Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?

Response of Lord Neuberger of Abbotsbury

Introductory: the scope of this Response

1. I am grateful to Lord Faulks QC for his invitation to respond to the questions raised by the Ministry of Justice in its call for evidence to the IRAL Panel. The Panel has a very important function, given the fundamental constitutional significance of judicial review (JR), and I wish it well in its deliberations.

2. I was a barrister from 1975-1996 (becoming a QC in 1987), a High Court Chancery judge from 1996, and a judge in appellate courts from 2004 to 2017 (including three years as Master of the Rolls and five years as President of the Supreme Court). Since then, I have been an arbitrator and legal expert.

3. My experience of JR as a barrister and High Court judge was limited. But I had considerable experience of JR cases in appellate courts, where I had the opportunity of considering judges' role in this area, through the prism of hearing a fair number of cases involving legal challenges to executive decisions and actions, as well as discussions with lawyers, academics, politicians, journalists and civil servants.

4. As my experience of first instance JR is limited and somewhat historic, and there are many serving judges and lawyers who are in a far better position than I am to discuss most of the questions in Sections 2 and 3 of the call for evidence, I will confine myself to answering questions 3 and 4. But, first, I wish to make some general points, which relate to all the questions raised in the call for evidence.

General remarks: overview

5. Leonard Shapiro, the celebrated historian of the Soviet Union, concluded that, of all the factors distinguishing democracies from autocracies, the most important was the rule

of law. Democracy and freedom of expression are fundamental, but his study of tyrannies led him to conclude that the ability of individuals to defend their rights in a court of law, especially against the government, was the most precious freedom of all.

6. The Panel will probably be bombarded with such remarks about the fundamental importance of JR to the rule of law. The risk of such overkill is that one takes the rule of law for granted, particularly in a country with such a remarkable record and reputation in this area. But, as history shows, the rule of law is fragile, can be eroded, often unwittingly, and once lost is very difficult to reclaim.

7. The rule of law may be at risk in the UK at the moment, in the light of developments such as some clauses of the Internal Markets Bill, and attacks by ministers on judges and lawyers. I do not want to overstate the point, but the price of liberty is eternal vigilance. Also, as Alexander Hamilton famously put in relation to the US Constitution, the judiciary is the weakest of the three branches of government because it has "no influence over either the sword or the purse" and "may truly be said to have neither FORCE nor WILL, but merely judgment." And that is all the more true in a country such as the UK without an overriding constitution.

8. This does not, of course, mean that it would be inappropriate to consider whether there are aspects of JR law which could be improved. But it does mean that great caution should be exercised before any significant procedural or (even more) substantive curb is imposed on JR. And that is especially true when the curb is proposed by, or is based on the views of, the executive. Of course, the executive will often feel thwarted by JR: in a sense that is the whole point of JR. While there are many civil servants who understand the value of JR, any complaints about JR from the executive have to be considered very carefully: turkeys would vote for the abolition of Christmas.

9. I respectfully suggest that the Panel should bear this in mind when considering the answers to Section One questions. I acknowledge that the views of judges and lawyers may be skewed the other way, because JR is, as it were, their territory. No doubt, I am not immune from this, but I have done my best to take a balanced view. Having said that, the judicial bias does not involve the same sort of partial interest as the executive potentially has in the issue of the scope of JR.

10. It also follows from these points that any significant changes to JR must be very carefully considered and their implications fully investigated. The timescale involved in the IRAL's remit is tight even if any recommendations are limited to procedural adjustments. But the time-scale renders it inappropriate for the Panel to make any far-reaching or fundamental changes, as it gives insufficient time to consult, assess, and weigh the consequences properly.

So-called judicial activism

11. A judge whom some people would consider to be fearlessly upholding the rule of law may be regarded by other people as an unelected activist interfering with policy issues. But nobody (well, almost nobody) wants elected judges, and JR is almost always invoked against the unelected executive. Indeed, I suggest that if there is a basic message from the two *Miller* cases (*Miller I*/Article 50 [2017] UKSC 5, and *Miller II*/prorogation [2019] UKSC 41), it is that the judges stand up for democratically elected legislature against the unelected executive.

12. I should like to discuss briefly four aspects of alleged judicial activism to put JR in its constitutional context, namely (i) *Miller II*, (ii) the perception that judicial power is too great, (iii) JR decisions generally, and (iv) human rights (HR).

13. There is a credible view that the setting up of the Panel was at least partly prompted by *Miller II*. I would like to explain, very briefly, why it was pretty plainly rightly decided. There were two points: (1) Can the court override a prorogation order?, and (2) Should the court have overridden the order in that case? As to (1), the fact that prorogation is a prerogative power plainly does not prevent its ambit being reviewable, and consideration of the implications demonstrate that the answer must be yes. If Parliament had been prorogued for a year without warning, then, unless the courts could step in, nothing could be done. The argument that such a purported prorogation would not be prorogation supports that view, as only the court could make that decision. As to (2), there was uncontradicted evidence that the long prorogation was unnecessary, so how could the court have said it was lawful to muzzle Parliament for no reason?

14. More generally, judicial power in this country is not overweening. The UK is one of the very, very few countries in the world without an overriding Constitution. So, unlike judges in many other countries, the UK judiciary cannot quash or refuse to apply primary legislation (save perhaps in the most extreme circumstances) and any judicial decision can be reversed by Parliament (and sometimes is). It is true that JR has increased over the past 75 years. The cause of the growth has been, I suggest, (i) societal changes (less "respect", more expectations), (ii) growth in secondary legislation and executive powers and actions, (iii) a change of judicial culture (which dates from cases decades ago, such as *Anisminic* [1968] UKHL 6, *Tameside* [1976] UKHL 6 and *GCHQ* [1984] UKHL 9), and (iv) Parliament passing the HR Act ("HRA") in 1998.

15. As to JR decisions, the executive and newspapers notice JR cases which the government loses and overlook the ones which it wins. The courts' preparedness not to interfere even when it has severe doubts about the executive's action (even in HR cases) is clear from e.g. *Corner House* [2008] UKHL 60, *Lord Carlile* [2014] UKSC 60, *Rotherham* [2015] UKSC 6, and *SG* [2015] UKSC 16, to mention a few. In *Corner House* the government's defeat in the High Court was splashed all over the newspapers, but the House of Lords overturning of the decision was hardly mentioned outside the legal reports. It is fair to add that judges – even in the Supreme Court – reach decisions which are questionable or even wrong from time to time: they are human. And the criticisms are not by any means all one way: many adverse comments suggest that judges have been too timid.. When it comes to the proportion of successful JR applications, there is an element of being damned either way: a high proportion of success can be said to show the judges are trigger-happy, whereas a low proportion can be said to show that too many hopeless applications get made.

16. Whatever restrictions are imposed on JR, they cannot conflict with article 6 of the HR Convention. Equally importantly, while Parliament can curtail JR without infringing international law, this is not true of curtailing HR, so long as the UK is a signatory to the Convention. Many judicial decisions which are seen by some as being too policy-driven were based on HR, and are therefore irrelevant for present purposes (and it was Parliament who decided to give the judges their HR jurisdiction). In addition, it would be a sad comment on the UK with its history of individual liberty, if individuals' rights under domestic JR looked pallid as against their rights under European HR.

Response to questions 3 and 4 in Section 2

17. I shall take Question 4 first, as my answer is relevant to my answer to Question 3.

Question 4: Should some decisions be excluded from JR?

18. Save, perhaps, in the most exceptional circumstances, it would be very wrong, indeed rather shocking, to exclude JR from certain areas of executive activity by statute. It would mean that the executive was being a green light to act unlawfully in those areas, and that there would be nothing that a citizen could do to stop it or to obtain redress. This would fundamentally infringe the rule of law.

19. It would also be unwise in practical terms to seek to exclude JR from any areas by statute – or to seek to cut down the ambit of JR in any areas by statute. Judges are well aware that there are areas, such as foreign policy, national security, allocation of economic resources, in which they should intervene only in extreme circumstances - see e.g. *Corner House*, paras 30-31, *Bank Mellat (No 2)* [2013] UKSC 39, para 21, *Lord Carlile*, paras 22-26, and *Rotherham*, para 61. But, as is clear from what was said in those cases, even in those areas the courts have an essential rule of law function.

20. Further, as I have mentioned, judges will anyway continue to have a function in all areas under the HRA. It would leave things in a lopsided state if JR were curtailed in some areas in which the judges could, indeed had to, intervene under the HRA.

21. Quite apart from this, legislation which sought to exclude certain areas of executive function from JR would be likely to place the executive and the judiciary, and maybe even parliament and the judiciary, on a constitutional collision course which would be destabilising and possibly worse. The judgments in *Privacy International* [2019] UKSC 22 illustrate the dangers and pitfalls of such legislation. Rightly in my view (although I appreciate that some might say "he would wouldn't he"), judges ensure that legislative incursions into fundamental constitutional rights and principles are very strictly

construed to preserve those rights and principles – see what Lord Hoffmann said in the second paragraph of his judgment in *Simms* [1999] UKHL 33.

Question 3: Statutory intervention.

22. In my view, both comprehensive and specific legislation should be avoided in this field. Substantive changes should not be made as a matter of both principle and practicality. If any such legislation was high-level and general, it would be pretty pointless. If it was more detailed and specific, it would be particularly likely to lead to uncertainty and to have unexpected consequences. Procedural changes should not be made by statute.

23. As I have already indicated, I question the constitutional propriety and the practical benefit of the legislature imposing any sort straitjacket on the judges in relation to one of the fundamental constitutional judicial functions. Just as the judges should, and do, studiously avoid stepping into Parliament's domain, so should Parliament avoid telling the judges how to ensure that the executive complies with the law.

24. Further, JR should be flexible in the sense of being adaptable to accommodate new developments in a world which is fast-changing, politically, culturally, commercially, and technically. As mentioned above, judges' decisions on JR are generally responsible, and demonstrate an ability to adapt to changing circumstances. Legislation can be very inflexible: a statute can normally only be amended by another statute, and the notion of judges' JR powers being controlled by secondary legislation is contrary to the rule of law: given the function of JR, it is plainly inappropriate for the executive to make the rules for JR – especially by secondary legislation made pursuant to Henry VIII clauses.

25. The flexibility of JR is an aspect of our common law, whose practicality is of enormous value in a fast-changing world. The UK's legal system with its flexibility and practicality has contributed enormously to the economic success of this country at home and abroad. It would represent an unwelcome signal if our law was seen to be starting down the more sclerotic, civil code-based approach. Our legal system is not one which involves detailed codes, save in a few specific technical areas (e.g. bills of exchange).

JR with its broad range of application, and in a fast-changing regulatory and administrative world is peculiarly ill-suited to comprehensive legislation.

26. The one legal principle which has proved wholly reliable in my 45 years in the law is the law of unintended consequences. I am as confident as I can be that, however carefully it is drafted, any supposedly comprehensive legislation on JR would lead to unintended and undesirable results. It would also lead to considerable uncertainty and a welter of litigation while the courts work out what it means. Similarly more specific legislation could be equally dangerous, not least because it would inevitably have an unanticipated effect on areas not covered by the legislation, as well as areas it covered.

27. Given that it would be wrong to exclude any area of executive functions from JR, the purpose of any legislation would be procedural in nature. Procedural issues could and should be dealt with by rules of court, not statute. Rules of court are the appropriate method of controlling court procedures as a matter of principle. In addition, they are far mor appropriate than statutes as a matter of practicality, as rules can be much more easily adapted and improved.

28. There are two other point I have already touched on. First, any change in JR law would not only mean a mismatch with HR law, but its effect would be hobbled in many cases by the HRA. Secondly, it would be wrong in principle for the Panel to propose substantive changes to JR law given the short period over which it is to consult and to deliberate. Such a recommendation would be likely to have wide-ranging and profound constitutional consequences, and it would not be responsible, to recommend it without having fully consulted in it specifically and having considered its implications in depth.

16th October 2020