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Welcome to Landmark Chambers'

'Judicial Review and Courts Bill' webinar

The recording may be accessed here.

Your speakers today are…

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David Lock QC (Chair)

Topic:
Judicial Review and Courts Bill: The background

Richard Drabble QC

Topic:
The Reversal of Cart Presumptions and Statutory Interpretation

David Elvin QC

Topic:
Clause 1: New provisions with respect to quashing orders

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Judicial Review and Courts Bill: The background

David Lock QC

The Background….

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The three primary drivers

JUDICIAL
POWER
PROJECT

Judicial Power Project

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- The Judicial Power Project is part of “Policy Exchange” which is a right-wing think 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?

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- 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

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- 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

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- *"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

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- 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

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- 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

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- 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

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Judicial Review and Courts Bill
Clause 1: New provisions with respect to quashing orders

David Elvin QC

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"The UK Government has committed to restoring the balance between Government, Parliament and the Courts. An essential part of this effort is to strengthen Judicial Review, ensuring that it continues to serve justice and good public administration.."

(MOJ *JR Fact Sheet*, 21 July 2021)

Clause 1: extended powers for quashing orders

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"1. Quashing orders

(1) After section 29 of the Senior Courts Act 1981 insert—

"29A Further provision in connection with quashing orders

(1) A quashing order may include provision— (a) for the quashing not to take effect until a date specified in the order, or (b) removing or limiting any retrospective effect of the quashing.

(2) Provision included in a quashing order under subsection (1) may be made subject to conditions.

(3) If a quashing order includes provision under subsection (1)(a), the impugned act is (subject to any conditions under subsection (2)) upheld until the quashing takes effect.

(4) If a quashing order includes provision under subsection (1)(b), the impugned act is (subject to any conditions under subsection (2)) upheld in any respect in which the provision under subsection (1)(b) prevents it from being quashed.

(5) Where (and to the extent that) an impugned act is upheld by virtue of subsection (3) or (4), it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect.

(6) Provision under subsection (1)(a) does not limit any retrospective effect of a quashing order once the quashing takes effect (including in relation to the period between the making of the order and the taking effect of the quashing); and subsections (3) and (5) are to be read accordingly.

Clause 1:

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(7) Section 29(2) does not prevent the court from varying a date specified under subsection (1)(a).

(8) In deciding whether to exercise a power in subsection (1), the court must have regard to—

(a) the nature and circumstances of the relevant defect;

(b) any detriment to good administration that would result from exercising or failing to exercise the power;

(c) the interests or expectations of persons who would benefit from the quashing of the impugned act;

(d) the interests or expectations of persons who have relied on the impugned act;

(e) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;

(f) any other matter that appears to the court to be relevant.

(9) If—

(a) the court is to make a quashing order, and

(b) it appears to the court that an order including provision under subsection (1) would, as a matter of substance, offer adequate redress in relation to the relevant defect,

the court must exercise the powers in that subsection accordingly unless it sees good reason not to do so.

Clause 1:

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(10) In applying the test in subsection (9)(b), the court is to take into account, in particular, anything within subsection (8)(e).

(11) In this section—

"impugned act" means the thing (or purported thing) being quashed by the quashing order;

"relevant defect" means the defect, failure or other matter on the ground of which the court is making the quashing order.""

- Subsections (2) and (3) make consequential amendments to s. 31 of the Senior Courts Act 1981 and s. 17 of the Tribunals, Courts and Enforcement Act 2007.
- On commencement of the provision:
  - "(4) The amendments made by subsections (1) to (3) have effect only in relation to proceedings commenced on or after the day on which this section comes into force."
- Contrary to the suggestions made in the Government Consultation following the Faulks review, the amendment to JR powers is far less radical even with respect to the issue of whether a decision is void, in which respect the Bill follows the Faulks' recommendation. See the July 2021 Government Response.
- https://www.gov.uk/government/consultations/judicial-review-reform
- https://www.gov.uk/government/publications/judicial-review-and-courts-bill (includes fact sheets)

Summary of clause 1 amendments

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- Contrary to the suggestions made in the Government Response following the Faulks *Independent Review of Administrative Law*, the amendment to JR powers is far less radical even with respect to the issue of whether a decision is a nullity.
- Clause 1(1) confers express powers on the Court to (a) postpone or (b) remove/limit the retrospective effect of quashing orders and to subject orders to conditions if appropriate, so that they do not take effect until provided by the order.
- Once the order takes effect, a postponement under cl. 1(1)(a) does not thereafter effect the retrospective nature of the quashing order "including in relation to the period between the making of the order and the taking effect of the quashing"
- There is a limited presumption in favour of the exercise of the s. 29A(1) power where its exercise by the Court would provide *adequate redress* "unless it sees good reason not to do so" and in doing so s. 29A(10) directs the Court to consider s. 29A(8)(e) i.e. whether "*so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act*". This leaves the critical questions within the decision of the Court:
  - Does the use of s. 29A(1) provide adequate redress taking into account anything in s. 29A(8)(e)?
  - Are there good reasons not to exercise the s. 29A(1) power?

What if the impugned decision or act may be a nullity?

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- In ***Ahmed v HM Treasury (No 2)*** [2012] 2 AC 534, the SC declined to suspend an order on the basis that it would obfuscate its effect
- IRAL treated the issue pragmatically at §§3.59-3.60 (see Government Response at §73) suggesting that if necessary Parliament should simply reverse the Supreme Court's decision in ***Ahmed*** and give the courts the power to grant remedies (including making suspended quashing orders) notwithstanding whether the act might be regarded as void. As IRAL noted
  - "The common law's adherence to the "metaphysic of nullity" has never been more than half-hearted, driven as it has been less by considerations of principle and more by policy concerns to limit the operation of legislation ousting judicial review or to preserve people's abilities to mount collateral challenges under the civil and criminal law to the lawfulness of administrative action."
- Rather than create potentially wide-ranging effects, and risking unintended consequences, the Bill follows the recommendation in IRAL and does not abolish or place general limits on the concept of nullity but simply makes provision that it does not effect the ability of the court to operate the powers in draft s. 29A(1) – see s. 29A(5) – "Where (and to the extent that) an impugned act is upheld by virtue of subsection (3) or (4), it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect."

What if the impugned decision or act may be a nullity?

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- The provision is intended to facilitate the exercise of the s. 29A(1) power.
- However, s. 29A(5) it does raise questions
  - whether therefore a distinction is bound to arise between a decision is considered to be a nullity where the Court decides not to exercise the s. 29A(1) power and one where it does – in the first case, the consequences of nullity might not arise if the decision is one not to give the quashing order retrospective effect under s. 29A(1)(b)
  - Whether the Court can taken into account the the consequences of a nullity as being a matter to take into account under s. 29A(8)-(10). It appears that this is intended e.g. under (8)(a), (c) and (d).
- The MOJ's JR Fact Sheet is silent. Para. 22 of the Explanatory Notes states:
  - "The clauses, while empowering the court to modify a quashing order, also provide for the effects of its doing so in the context of the doctrine of nullity. This means that the underlying invalidity of the act in question may be treated as if it were valid and treated as such until the quashing order comes into effect (in regards suspended orders) or its past use may be permanently treated as if it were valid. The inclusion of clauses dealing with this point should not be taken however to suggest that every error goes to the validity or invalidity of an action, simply that regardless of a particular error being deemed as invalidating the act the court may still suspend or alter the effect of a quashing order, which in turn would allow the act to be treated as valid, as if the error invalidating the act had not occurred."

Exercise of the s. 29A power

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- Clause 1(1) confers express powers on the Court to (a) postpone or (b) remove/limit the retrospective effect of quashing orders and to subject orders to conditions if appropriate, so that they do not take effect until provided by the order.
- Once the order takes effect, a postponement under cl. 1(1)(a) does not thereafter effect the retrospective nature of the quashing order "including in relation to the period between the making of the order and the taking effect of the quashing"
- There is a limited presumption in favour of the exercise of the s. 29A(1) power where its exercise by the Court would provide *adequate redress* "unless it sees good reason not to do so" and in doing so s. 29A(10) directs the Court to consider s. 29A(8)(e) i.e. whether
  - "*so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act*".
- This leaves the critical questions for the decision of the Court:
  - Does the use of s. 29A(1) provide *adequate redress* taking into account anything in s. 29A(8)(e)?
  - Are there good reasons not to exercise the s. 29A(1) power?

Exercise of the s. 29A power

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- Lord Nicholls in ***In re Spectrum Plus Ltd*** [2005] 2 AC 680 at §§12-17, 26-38, in considering whether there was power to overrule prospectively, he considered practical and in principle objections to prospective remedies, though acknowledging that they were not incompatible per se with the judicial function (noting s. 102 of the Scotland Act 1998 a provision which clearly attracted the Government to judge by the Response). The analysis shows that prospective remedies may not be generally suitable as Lord Nicholls' careful analysis makes clear. See also Lord Hope at §§71-74.
- Note e.g. Lord Nicholls' discussion of the unfairness caused by a prospective remedy itself, leaving the victims of the unlawful act without a remedy, the possibility of discrimination between those who bring the action and those who wait until after it concludes, and arbitrariness in the relationship between the timing of multiple cases. This may well point towards the approach which the Courts may have when faced with the exercise of s. 29A(1).
- Indeed, the non-exhaustive factors set out in s. 29A(8) would enable the Court to give full consideration to issues of unfairness, arbitrariness and discrimination (subject to anything under s. 29A(8)(e) which might be relevant) and go to the adequacy of the use of that power to provide an appropriate remedy.

Exercise of the s. 29A power

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- The non-exclusive s. 29A(8) factors which must be considered comprise not only the *nature and circumstances* of the defect (does the concept of nullity remain for these purposes?) but -
  - any detriment to good administration that would result from exercising or failing to exercise the power. This appears to be of interest to Government e.g. to allow the opportunity to correct an error without unwinding all the consequences of the defect
  - the interests or expectations of persons who would benefit from the quashing of the impugned act. This may be relevant where the action is a test case for a class of persons or where the effects of the defect may extend more widely than one individual or group of individuals
  - the interests or expectations of persons who have relied on the impugned act, e.g. where benefits may have been paid out or decisions acted upon. In some contexts, e.g. planning, it generally is not a compelling point that a developer may have begun a development before the court has ruled
  - so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;
  - any other matter that appears to the court to be relevant
- On its face, the new powers appear more targeted to defects in regulations and statutory schemes rather than to individual decision making in local government, such as housing or planning.

Exercise of the s. 29A power

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- S. 29A(8)(e) allows the Court to take into account (but does not require the Court to do so especially if it does not consider the proposal relevant or realistic) "any action taken or proposed to be taken, or undertaking given" by a person with responsibility for the impugned act – this is specially required to be considered when rebutting the presumption in s. 29A(9) that the s. 29A(1) powers should be exercised.
- In considering whether the presumption is rebutted, what is adequate redress? Adequate for what? Presumably adequate in terms of resolving the issues which have arisen as a result of the defect which has led the Court to a quashing order.
- Is the case one, such as a defective regulation, where it may be said to be sufficient if the Claimant is provided with redress even if others affected are not? Is adequacy to be judged by the extent of the unlawfulness? Or by the effect it has on e.g. a class of people or the physical environment? Presumably the factors under s. 29A(8) will assist in guiding the Court to consider whether the redress in the form of a limited form of quashing order will be "adequate", in which case a prospectively effective order may strike the Court as unfair or discriminatory depending on how that effects those who have already been affected by the defect. Explanatory Notes, §21:
  - "suspending or altering the retrospective effect of a quashing order may afford the defendant time to remake their decision. The diverse circumstances of possible cases make it difficult to assume that any one remedy or combination of remedies would be most appropriate in all circumstances."

Exercise of the s. 29A power

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- Expl. Notes §19 does not suggest that the Government expects the s. 29A power to be used extensively –
  - "Consultees had mixed views on this proposal and a number argued that they struggled to conceive of many cases where such a remedy would be appropriate. The Government acknowledges that these circumstances may arise relatively rarely, however, it believes that the courts will apply their discretion appropriately and as an additional tool for them to use in deciding on remedies the proposal does have merit."
- In practical terms, the use of such a power may in practice require clear evidence or proposals from the respondent as to how the injustice created by the unlawful act would be remedied and within what timescales, otherwise it seems the Court would be unlikely to be attracted by its use if it leaves in place the consequences of an unlawful act for an uncertain period and possibly without any remedy for the subject of the unlawful act. This is likely to be enhanced in cases of unlawful delegated legislation where the effect on individuals is likely to be greater.
- The scope for satellite litigation is clear. It could create a complex situation where post-judgment consideration of remedies is significantly extended to allow evidence and proposals to be put before the Court to justify the use of a prospective order and may require the granting of a form of post-judgment interim relief to protect those affected by the unlawful act. It may require new procedural rules. It is capable of extending well beyond the limited evidence the Courts take into account in considering whether to refuse relief under s. 31(2A)-(2C) (see ***Plan B Earth*** in the Court of Appeal [2020] PTSR 1246 at [267]-[276]).

Exercise of the s. 29A power

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- How easily will it be to accommodate the impact of decisions where a case is made out for JR in e.g. the deprivation of benefits, unlawful treatment, discrimination etc if it is to be suspended/prospectively quashed?
- How to accommodate consideration of certainty and timing in remedial action which should follow a suspended or prospective order e.g. in terms of legislation in Parliament which is less certain and speedy than subordinate legislation or amending policy, or in terms of statutory processes applying to local government, or interim relief to be required to satisfy the Court.
- What assurances will be able to be provided to the Court e.g. if the Government does not have a sufficient majority, or there is not enough legislative time or there is no consensus as to the manner of resolving the legal issue?
- The scope for dispute at the remedies stage includes to what extent adequacy will turn on whether redress is provided to
  - The successful claimant whose interests have been harmed by the unlawful act e.g. by the deprivation of financial support, loss of status etc.
  - Others who have brought claims following the successful claim and equally harmed
  - Those who have not brought claims but are harmed and await the outcome of the claim
  - Will there be discrimination between those prejudiced?

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Examples from the Judicial Review and Courts Bill Fact Sheet (Judicial Review)

Examples from Judicial Review and Courts Bill Fact Sheet (Judicial Review)

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"How will suspending the effects of quashing orders work?

- Judges will be empowered to suspend the effects of any quashing order they make for any length of time. In practice, this would allow affected parties to prepare for the order being quashed and take any necessary action (such as making transitional arrangements). In similar vein to an appeal, affected parties will still be able to rely on the decision subject to the quashing order up until the date the suspension is ended and it is fully quashed.
- *Example*: Upon finding a decision by a public body to be unlawful the court may make an order such as this:

  "The public body's decision will be quashed on the 30th day from this judgment, on condition that no further steps are taken to enforce it."

    - This might allow the public body to prepare transitional arrangements, while providing that the unlawful action could not continue to be enforced against third parties.."

Examples from Judicial Review and Courts Bill Fact Sheet (Judicial Review)

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"How will limiting the retrospective effect of quashing orders work?

- The courts will be empowered to make the effects of any quashing order they make prospective only. This limits the effects of the quashing to prevent further reliance, whilst preventing injustice caused to groups that have relied in good faith on the impugned provisions in the past. The courts will have discretion to determine from what date the quashing order will apply, be that in the past or the future.
- *Example*: Upon finding a decision by a public body to be unlawful the court may make an order such as this:

  "The decision will be quashed one week from this judgment prospectively only."

  - This means that all past reliance on the decision and any reliance in the following week will always be upheld – as the decision itself, for that time period, will be considered to be valid for all intents and purposes. This may be necessary because the decision concerned a large regulatory scheme, the undoing of which would cause significant economic consequences or prejudice the wellbeing of third parties.
  - In relation to an employment regulation that gave employees healthcare protection, for example, immediate quashing may jeopardise the safety of workers. The court might give a prospective order to come into effect in several months, to give the Government time to make new regulations. Meanwhile, employees would be able to rely on the previous regulation."

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Judicial Review Bill: The Reversal of Cart Presumptions and Statutory Interpretation

Richard Drabble QC

TOPICS TO BE COVERED

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- This section will address – shortly –
- the mechanics of the provision reversing Cart [2011] UKSC 28 [2012] 1 AC 663
- The possible use of those mechanics as a precedent for other ouster clauses
- The common law approach to statutory interpretation
- The relevance of that approach to the provisions of the Bill dealing with retrospectivity and issues which can arise both by way of judicial review and in statutory appeals

The mechanics

- Clause 2 inserts a new s11A into the Tribunals Courts and Enforcement Act 2007.

(1) Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal to refuse permission (or leave) to appeal further to an application under section 11(4)(b).

(2) The decision is final, and not liable to be questioned or set aside in any other court.

The mechanics continued

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(3) In particular –

(a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision

(b) The supervisory jurisdiction does not extend to, and no application or petition may be made or brought in relation to, the decision.

The mechanics continued

- Subsection (4) states that subsections (2) and (3) do not apply so far as the decision gives rise to
- any question as to whether the UT has or had a valid application before it;
- whether the UT was properly constituted
- Whether the UT is acting or has acted (i) in bad faith, or (ii) in fundamental breach of the principles of natural justice

The contrast with Cart [2011] UKSC 28 [2012] 1 AC 663

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- The Government argument in Cart that JR did not lie relied primarily on the designation of the UT as a superior court of record. This failed at first instance and was not revived.

Nevertheless the argument was comprehensively demolished by Laws LJ….. It was a constitutional solecism to consider that merely to designate a body "a superior court of record" was sufficient to preclude judicial review. This could only be done by the most clear and explicit language and not by implication, still less by what was effectively a deeming provision. The rule of law requires that statute law be interpreted by an authoritative and independent judicial source "the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it … The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective …"

Cart continued

That source was the High Court. This was not because it was a superior court of record but because it was a court of unlimited jurisdiction. Other courts and tribunals, having a limited jurisdiction, were not that source and were susceptible to judicial review by the High Court. Unreviewable courts of limited jurisdiction were exceptional.

RETROSPECTIVITY AND STATUTORY INTERPRETATION

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A large number of JR's are basically concerned with issues of statutory interpretation. One issue that will have to be grappled with is how the provisions of clause 1 should be operated where the same issue can be raised both in a JR and by a statutory appeal – say in a social security case.

The classic approach to statutory interpretation

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Lord Nicholls in *Spectrum*

Cases of these types are of increasing importance. But leaving these aside, the interpretation the court gives an Act of Parliament is the meaning which, in legal concept, the statute has borne from the very day it went onto the statute book. So, it is said, when your Lordships' House rules that a previous decision on the interpretation of a statutory provision was wrong, there is no question of the House changing the law. The House is doing no more than correct an error of interpretation. Thus, there should be no question of the House overruling the previous decision with prospective effect only. If the House were to course it would be sanctioning the continuing misapplication of the statute so far as existing transactions or past events are concerned. The House, it is said, has no power to do this. Statutes express the intention of Parliament.

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Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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