

Judicial Review and Courts Bill: The background



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The Background....



The three primary drivers

JUDICIAL
POWER
PROJECT



Judicial Power Project

- The Judicial Power Project is part of “Policy Exchange” which is a right-wing think tank which pushes the agendas of its unidentified funders
 - See “Democracy for Sale” by Peter Geoghegan for a detailed and fascinating account of the way money can buy influence
- Pre-dates *Miller v Prime Minister*.
- Led by Professor Richard Ekins of Oxford and Professor Graham Gee of Sheffield who advance a central thesis of “judicial overreach” leading to undue interference in government decision making:

“the project aims to understand and correct the undue rise in judicial power”

What does this mean in practice?

- “*The project’s central idea is that the decisions of Parliament ought not to be called into question by the courts and that the executive ought to be free from undue judicial interference, which fails to respect political judgment and discretion*”
- “*Fair trials for terrorists: why the Court of Appeal was right to reject the view from Strasbourg*”
- “*The political campaign against the UK’s immigration laws secured an important victory yesterday, with the High Court denouncing sections 20-37 of the Immigration Act 2014 as racially discriminatory ...*”

The reaction to judicial “interference”

- Miller 1: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61.



Miller No2: The reaction?

- R (Miller) v The Prime Minister [2019] UKSC 41
 - Minister Kwasi Kwarteng “*many people ... are saying that the judges are biased*”
 - Dominic Raab, an “*unholy alliance of diehard Remain campaigners, a fund manager [and] an unelected judiciary*” had “*thwart[ed] the wishes of the British public*”
 - Chris Grayling judicial review was a “*promotional tool for left-wing campaigners*” and spoke of legislating to restrict its use.
- The 2019 Conservative manifesto promised to set up a Constitution, Democracy and Rights Commission to look at “*the relationship between the Government, Parliament and the courts*”

Independent Review of Administrative Law

- IRAL launched in July 2020 under Lord Faulks
- Substance of review was in para 4 of Terms of Reference:

“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 affects 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”

Call for evidence - Policy Paper to support IRAL

- *“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?”*
- Published “discussion paper” of doubtful accuracy – inspired by Judicial Power Project approach
- Many responses – government has refused to publish those that were not published by the body responding

The IRAL Report

- Published March 2021
- Rejected codification of administrative law
- Recommendations on:
 - Reforming *Cart* appeals
 - Flexibility on quashing orders
- Overall must have been a disappointment to the government

Then a further consultation document

- 60 page further consultation document published in response to IRAL report in March 2021
- Went back to “responses” to IRAL and asked whether these should be adopted
 - Prospective only quashing orders
 - More effect to ouster clauses

“Ouster clauses are not a way of avoiding scrutiny”

Professor Ekins argues that the intensification of Judicial Review is due to a “loss of confidence in the competence of other (political) institutions and in the political process more widely”.

Judicial Review and Courts Bill

- Limits statutory reform to:
 - Quashing orders
 - Removal of Cart appeals
- However further reform might come via the Civil Procedure Rules Committee:
 - Provision for a Reply
 - Extended period for Detailed Grounds

Thank you for listening

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