).

In practice however, Parliament reacts to correct (reverse) administrative law decisions only rarely. The legislative timetable groans with Bills conferring yet more new powers on government bodies. But here as elsewhere the attitude seems to be to "enact and forget". Once the powers are conferred there is no systematic process for Parliament to monitor how they are used—nor how the courts control their use. It is true that should a case remove the legal basis for important policy, a corrective Government Bill will likely follow (e.g. the 2017 Act), perhaps with considerable haste (e.g. the 2010 Act). Still, compared with the number of defeats suffered in judicial review litigation overall, legislation which reverses the court's decision is unusual.

Arguably, this failure by Parliament to reverse controversial judgments gives those decisions tacit parliamentary approval. Critics of *Evans* (see above) cannot complain indefinitely that the Supreme Court defied the will of Parliament through its misconstruction of the Freedom of Information Act; Parliament has had ample time to consider the judgment (now over five years), but has not legislated to correct the alleged misconstruction. Parliamentary inactivity in the face of fundamentally important constitutional judgments effectively cedes the role of developing constitutional law to the judges alone—including decisions about the scope of parliamentary sovereignty itself.

The remedy for perceived judicial overreach is clear and simple. Parliament should reverse contentious judgments using its undoubted legislative supremacy.

What this would entail for my three examples? As I have argued elsewhere, if the government shares senior military officers' disquiet about the *Smith* decision's impact on military effectiveness, it should act to reverse its effect in future armed conflicts. This would not require primary legislation. The government is already empowered to revive the Crown's immunity in tort during "warlike operations" by the Crown Proceedings (Armed Forces) Act 1987. As for the Human Rights Act strand of *Smith*, the government could derogate from the relevant ECHR obligations in future conflicts using article 15 of the Convention. It is worth emphasising that if the government takes no steps to reverse *Smith v Ministry of Defence* it will have accepted the courts' jurisdiction over matters of military preparation. The omission to act—or rather react—concedes the correctness of the court's extension of judicial review.

On the *Evans* case, Parliament would have to amend the Freedom of Information Act to reinstate the ministerial veto that the Supreme Court's decision effectively read out of the statute. A paper by Christopher Forsyth and Richard Ekins showed precisely how this could be done, containing a Draft Bill for the purpose (*Judging the Public Interest: The rule of law versus the rule of courts* (2015)). Critics may decry the *Evans* decision, as may ministers. But the only way actually to change the law is through a statute. No such amendment has been passed to date. As a result of this parliamentary inaction, *Evans* remains authoritative both on the specific section of the FOI Act and also as a wider precedent on the correct interpretation of analogous provisions.

The same points apply to *Cherry / Miller 2*. Ministerial anger about the Supreme Court's unusual intervention counts for nothing, constitutionally speaking. Concrete action to reverse the decision is necessary to give such criticisms legal force. This could be a one-line Bill reinstating prorogation to the status of "proceedings in Parliament" that cannot be "impeached or questioned" under Article 9 of the Bill of Rights 1689, or otherwise specifically confirming that prorogations are non-justiciable. To the extent that the *Cherry* case has wider implications (some have hailed it as "the *Anisminic* of non-justiciability"—i.e. that concept's death), a broader legislative response could be considered. For example, confirming which of Wade's "true prerogative" powers (those that *only* the Crown possesses) are non-justiciable.

I hope the point is made; it would be tedious to pile up further examples (again, I do not suggest that the three cases mentioned above are the worst examples, let alone the only examples—and obviously many would argue against me that these three cases were correctly decided and convincingly reasoned).

I accept that an "issue by issue" response would not satisfy those who think that judicial review has extended its reach too far, across the board. Even if that claim is correct (and it will be bitterly rejected by many lawyers and commentators) I still cannot see an easy solution to it (other than what I advocate here). I have already argued that procedural filters are too crude and restatement of the heads of review futile. Parliament could attempt to lay down general rules restricting the scope and basis of judicial review (i.e. not just "codify" but narrow the substantive principles of review). I strongly suspect that this too would fail. The robust interpretation of ouster clauses from *Anisminic* down to *Privacy International* shows how jealously the courts guard their jurisdiction to review unlawful (or potentially unlawful) decisions.

The truly radical critic might then say that we need to change judicial attitudes. Even if that were correct, how could it be done while preserving the independence of the judiciary? Surely nobody wants to import the party-political disputes over judicial appointments which characterise the US federal judiciary. It seems to me that all general or "wholesale" solutions to the "problem" of judicial overreach (if the problem exists in any general way) will either fail or (with procedural tightening or a concerted attempt to select "moderate" judges) will do more harm than good.

It is partly because I am sceptical about the effectiveness or propriety of any such cross-cutting reforms of judicial review (or judicial appointments) that I recommend instead a case-by-case legislative response.

Conclusion: Precision not Generalisation

There are serious difficulties in trying to restate, let alone to restrict, the substantive principles of judicial review. To the extent that the application of abstract principles in concrete cases depends on the courts' jurisprudential and constitutional philosophy, some might suggest addressing the judicial appointment process. Yet this would jeopardise UK law's reputation for high-quality, non-partisan administration of justice.

Instead we should recognise that administrative law necessarily requires active development by the courts—that its application in difficult, novel or borderline cases requires judgement. The courts are entitled, and indeed required, to make such active interpretations. But under the paramount doctrine of parliamentary sovereignty, the legislature is fully entitled to reverse those judgments when, in Parliament's view, the courts have intervened too readily (or indeed too reluctantly). This respects the independence of the courts and their primary responsibility for developing and applying judicial review. But it also acknowledges that ultimately, the sovereign Parliament can overrule the court's view.

Parliament could and should make more frequent use of that power. I accept that my suggestions have a rather ad hoc flavour—intentionally so. But if a more systematic procedure were needed, a parliamentary committee could be instituted to keep court decisions about the scope of government powers under standing review. The committee could bring areas of concern to wider public attention through its reports. Its remit could include the consideration of Government Bills intended to reverse administrative law judgments. Such a committee could ensure ongoing *parliamentary* scrutiny of this crucial flashpoint between the courts and the government. With such a mechanism in place my suggestion could not be dismissed as a call merely for kneejerk government responses to defeat in litigation.

Naturally Parliament would not lightly reverse a judgment. Strong reasons would have to be advanced and given that controversy would still surround all such legislation, Parliament (and the Government) would have to accept the political cost. That would be far more honourable, honest and brave than the current situation in which ministers and other politicians so often criticise the outcomes of judicial review cases but then do nothing concretely about it (if we except setting up your Review). Inaction is de facto acceptance of the judicial interpretation. The political branches of the constitution should either manifest its acceptance of the court's interpretation or should take action against it and explain why such a reversal is justified.

In conclusion, I would warn against over-generalised diagnoses of problems; warn against over-general solutions to (misdiagnosed) problems; and instead urge the systematic adoption of an active legislative response to particular judgments which are thought to misapply, or incorrectly expound, the principles of judicial review.

Yours sincerely,

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