

Judicial Review and the Rule of Law

Who is in Control?

Amy Street

THE
CONSTITUTION
SOCIETY



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THE RULE OF LAW
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About the author

Amy Street is a barrister at Serjeants' Inn Chambers. She has appeared in leading cases up to the Supreme Court, especially in the fields of administrative law and human rights. In 2012 she co-wrote (with Richard Gordon QC) a report, *Select Committees and Coercive Powers – Clarity or Confusion?*, praised in Parliament as 'very important' (Shadow Chancellor Ed Balls), 'one of the best considerations of the issues I have seen' (Clerk of the Commons Sir Robert Rogers), and reported widely in the media. Amy is Research Director of The Constitution Society and legal consultant to BBC Radio 4's legal discussion series, *Unreliable Evidence*.

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Introduction

Government proposals in relation to judicial review – most recently in its September 2013 consultation paper, *Judicial Review: Proposals for further reform* – have attracted controversy.

Following a first wave of procedural reform earlier in 2013, the further reform proposals seek to address the government's concerns that judicial review is hampering economic recovery and growth, and is being used inappropriately as a campaigning or delaying tactic. The further reform consultation paper requests views in six areas:

- ◆ planning challenges
- ◆ the question of standing, ie who is entitled to apply for judicial review
- ◆ how the courts deal with minor procedural defects, and whether this can be improved
- ◆ the use of judicial review to resolve disputes relating to the public sector equality duty
- ◆ whether the current arrangements for costs provide the right financial incentives, including legal aid
- ◆ the scope for making greater use of 'leapfrogging' orders, so that appropriate cases can move quickly to the Supreme Court.

Others will set out their cases for and against the government proposals and examine them in detail. The purpose of this report is different: to put the proposals in their wider constitutional context.

Do the government's proposals threaten the rule of law? If so, is Parliament nevertheless free to legislate as it wishes? What does the courts' track record tell us about the potential reaction of the judiciary to a proposal which it may perceive as threatening the rule of law? What implications may these proposals have for our constitutional arrangements, even beyond the field of judicial review?

The answers to these questions do not dictate what the government and Parliament may wish to do in relation to judicial review. However, judicial review lies at the heart of our constitutional arrangements. Reform without a wider debate about the potential constitutional consequences could be unwise.

This report seeks to generate – and contribute to – that wider debate.

Summary

This report steps back from the controversy of the current proposals to reform judicial review and explores the wider constitutional context. It seeks to generate – and contribute to – wider debate about the potential constitutional consequences. Such debate has relevance for informed decisions by the government and Parliament.

Executive summary

- ◆ This report steps back from the controversy of the current proposals to reform judicial review and explores the wider constitutional context. It seeks to generate – and contribute to – wider debate about the potential constitutional consequences. Such debate has relevance for an informed decision by the government and Parliament.
- ◆ The courts' ability to subject decisions of the executive to an independent review of lawfulness defines our constitutional climate. There is debate over the meaning of the rule of law; but it may be thought to have a core meaning for the judiciary in the context of judicial review. There is debate too over whether it is the will of Parliament (as traditionally understood) or the constitutional principle of the rule of law (as more recently and controversially suggested by some) which provides the theoretical justification for the courts' judicial review jurisdiction. It may be thought sensible to take this debate into account whichever justification for judicial review may be favoured: if Parliament were to legislate in a way which the courts considered to be contrary to the rule of law, the courts would need to confront whether they consider their primary obligation to be to the will of Parliament, or to the constitutional principle of the rule of law. If the courts were to conclude the latter, they may feel justified in not applying Parliament's will.
- ◆ The courts have developed a liberal test for 'standing' so that a judicial review claim may proceed depending on a

number of factors, even if the claimant has no direct interest. A rationale is that ‘insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law.’ The government proposes to rule out claims unless the claimant has a direct interest. A clear case may be made out that this proposal would contravene the rule of law, because it would put some unlawful executive action, which the courts would currently review in the name of the rule of law, beyond the reach of the courts. The government’s proposal may be seen as seeking in substance to enact a constitutional change. For the purpose of further analysis, this paper will take the proposal to restrict standing as an example of a measure which the government may seek to advance, which on one clear analysis, is contrary to the rule of law as understood by the judiciary in this context.

- ◆ There may be a case for the government to use primary rather than secondary legislation to implement proposals which may be thought by the judiciary to threaten the rule of law. Even if Parliament sought to pass primary legislation which is widely thought to be contrary to the rule of law, there are no constitutional requirements for such legislation to be treated differently from other legislation, during its passage. Under a traditional understanding of Parliamentary sovereignty, Parliament may pass whatever laws it likes. However, an answer to the question whether Parliament could legislate contrary to the rule of law may in substance be incomplete without addressing the question of how the judiciary might respond to such legislation.
- ◆ Under a traditional understanding of Parliamentary sovereignty, legislation will be applied by the courts and there is no reason to question this most of the time. However, there

is some judicial support for the proposition that while the supremacy or sovereignty of Parliament is still the general principle of our constitution, the principle is not absolute and, because the principle was created by judges, judges could decide not to follow it in certain circumstances, such as an attempt to abolish judicial review. This proposition is controversial and there is no consensus about it. However, it may be unwise for the government and Parliament to assume, simply because the judiciary in this country have so far not purported to review primary legislation for its compliance with constitutional principles, that this is a fixed constitutional arrangement. Furthermore, the judiciary have considerable powers of statutory interpretation which they have used in the past to 'disobey' Parliament's intention, while maintaining that they are upholding it. The judiciary might find it easier to use such powers if Parliament were to maintain that it is acting in accordance with the rule of law, because this may justify the judiciary in interpreting legislation not in accordance with its wording, but in accordance with judicial interpretation of what the rule of law entails.

- ◆ Legislation restricting judicial review which is thought by the judiciary to be contrary to the rule of law has potentially wide further constitutional consequences including:
 - ◆ Detracting attention from any less controversial proposals which may be suggested to make the judicial review process more efficient.
 - ◆ Potentially triggering action by the courts which might make the constitutional position in relation to the continuing significance of Parliamentary sovereignty less certain.

- ◆ Making the case for a codified constitution against which primary legislation could be reviewed seem more attractive, if the potential alternative may be unregulated disobedience by the courts of Parliament's will.
- ◆ Potential challenges to – and questions about – the role of the Lord Chancellor.
- ◆ Proposals to restrict judicial review have the potential to significantly alter the constitutional balance of power. Such reform proposals have the potential to alter the constitutional balance in ways which the government and Parliament may not have anticipated. The result could be a constitutional crisis of uncertain effect and proportions. Reform of judicial review could properly form the terms of reference for an independent inquiry which could be used to inform the government and Parliament about the possible and likely constitutional effects of such reforms. There are three possible courses of action. First, the government or Parliament may decide to do nothing. Secondly, efficiency reforms may be taken forward, potentially following a review to consider how best to introduce reforms consistent with the rule of law. Thirdly, judicial review reform may go beyond efficiency, including measures which have the potential to destabilise existing constitutional arrangements and understandings and even to provoke a constitutional crisis. It may be thought, therefore, that great caution should be exercised in relation to option three. Both government and Parliament on the one hand, and the judiciary on the other, may have competing claims as to how best to protect the public interest in relation to judicial review. Ultimately, restraint from at least one or the other may be required in order to avert a crisis.

Judicial review and the rule of law

“Judicial review...can be characterised as the rule of law in action...”

Judicial Review: Proposals for further reform
consultation paper, Ministry of Justice, September
2013, paragraph 21

A claim for judicial review has a special quality which sets it apart from other forms of litigation: it is a claim against the government¹ which may result in the government’s unlawful actions being quashed. Perhaps we have come to take its existence for granted, but its key elements are striking: not only do individuals² have the power to subject government decisions to an independent review of lawfulness, but such power is exercised on the premise that the government abides by the outcome in its exercise of executive power.³ Judicial review thus defines our constitutional climate. It plays a key role in ensuring that the executive acts only according to law. Without it, we are closer to an authoritarian or even totalitarian state. With it, we live⁴ under the rule of law.

While the rule of law is a familiar phrase, it has no universally agreed meaning. Its meaning has been the subject of considerable

1 Both central government and other public bodies.

2 And organisations and other public bodies.

3 Although it could seek to introduce legislation in Parliament to authorise its future conduct.

4 At least with regard to the aspects of the rule of law to which judicial review is relevant.

academic debate, which can be crudely divided into theories of the rule of law as:

- ◆ Formalist or ‘thin’: under these theories the concept requires that laws must merely comply with certain formal rules in order to be valid, irrespective of their content; a repressive and murderous regime could meet the rule of law under this definition.
- ◆ Substantive or ‘thick’: this version of the rule of law judges the content as well as the form of ‘law’, requiring substantive rights to be recognised.⁵

There are many contrasting theories within these two categories.⁶

Our system of judicial review includes both procedural and substantive elements⁷ and thus is probably best described as reflecting a version of the ‘thick’ understanding of the rule of law. Despite there being no established definition among the judiciary of the rule of law, there may be thought to be sufficient judicial dicta to show that the rule of law does have a core meaning for the judiciary. It is repeatedly invoked by judges to explain the basis and extent of their judicial review jurisdiction. See for example the following statements by law lords:

5 Lord Bingham referred to the ‘thin’ and ‘thick’ definitions: Bingham, Tom, *The Rule of Law*, Allen Lane, 2010, pp66–67

6 The significance of the rule of law goes beyond judicial review. Other claimed elements of the rule of law include the accessibility of, and equality before, the law. See generally Bingham, Tom, *op cit*

7 Craig, Paul, *The Rule of Law*, paper included as Appendix 5 to House of Lords, Select Committee on the Constitution, 6th Report of Session 2006–2007, *Relations between the executive, the judiciary and Parliament* (2007), p101. The principles behind the constraints imposed on government under judicial review include ‘legality, procedural propriety, participation, fundamental rights, openness, rationality, relevancy, propriety of purpose, reasonableness, equality, legitimate expectations, legal certainty and proportionality.’

There is however another relevant principle which must exist in a democratic society. That is the rule of law...The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament...⁸

...the rule of law enforces minimum standards of fairness, both substantive and procedural.⁹

These dicta are reflected in Lord Bingham's expression of the particular requirement of the rule of law which is relevant to judicial review:

Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.¹⁰

The question arises whether there is any broader societal consensus as to the meaning of the rule of law in the United Kingdom as it relates to judicial review. It may be thought reasonable to postulate a general core consensus in our society that it should be possible for the courts to review executive action on grounds not merely of whether the action has a basis in established law, but also on grounds such as reasonableness, fairness, and compliance with

⁸ *Regina (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paragraph 73 per Lord Hoffmann

⁹ *Regina v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539, 591F per Lord Steyn

¹⁰ Bingham, Tom, *op cit*, p60

certain basic rights.¹¹ Otherwise, it may be said, our constitutional arrangements risk becoming authoritarian or even totalitarian (despite being ‘statistically’ democratic), because a government, once elected, could exercise executive power unreasonably, unfairly, and contrary to the most fundamental of human rights. If this attempt at assessing a general societal consensus is correct, this would represent a consensus that our collective understanding of the rule of law is a version of a ‘thick’ definition.

However, a secondary question then arises – can such a consensus be postulated in relation to issues which may not be recognised by members of society generally as being at the heart of judicial review, such as the test for who is permitted to bring a judicial review claim? This is more difficult. It is not obvious that a judicial view of the constituent elements of the rule of law will coincide with what most people think.

These considerations are relevant because it may be important to identify whose view about the meaning of the rule of law in relation to judicial review matters, and why. It may be thought that a sensible way of approaching this is as follows:

- ◆ The judiciary’s view about the meaning of the rule of law in relation to judicial review matters, because it falls to the judiciary to apply any relevant legislation passed by Parliament. If there is a difference of view about the meaning of the rule of law, as it applies to judicial review, as between Parliament on the one hand, and the judiciary on the other hand, this might give rise to a disagreement between those two branches of state. The potential for, and possible consequences of, such a disagreement will be explored in this paper.

¹¹ The role of rights in the rule of law is controversial, but a core of rights, including the right to life, may be thought likely to be accepted for present purposes.

- ◆ The public's view about the meaning of the rule of law in relation to judicial review matters, because all three of our constitutional 'players' (the government, Parliament and the judiciary) may plausibly claim to be acting in the public interest when proposing, making or interpreting the law in relation to judicial review. This fact highlights a fundamental tension within our constitutional arrangements about which branch of state can best claim to represent the public interest in specific circumstances, and what the public interest means. For example, the government may legitimately have in mind a majoritarian conception of the public interest, whereas the judiciary may prioritise the need to identify enduring values which protect all, including minorities.

When invoking the rule of law, this paper will focus on the rule of law as may be understood by the judiciary. This is because it is this view which will influence the likelihood of any potential disagreement between the judiciary and Parliament.

On the face of the further reform consultation paper, the government says that judicial review, a 'largely judge-developed procedure',¹² is a manifestation of the rule of law. Whether the government understands the rule of law in the same way as the judiciary will also be explored in this paper.

While a creature of the common law, the rule of law has now also been recognised (although not defined) by statute, namely the Constitutional Reform Act 2005, which states:

This Act does not adversely affect—

*(a) the existing constitutional principle of the rule of law,
or*

12 Paragraph 21

(b) the Lord Chancellor's existing constitutional role¹³ in relation to that principle.

and requires the Lord Chancellor to swear the following oath (emphasis added):

*"I, do swear that in the office of Lord High Chancellor of Great Britain I will **respect the rule of law**, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God."*

Parliament has been mentioned above, but where does it 'fit' in our understanding of judicial review and the rule of law? The courts' judicial review jurisdiction is justified by the notion that this procedure merely enforces the will of Parliament, by ensuring that public bodies do not exceed the powers given to them by the legislature. This theory ('ultra vires') elevates the power of Parliament over the judiciary. Ultra vires has been described as 'the juristic basis of judicial review'.¹⁴

There has been academic debate about the merits of this analysis. A competing theory reported to be gaining 'increasing acceptance',¹⁵ but remaining controversial, is that the justification for the courts' judicial review jurisdiction derives not from the will of Parliament, but from the courts' role in enforcing the rule of law as a constitutional principle. Under this theory, the courts' role has not been ordained by Parliament,¹⁶ rather it derives from

¹³ This is not defined either.

¹⁴ Wade & Forsyth, *Administrative Law*, 10th Ed, 2009, p30

¹⁵ Auburn, Jonathan, Moffett, Jonathan & Sharland, Andrew, *Judicial Review: Principles and Procedure*, Oxford University Press, 2013, paragraph 1.12

¹⁶ Although as described above, the rule of law as a constitutional principle is now referred to in statute.

what the courts have in fact done and said, and is thus part of our common law. Generally, upholding the rule of law will include upholding the will of Parliament. However, if Parliament were to legislate in a way which the courts considered to be contrary to the rule of law, the courts may on this competing theory consider that their primary obligation to the constitutional principle of the rule of law justified them in not applying Parliament's will. This theory thus elevates the power of the judiciary over Parliament in extreme circumstances.

This competing theory has been strongly criticised and whether it has force is the subject of intense debate.¹⁷ But whichever theory is correct, it may be thought sensible to take this debate into account when imagining how the judiciary might respond in extreme circumstances.

The further reform consultation paper raises the real possibility that the government may introduce legislation restricting judicial review which may be thought by the judges to contravene the rule of law in that it prejudices the ability of the courts to hold the executive fully to account. That raises the following questions which will be explored in this paper:

- ◆ Do the further reform proposals undermine the rule of law?
- ◆ Could Parliament legislate contrary to the rule of law?
- ◆ How might the judiciary respond to legislation contrary to the rule of law?
- ◆ What are the wider constitutional consequences?

¹⁷ See for example Wade, *op cit*, p33

Summary

The courts' ability to subject decisions of the executive to an independent review of lawfulness defines our constitutional climate. There is debate over the meaning of the rule of law; but it may be thought to have a core meaning for the judiciary in the context of judicial review. There is debate too over whether it is the will of Parliament (as traditionally understood) or the constitutional principle of the rule of law (as more recently and controversially suggested by some) which provides the theoretical justification for the courts' judicial review jurisdiction. It may be thought sensible to take this debate into account whichever justification for judicial review may be favoured: if Parliament were to legislate in a way which the courts considered to be contrary to the rule of law, the courts would need to confront whether they consider their primary obligation to be to the will of Parliament, or to the constitutional principle of the rule of law. If the courts were to conclude the latter, they may feel justified in not applying Parliament's will.

Do the government proposals undermine the rule of law?

Notwithstanding the constitutional significance of judicial review, some reforms of judicial review will have little or no constitutional significance. For example, reforms to make the procedure more efficient may not be constitutionally significant in terms of being perceived by the judges as eroding the rule of law. However, there are two caveats. First, great caution would be needed to ensure that reforms in the name of efficiency did not in fact threaten the rule of law, as perceived by the judiciary, for example because they materially restricted access to the courts. Secondly, there may not be an entirely clear dividing line between 'mere' efficiency reforms on the one hand, and reforms which may be relevant to whether judicial review meets the judiciary's understanding of the rule of law on the other. The Bingham Centre for the Rule of Law has, in fact, established a review specifically to consider and report on possible ways of improving judicial review procedures, to save and protect public funds, in a manner consistent with the rule of law.¹⁸

First wave of reforms

The government has already taken forward a first wave of judicial review reforms:

¹⁸ Launched on 2 October 2013, the Review aims to issue an interim report by the end of 2013 and a final report in early 2014. See www.biicl.org/binghamcentre/JRinquiry/

- ◆ shortening the time limit for bringing a judicial review from three months to six weeks in certain planning cases and to thirty days in certain procurement cases, bringing them into line with the time limits for statutory appeals;
- ◆ removing the right to an oral permission hearing where the case is assessed by a judge as totally without merit on the papers; and
- ◆ introducing a fee for an oral renewal hearing, where permission has already been refused by a judge on the papers but the claimant asks for the decision to be reconsidered at a hearing.¹⁹

These reforms focused on ‘procedure and administration’ and were ‘ostensibly anodyne’.²⁰ Of themselves, there is a case for saying that they were not constitutionally significant.

However, potentially more significant was the tone of the proposals and the political rhetoric accompanying them, revealing, in the opinion of a leading constitutional lawyer, a ‘scarcely concealed impatience’ ‘of the executive with what it implicitly perceives to be an unnecessary constraint on its powers.’²¹ There is therefore a case for saying that even the first wave of reforms, viewed broadly and in context, heralded a new climate in the government’s attitude towards judicial review. They represented the first time that the Government had mounted a ‘head-on attack’ on judicial review.²²

19 See paragraphs 2–3 of the further reform consultation paper.

20 Gordon, Richard, *Judicial review – storm clouds ahead?* J.R. 2013, 18(1), 1–5

21 Gordon, *op cit*

22 Gordon, *op cit*

Further reforms

In its further reform consultation paper the Government says it seeks to address three issues:²³

- ◆ the impact of judicial review on economic recovery and growth
- ◆ the inappropriate use of judicial review as a campaign tactic; and
- ◆ the use of the delays and costs associated with judicial review to hinder actions the executive wishes to take.

The last two points reflect what the government views as the inappropriate use of judicial review.

The further reform consultation paper proposes reforms in six areas:

- ◆ planning challenges
- ◆ the question of standing, ie who is entitled to apply for judicial review
- ◆ how the courts deal with minor procedural defects, and whether this can be improved
- ◆ the use of judicial review to resolve disputes relating to the public sector equality duty
- ◆ whether the current arrangements for costs provide the right financial incentives, including legal aid
- ◆ the scope for making greater use of ‘leapfrogging’ orders, so that appropriate cases can move quickly to the Supreme Court.²⁴

²³ Paragraph 7

²⁴ Paragraph 19

To the extent that such reforms address efficiency concerns alone (as understood with the caveats above), they have no wider constitutional significance. For example, the Government proposes to address the impact of judicial review on economic recovery and growth by, in the planning context, ‘streamlin[ing] the existing judicial and administrative processes to increase the speed with which statutory challenges and judicial reviews are heard.’²⁵ This undertaking is, in principle, consistent with the function of judicial review as a constitutional foundation stone. It is in everyone’s interests for judicial review to be streamlined and efficient, so long as its fundamental constitutional role is maintained.²⁶ There may, of course, be different perceptions as to how efficiency may best be promoted and also views about the risks of prioritising efficiency over justice. These are legitimate concerns for the consultation process on the proposed reforms that has now concluded.

However, the government’s proposals which go beyond efficiency – notably those proposals in relation to standing, financial incentives and procedural defects – are of a qualitatively different nature and may have significant constitutional implications.

Standing

A key proposal in the consultation is to change the ‘standing’ rule which determines whether a particular claimant may bring a judicial review claim or not. Parliament has simply stated that a claimant must have ‘sufficient interest in the matter to which

²⁵ Further reform consultation paper, paragraph 36

²⁶ Note the review outlined above established by the Bingham Centre for the Rule of Law to consider and report on possible ways of improving judicial review procedures in the Administrative Court, to save and protect public funds, in a manner consistent with the rule of law.

the application relates' in order to bring a claim.²⁷ The courts have interpreted this requirement broadly. They take account of a whole range of factors in determining whether a claimant's 'interest' is 'sufficient' to justify allowing the claim.²⁸ In the vast majority of claims, the claimant has a clear private interest in the subject of the challenge and it will be self-evident that the claimant has standing in such a case. But where a claim is brought on the basis of the public interest rather than an individual interest, standing will need to be considered. The merits of the claim often have a substantial impact on the court's decision as to whether the claimant has standing; and the courts also consider the importance of vindicating the rule of law and ensuring that unlawful decisions do not go uncorrected.²⁹ The current test may thus be thought to have been developed by the courts expressly in order that the courts can perform their function in protecting the rule of law. See the following explanation by Lord Reed in the Supreme Court.³⁰ It merits quoting, despite its length, because it demonstrates the nuances of the courts' approach:

27 Section 31(3) of the Senior Courts Act 1981 states: 'No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.'

28 Auburn et al, *op cit*, paragraphs 24.15–24.30

29 Auburn et al, *op cit*, paragraph 24.30. See, in relation to the rule of law, *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 644E per Lord Diplock: 'It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.'

30 *AXA General Insurance Ltd and others v HM Advocate and others* [2012] 1 AC 868 at paragraphs 169–170. This is a Scottish case but nevertheless helpfully illuminates an approach to standing based on the rule of law.

...There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual: if, for example, the duty which it fails to perform is not owed to any specific person, or the powers which it exceeds do not trespass upon property or other private rights. A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights: in particular, so far as it requires the courts to exercise a supervisory jurisdiction. The exercise of that jurisdiction necessarily requires a different approach to standing.

For the reasons I have explained, such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say "might", because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify

his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context.

The government is consulting on a proposal that a judicial review claim could not be brought unless the claimant has a direct interest.³¹ This would be constitutionally significant because it would in principle allow unlawful executive action, which the courts would currently review, to remain unchallenged. The Public Law Project gives an example of how such reform would make some government action (which the courts currently consider it appropriate to review despite the lack of an individual claimant with a direct interest) impossible to challenge:

This is because there are times when an individual is not able to bring a challenge. This might be because an unlawful policy exists, but has not affected any individuals yet and so could not be challenged by an individual claimant or because the people affected by an unlawful policy are unable to bring a challenge. For example, in a judicial review brought by the immigration detention charity Medical Justice, the courts decided that the Home Office policy of deporting people with less than 72 hours' notice, so that they did not have time to get legal advice, was unlawful because it violated the common law right of access to the courts.³² This challenge could not have been brought by the individuals affected by the unlawful policy, because they had been deported without sufficient time to get

31 Paragraph 67 onwards

32 *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710

*legal advice on the lawfulness of their deportation or the lawfulness of the policy as a whole. Only an NGO could challenge the unlawful policy, and if Medical Justice had not brought the challenge, the unlawful policy might still be in existence.*³³

A clear case can be made out that this state of affairs would contravene the rule of law as understood by the judiciary, because it would put some unlawful executive action, which the courts would currently review, beyond the reach of the courts. It may not be difficult to see how this would threaten the rule of law in the sense understood by the judiciary, in the light of Lord Reed's statement above, particularly where he emphasises that:

insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law.

Rebalancing financial incentives

The further reform consultation paper proposes that lawyers should only generally be paid for legal aid work carried out on an application for permission for judicial review if permission is granted by the court (subject to a discretion to pay in certain cases concluding before permission). Others will respond to the merits or otherwise of this specific proposal. However, for present purposes, it may be considered important to recognise the potential for the existing legal aid reforms (which in effect restrict access to the courts by those who cannot otherwise afford litigation) taken in combination with the present proposals, to erode the rule of law, as understood potentially both by the

³³ Public Law Project, *Judicial review: proposals for further reform briefing paper*, October 2013

judiciary and under a societal consensus. In early 2013, Lord Neuberger, President of the UK Supreme Court, told the BBC:³⁴

My worry is the removal of legal aid for people to get advice about law and get representation in court will start to undermine the rule of law because people will feel like the government isn't giving them access to justice in all sorts of cases.

And that will either lead to frustration and lack of confidence in the system, or it will lead to people taking the law into their own hands.

Another proposal under the heading of rebalancing financial incentives relates to protective costs orders, which limit the costs exposure of a claimant in a public interest case. The government proposes to stipulate that protective costs orders will not be available in any case where there is a private interest, regardless of whether there is a public interest. PCOs are arguably constitutionally significant because they enable issues of public importance to be raised which would otherwise be stifled because of a claimants' lack of means. There is a clear case to say that to ignore the wider public interest would therefore undermine the constitutional purpose and effect of PCOs. Furthermore, this proposal in conjunction with that in relation to standing would create a Catch-22 situation whereby a claimant would never meet the tests for both standing and a PCO, because the qualifying feature for standing (direct interest) would rule out a PCO. This position may be thought to lack internal logic, because PCOs, while available in principle, could never be obtained in practice.³⁵

34 As reported on the BBC news website, *Lord Neuberger, UK's most senior judge, voices legal aid fears*, 5 March 2013

35 Further reform consultation paper, paragraph 154 onwards; the Bingham Rule of Law Centre in its response to the further reform consultation paper has responded in more detail in relation to the proposals generally on 'rebalancing financial incentives', of which PCOs are one aspect.

Procedural defects³⁶

Currently, where the defendant argues that a remedy should not be granted (or a claim should be dismissed) because the outcome would have been the same even if the unlawful conduct had not occurred, the defendant must show that the outcome would inevitably have been the same. The government is proposing lowering the threshold to ‘highly likely’. This proposal may risk interfering with the both the rule of law as understood by the judiciary, and the separation of powers.

In relation to the rule of law, the relevant concern may be thought to be that the proposal inevitably contemplates that some cases of unlawful action where the outcome might have been different would not be allowed to proceed. That may be thought to create another category of cases, in addition to the category created by the standing proposal (of claims where the claimant has no direct interest), where unlawful executive action, even that which might have made a difference to the outcome, would be put beyond the reach of the courts.

Further, in relation to the separation of powers, this concept dictates, in this context, that the courts do not stray into the decision-making territory which is the remit of the executive. That boundary may be threatened by the lowering of the threshold if it were to require the court to ‘stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision’ (*Smith v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, paragraph 10).

36 Further reform consultation paper, paragraph 91 onwards

International human rights obligations and the EU

The government's further reform consultation paper may be thought to lack clarity in relation to its impact on the courts' obligations under the Human Rights Act 1998 and the European Communities Act 1972. The consultation paper states that 'primary legislation [is] not susceptible to judicial review'.³⁷ This is correct outside the impact of those two statutes. But the European Communities Act obliges domestic courts to disapply primary legislation which is inconsistent with EU law;³⁸ and the Human Rights Act gives the High Court (and other courts):

- ◆ The duty to interpret primary legislation in a way which is compatible with rights under the European Convention on Human Rights, so far as it is possible to do so; and³⁹
- ◆ The power to declare that a provision of primary legislation is incompatible with a Convention right.⁴⁰

The consultation paper notes that the requirements of EU law as reflected in the Aarhus Convention would mean that cases which raised environmental issues could not be subject to the proposed restrictions on, for example, standing or protective costs.⁴¹ However, it does not appear to make any other exceptions, for EU law more generally or Convention rights.

³⁷ Paragraph 21

³⁸ See for example *R v Secretary of State for Transport, ex parte Factortame* [1990] 2 AC 85 and *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1.

³⁹ Section 3(1). Per Lord Nicholls in *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291: "This is a powerful tool whose use is obligatory. Is it not an optional canon of construction. Nor is its use dependent on the existence of ambiguity. Further, the section applies retrospectively. So far as it is possible to do so, primary legislation "must be read and given effect" to in a way which is compatible with Convention rights. This is forthright, uncompromising language."

⁴⁰ Section 4(2)

⁴¹ Paragraphs 81 and 156

If the government does intend to make an exception for cases which may require the disapplication of, or a declaration of incompatibility in relation to, primary legislation then there is no potential further erosion of the rule of law under this heading. However, if it does not, then this position may be thought to be inconsistent with the rule of law as likely to be applied by the judiciary: in these cases Parliament (unless the two statutes cited above are amended) has provided the courts with the power or the duty to disapply, or declare incompatible with the ECHR, primary legislation. Furthermore, creating exceptions may create anomalous situations whereby different restrictions may be imposed on judicial review depending on whether the claim may include matters of EU or Convention law or not and the nature of such claim. Such different treatment may be thought to need justification.

Approach to the government's specific proposals

The intention of this paper is not to examine in detail the overall merits of the government's specific proposals. The examples given above are intended to demonstrate the potential constitutional impact of some of the reforms which seek to go beyond efficiency.

Further sections of this paper will take the government's proposal in relation to standing as an example of a measure which the government may seek to take forward, which on one clear analysis, is contrary to the rule of law as it may be understood by the judiciary. The analysis in those further sections could – by parity of reasoning – also apply *mutatis mutandis* to other examples of measures arguably threatening the rule of law which the government may seek to take forward.

Further analysis

A question arises whether the government understands the rule of law to mean the same as that understood by the judiciary. The answer is not clear. The government makes two statements which may be thought to support a core understanding of the rule of law as it applies to judicial review, which is in line with the core judicial understanding and societal consensus postulated above, suggesting that it supports a ‘thick’ rather than ‘thin’ version of the rule of law in this context. Those statements are:

- ◆ that judicial review ‘is a largely judge-developed procedure and can be characterised as the rule of law in action’⁴² and
- ◆ that the government ‘wants to ensure that judicial review is readily available where it is necessary in the interests of justice in holding the executive to account, but that it cannot be used simply to campaign against, frustrate or delay decisions.’⁴³

However, it is difficult to assess whether the government agrees with judicial dicta that a wide notion of standing may be necessary in order to uphold the rule of law. The government’s proposals may be said, as outlined above, to be contrary to this understanding of the rule of law, but there are perhaps two alternative interpretations of the position: first, that the government does disagree with the judiciary; or second that the government may not disagree but has not fully considered the implications for the rule of law of its proposal.

As outlined above, judicial review is intrinsically related to the balance of power between the component parts of the constitution. The government’s proposal may be seen as seeking

42 Paragraph 21

43 Paragraph 8

in substance to produce a constitutional change in two respects:

- ◆ First, in its nature: it would be the first occasion on which the executive has sought to place restrictions on the judicial review process as a whole with the intended result of preventing court challenges to potentially unlawful executive action. This proposal may thus be seen as having crossed a line which paves the way for further restrictions.
- ◆ Secondly, in its effect: barring the courts' review of an unlawful decision on grounds of standing which do not allow consideration of the merits may be thought to significantly alter the balance of power between the executive on the one hand, and the judiciary (who act to protect both the interests of individuals and the general public interest in preventing abuse of power) on the other.

A possibility that the real desire of the executive is to strengthen its power as against the judiciary may be thought to be supported by what many will see as rhetoric accompanying the government's proposals. This includes:

- ◆ In the first consultation paper, the 'scarcely concealed impatience' of the executive with what it implicitly perceives to be an unnecessary constraint on its powers': this enabled Richard Gordon QC to predict (it may be thought, accurately) that the 'ostensibly anodyne' first wave of reforms, focusing on procedure and administration were paving the way for a more substantial attack on judicial review.⁴⁴
- ◆ Chris Grayling's article in the Daily Mail (September 2013), 'The judicial review system is not a promotional tool for countless Left-wing campaigners', which many will interpret as politically toned, timed to coincide with the launch of the

⁴⁴ Gordon, *op cit*

further consultation. In this article he may be thought to have suggested (if not made a virtue of the fact) that he does not have an open mind in advance of the consultation:

In proposing these changes, I will no doubt be accused of killing justice and destroying Magna Carta...But in proposing these changes, I know we will be doing the right thing for Britain.

- ◆ Features of the further reform consultation paper, including the suggestion that ‘Parliament and the elected Government are best placed to determine what is in the public interest.’⁴⁵ This may be viewed as an attempt to side-step the point (which it acknowledges⁴⁶ but does not address, in relation to its proposal) that judicial claims brought by NGOs etc (the very groups which it seeks to restrict) are *more* successful than those brought by other claimants.

It may be suggested on the government’s behalf that the government is not trying to shift the balance of power; rather, that it is trying to pull the balance back to its rightful place. Indeed, this is what the government in effect claims.

However, a problem may be perceived with this analysis. The government says that the ‘wide approach to standing has tipped the balance too far, allowing judicial review to be used to seek publicity or otherwise to hinder the process of proper decision-making.’⁴⁷ Notably, the government does not say that the courts have been allowing unmeritorious claims to succeed (including those brought by public interest groups). In judicial review, a claim does not necessarily need a particular interest to be

45 Paragraph 80

46 Paragraph 78

47 Paragraph 79

meritorious, as Lord Reed explains in the quotation above. So what is the government's criticism?

The government says that its criticism is of the inappropriate use of judicial review in various respects – simply to generate publicity or campaign; delay the implementation of decisions; or frustrate or discourage legitimate executive action. But it may be thought that if a claim is meritorious (which may be thought to mean for present purposes that the claim reveals a real case of unlawful executive action) and the claimant has sufficient interest to bring the claim (as determined on current principles by the courts in order to uphold the rule of law) – then even the government's own expressed view may on one reading support such a claim proceeding, despite publicity or delay etc. The government's own view may be thought to support this because the government has said that it 'wants to ensure that judicial review is readily available where it is necessary in the interests of justice and holding the executive to account': this may be thought to be exactly the assessment which the courts have made in applying a relatively wide test for 'sufficient interest'.

For this reason, it may be thought that the government's suggestion to limit standing is not easily explained by its stated desire to ensure that unmeritorious claims are not brought simply for inappropriate purposes such as publicity. If this were the case it would perhaps target unmeritorious claims. Instead, it has targeted a category of claims which have proved to be *more* meritorious than others but may be thought politically irksome.

Summary

The courts have developed a liberal test for 'standing' so that a judicial review claim may proceed depending on a number of factors, even if the claimant has no direct interest. A rationale

is that ‘insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law.’ The government proposes to rule out claims unless the claimant has a direct interest. A clear case may be made out that this proposal would contravene the rule of law, because it would put some unlawful executive action, which the courts would currently review in the name of the rule of law, beyond the reach of the courts. The government’s proposal may be seen as seeking in substance to enact a constitutional change. For the purpose of further analysis, this paper will take the proposal to restrict standing as an example of a measure which the government may seek to advance, which on one clear analysis, is contrary to the rule of law as understood by the judiciary in this context.

Could Parliament legislate contrary to the rule of law?

If a relevant proposal amending the standing rule were to be implemented in secondary legislation, it may itself be susceptible to challenge by way of judicial review and vulnerable to quashing by the courts (for example on the ground that the enabling legislation did not permit secondary legislation which interfered with the rule of law). In any event, even if secondary legislation were introduced and not judicially reviewed, there is a case for saying that it may not have the intended effect in the courts. Given that the courts' current wide test of standing derives from their broad interpretation of 'sufficient interest' in the Senior Courts Act 1981, section 31(3) (ie primary legislation), there is a case for saying that if Parliament does not amend this provision, the courts may proceed, in effect, as they had done before in relation to standing, on the basis that if Parliament really wished the courts' approach to change it would have amended the primary legislation.

The government may choose to introduce any relevant proposals by way of primary legislation. An example of relevant primary legislation would be a statute amending the Senior Courts Act 1981 to define sufficient interest so as not to include claimants with no direct interest.

According to the Diceyan exposition of Parliamentary sovereignty, Parliament can pass whatever legislation it chooses, including legislation contrary to the rule of law. However,

it seems unlikely that the government would advance a bill stating it to be contrary to the rule of law. It thus seems more likely that the central debate would be whether the proposal in question infringes the rule of law or not. There may be debate in Parliament about the meaning of the rule of law; whether the proposal in question infringes it; whether Parliament should legislate contrary to the rule of law; and what the implications might be of legislation which may be perceived by members of the judiciary as interfering with the rule of law. Significant hurdles may be placed in the government's way (including the analysis of committees such as the Joint Human Rights Committee and the House of Lords Constitutional Committee; and potential opposition from the House of Lords itself if not the Commons). However, if the government had the support of the majority of the House of Commons, it could (using the Parliament Acts 1911 and 1949 if necessary to overcome House of Lords opposition) bring into force legislation which is widely believed to contravene the rule of law. There is, for example, no provision for 'constitutional statutes' (which might be defined as statutes which enjoy a distinctive constitutional status within the United Kingdom because of their special subject matter) to be given special protection, such as being exempted from the Parliament Acts so that agreement of the House of Lords would be required to amendment or appeal; or permitting substantial amendment or repeal only by absolute or special majority in the House of Commons, or by referendum.

Lord Bingham noted that 'respected and authoritative voices now question whether parliamentary sovereignty can coexist with the rule of law'.⁴⁸ So an answer to the question whether Parliament could legislate contrary to the rule of law may be in substance incomplete without addressing the question of

48 Bingham, *op cit*, p161

how the judiciary might respond to such legislation. That is the question which this paper will address next.

Summary

There may be a case for the government to use primary rather than secondary legislation to implement proposals which may be thought by the judiciary to threaten the rule of law. Even if Parliament sought to pass primary legislation which is widely thought to be contrary to the rule of law, there are no constitutional requirements for such legislation to be treated differently from other legislation, during its passage. Under a traditional understanding of Parliamentary sovereignty, Parliament may pass whatever laws it likes. However, an answer to the question whether Parliament could legislate contrary to the rule of law may in substance be incomplete without addressing the question of how the judiciary might respond to such legislation.

How might the judiciary respond to legislation contrary to the rule of law?

For the purpose of considering this question, this paper will assume hypothetically that Parliament were to pass primary legislation requiring that a judicial review claimant must have a direct interest. As outlined above, this is used as an example only of potential legislative action in relation to judicial review which may be thought to be inconsistent with the rule of law.

This paper will also hypothetically assume:

- ◆ that following the coming into force of such legislation, a claimant (such as an NGO or other public interest group) with no direct interest seeks to bring a judicial review claim with a clear *prima facie* argument that an executive decision is unlawful;
- ◆ that this claimant would have been considered to have standing under the current test; and
- ◆ that this claimant argues in its application for permission for judicial review that the new amendment does not compel the court to refuse permission.

It is conceivable that a claimant would argue that the amendment should not be applied by the judiciary at all because it infringes the rule of law. A traditional understanding of Parliamentary sovereignty (that Parliament can legislate for what it likes and the courts will apply its will) would put paid to this argument. However, there are judicial dicta which suggest it may be unwise

to assume that the courts would necessarily apply a traditional understanding of Parliamentary sovereignty in extreme circumstances where they considered Parliament to be eroding the rule of law. There is some judicial support for the proposition that while the supremacy or sovereignty of Parliament is still the general principle of our constitution, the principle is not absolute and, because the principle was created by judges, judges could decide not to follow it in certain circumstances (*R (Jackson) v Attorney General* [2006] 1 AC 262). Lord Steyn said (paragraph 102):

In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the...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.

Lord Hope said (paragraph 104):

*My Lords, I start where my learned friend, Lord Steyn, has just ended. Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.*

It is important to emphasise that the dicta of Lord Steyn as supported by Lord Hope do not amount to a consensus. Far from it – whether there are ‘constitutional fundamentals’ which qualify

the sovereignty of Parliament is highly controversial and the subject of considerable debate. But if any Parliamentary action is likely to prompt this response, an interference with judicial review may be thought to be a key candidate. While the government is not currently proposing to abolish judicial review altogether, the same principles may be invoked even in relation to lesser inroads.

Considerations as to whether the judiciary might in extreme circumstances disobey Parliament are not new. See for example Clare Dyer's profile of Lord Woolf in the Guardian nearly a decade ago,⁴⁹ headed 'The lord chief justice has used all his skill and pragmatism trying to persuade the government not to take asylum and immigration issues out of the courts. Now his fellow law lords are threatening the nuclear option: a blank refusal to obey'. It includes:

...The Home Office is talking tough, but in the department of constitutional affairs the realisation is dawning that the judges have a potential weapon of mass destruction. The fear is that they could invoke what the Liberal Democrat peer and QC Lord Goodhart called the "nuclear option" – refusing to enforce the clause and allowing cases to go the high court nevertheless. "Some judges have been talking about it," he told BBC Radio 4's World at One yesterday.

Lord Falconer looked disconcerted when I mentioned that a leading judicial – review expert had produced a legal opinion to that effect. Some public law specialists, including those who often appear on the government side in court, are speculating that the time may have come when the courts can simply refuse to enforce such a ban as an affront to the rule of law and a breach of our unwritten constitution...⁵⁰

49 5 March 2004

50 See the account of the debate over the Asylum and Immigration (Treatment of Claimants, etc) Bill 2004 in Wade, *op cit*, p617, fn 279

Our constitutional arrangements have not faced an ultimate test of this type. The United States constitution is known for the ability of judges to strike down primary legislation. However, what is less well appreciated is that this power does not stem from any express provision in the US constitution but was created by the judiciary (albeit in the context of that constitution), the Supreme Court having laid the foundations in the case of *Marbury v Madison* (1803).⁵¹ There is speculation about whether the UK, especially now it has a Supreme Court, might have its own *Marbury*⁵² (in other words, whether the judiciary here might increasingly lay the foundations for the courts, in an extreme case, expressly not applying a statute because of its lack of compliance with fundamental constitutional principles).

It may be unwise for the government and Parliament to assume, simply because the judiciary in this country have so far not purported to review primary legislation for its compliance with constitutional principles, that this is a fixed constitutional arrangement. On one view, it is not and will merely endure for so long as the judiciary restrain from doing so. Further, as Professor Paul Craig has stated:

It should... be recognised that the case law authority for the traditional proposition that courts will not invalidate or refuse to apply statute is actually rather thin. There are to be sure many judicial statements extolling the sovereignty of Parliament, but they are principally just that, judicial statements rather than formal decisions. Insofar as there are formal decisions that could be said to be based on the traditional proposition, the facts of such cases were generally relatively innocuous. They were a very long way from the types of case where courts might consider it to be justified to refuse to apply a statute, which also means

51 5 U.S. 137

52 Eg Edlin, Douglas, *Will Britain Have a Marbury?* UK Const. L. Blog (7th June 2013) (available at <http://ukconstitutionallaw.org>)

*that such cases could be readily distinguished should a court feel minded to do so.*⁵³

If the government and Parliament were themselves to refrain from advancing and passing legislation which may be said to contravene the rule of law (or other fundamental constitutional principles) as understood by the judiciary, then the judiciary would not be put to the test in this respect. Conversely, if the government and Parliament were to advance and pass legislation which may be thought to contravene a concept which members of the judiciary recognise as a constitutional principle, such as the rule of law (as interpreted by the judiciary), this should be done with an appreciation of the risk that it may prompt the judiciary to take on a more active constitutional role and expressly refuse to apply a statutory provision.

If the judiciary were to act in this way on one occasion in response to exceptional and extreme circumstances, its collective inhibitions may be reduced, with the effect that it may be thought more ready than it had previously been, to strike down primary legislation. Any such action by the courts may, at least if not accepted by the government and Parliament, create a serious constitutional 'moment' with the potential to destabilise existing constitutional arrangements which are currently taken for granted.

The prospect of the courts purporting to strike down primary legislation is speculative; and they are likely to contemplate such action – if at all – only in the most extreme of circumstances. However, there is other action which the courts might be more willing to contemplate which could achieve a not dissimilar effect in substance. Such action would be superficially less controversial, but perhaps equally significant in terms of whether Parliament's will is enforced or not.

53 Craig, *op cit*

The courts have a long-established history of refusing to enforce even the clear intention of Parliament where to do so would erode the rule of law in the sense that some instances of unlawful administrative action, which it is necessary to review in order to uphold the rule of law, would be put beyond the reach of the courts. However, what differentiates this type of court action from that considered above is that here, the courts pay what may be thought of as lip service to the notion that they are enforcing the will of Parliament. Well-known canons of statutory interpretation dictate that on occasions, the courts will interpret a statute contrary to its natural wording while maintaining that they are applying Parliament's intention.

The courts have quashed decisions made under statutes despite those statutes containing 'no certiorari' clauses, which provided essentially that decisions made under the relevant statute should not be quashed.⁵⁴ 'Ouster clauses', stating that a particular decision 'shall not be called in question in any court of law' (or equivalent wording), have not prevented the courts from intervening in the case of unlawfulness (see notably *Anisminic Ltd v Foreign Compensation Commission*).⁵⁵

In the present context, there is therefore a clear risk that the courts may, through powerful principles of statutory interpretation, in effect not apply any purported restriction to the standing test (ie that the courts would disobey Parliament, while claiming to obey) in circumstances where the courts would previously have permitted a claim to proceed, if the courts considered this necessary in order to uphold the rule of law.

The courts are likely to take some support for their approach from Parliament's recognition of the rule of law in the Constitutional Reform Act. As Lord Bingham has said:

⁵⁴ Wade, *op cit*, p612

⁵⁵ [1969] 2 AC 147

[T]he statutory affirmation of the rule of law as an existing constitutional principle and of the Lord Chancellor's existing role in relation to it does have an important consequence: that the judges, in their role as journeymen and judgment-makers, are not free to dismiss the rule of law as meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie, even if they were inclined to do so. They would be bound to construe a statute so that it did not infringe an existing constitutional principle, if it were reasonably possible to do so.⁵⁶

The government may argue that the principle of legality merely requires that if it chooses to legislate contrary to a constitutional principle, it may do so, as long as it makes this clear.⁵⁷ However, in the case of *Anisminic* cited above, the court in effect rewrote the relevant statute to say that only a lawful decision could not be called into question. This was clearly contrary to Parliament's intention. It is therefore at least possible that the courts may consider deploying equally inventive legal techniques in relation to legislation purporting to restrict aspects of judicial review more generally.

The risk of judicial interpretation contrary to Parliament's clear intention may be all the more conceivable if the government maintains that it is acting in accordance with the rule of law (as it may be politically required, in practice, to do). If the government has stated essentially that it does not intend to undermine the rule of law (particularly in material which would be admissible

⁵⁶ Bingham, Tom, *The Rule of Law*, lecture at University of Cambridge, Centre for Public Law, 16 November 2006

⁵⁷ This would draw on the principle of legality, which states that Parliament will be presumed to legislate in accordance with fundamental rights unless it makes expressly clear its intention to the contrary. See for example per Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at 131E-G and Lord Steyn in *Pierson*, cited above.

in court proceedings in order to help interpret an ambiguous legislative provision⁵⁸), but a judge considers that the proposals do undermine the rule of law, this could increase the ease with which a judge may justify interpreting the proposals so as not to give effect to the government's proposal. The justification may be that Parliament did not intend to contravene the rule of law; therefore the provision must be interpreted so as not to contravene the rule of law, even if such interpretation is contrary to the natural meaning of the words in the provision.

However, there is good reason for the judiciary to act with extreme caution in deciding whether to take any step which it perceives to be contrary to the will of Parliament. Two factors requiring caution have already been touched upon in this section, namely whether such step would usurp the courts' proper constitutional function (which itself requires consideration of what their proper constitutional function is), and what the constitutional consequences may be. Another factor closely related to the first (or perhaps part of it) is whether judges could, as unelected officials, legitimately claim to represent the public interest in a direct conflict with Parliament, when the government and Parliament – perhaps more substantially – claim to do that through representative democracy. That tension is central to the issues in this paper and will be returned to in the conclusion.

Summary

Under a traditional understanding of Parliamentary sovereignty, legislation will be applied by the courts and there is no reason to question this most of the time. However, there is some judicial support for the proposition that while the supremacy or sovereignty of Parliament is still the general principle of our

58 Under the rule in *Pepper v Hart* [1993] AC 593.

constitution, the principle is not absolute and, because the principle was created by judges, judges could decide not to follow it in certain circumstances, such as an attempt to abolish judicial review. This proposition is controversial and there is no consensus about it. However, it may be unwise for the government and Parliament to assume, simply because the judiciary in this country have so far not purported to review primary legislation for its compliance with constitutional principles, that this is a fixed constitutional arrangement. Furthermore, the judiciary have considerable powers of statutory interpretation which they have used in the past to 'disobey' Parliament's intention, while maintaining that they are upholding it. The judiciary might find it easier to use such powers if Parliament were to maintain that it is acting in accordance with the rule of law, because this may justify the judiciary in interpreting legislation not in accordance with its wording, but in accordance with judicial interpretation of what the rule of law entails.

What are the potential wider constitutional consequences?

Discussions about the rule of law

As outlined above, the passage of any new legislation restricting judicial review is likely to prompt debate about the rule of law. Such debate may be prone to raise further questions about the government's relationship with the rule of law. Such questions may go beyond judicial review. A prime example would be whether a state such as the UK breaches the rule of law by not complying with international law obligations (for example in relation to prisoner voting). There is a view⁵⁹ that the rule of law requires a state to respect international obligations.

There is a risk that such discussions may paint a general picture of the government as having an intention in effect to erode the rule of law because it wishes to increase its power, whether as against another branch of state (the judiciary) or an international force such as the European Court of Human Rights. Such a picture may detract attention from consideration of other, potentially less controversial, proposals for the increased efficiency of the judicial review procedure which are consistent with the rule of law.⁶⁰

59 For example, this was Lord Bingham's eighth sub-rule in his analysis of the rule of law: Bingham, *op cit*, p110

60 Of a kind which may, for example, be introduced following a careful review as outlined above.

Parliamentary sovereignty

The analysis in the previous section demonstrates that it may not be fanciful to suggest that legislation restricting judicial review could be the trigger for cases which might make the constitutional position in relation to the continuing significance of Parliamentary sovereignty less certain. Such cases could potentially involve:

- ◆ The courts' powerful methods of statutory interpretation which they have previously used so as not to enforce the clear will of Parliament, in order to uphold the rule of law.
- ◆ An express ruling that they will not apply a particular statutory provision.

If the courts are given cause, in effect not to apply legislation by either of the above means, they may be more prepared to do so in other cases outside the field of proposed restrictions to judicial review.

Codified constitution

There are several reasons why the purported implementation of a measure in primary legislation widely thought to be contrary to the rule of law may tend to trigger further consideration of the prospect of a codified constitution.

The notion that primary legislation cannot, according to a traditional model of Parliamentary sovereignty, be judged against fundamental constitutional principles including human rights, may be seen to become increasingly unattractive if Parliament has shown its willingness to legislate contrary to such principles.

If the judiciary shows itself to be willing to disobey Parliament in order to uphold the constitutional principle of the rule of law,

there may be a powerful case for saying that this power of the judiciary should be regulated, rather than left to develop ad hoc. That could be a case which a government and Parliament may favour – because it may be politically and constitutionally more acceptable to be constrained by a judiciary that is acting on the basis of codified constitutional principles, than to be constrained by a judiciary exercising apparently free power.

Lord Chancellor's oath and duties

If restrictions on judicial review were to be perceived as extreme, opponents of such restrictions may take extreme measures in order to challenge them. Some extreme opponents might take the view that the Lord Chancellor, in presenting the further reform proposals to Parliament, had acted contrary to his oath. The courts might even be asked to rule upon the Lord Chancellor's adherence to his oath and even whether he should remain in office. Whether any legal basis for adjudication of the latter type exists is unclear and beyond the scope of this paper, and it seems reasonable to predict that any such claim would be far from straightforward and perhaps non-justiciable. However, any litigation of this type (even if ultimately unsuccessful) would have the potential to bring to the fore what may be thought of as anomalies in the Lord Chancellor's role which are highlighted by proposals such as those currently advanced.

Summary

Legislation restricting judicial review which is thought by the judiciary to be contrary to the rule of law has potentially wide further constitutional consequences including:

- ◆ Detracting attention from any less controversial proposals which may be suggested to make the judicial review process more efficient.

- ◆ Potentially triggering action by the courts which might make the constitutional position in relation to the continuing significance of Parliamentary sovereignty less certain.
- ◆ Making the case for a codified constitution against which primary legislation could be reviewed seem more attractive, if the potential alternative may be unregulated disobedience by the courts of Parliament's will.
- ◆ Potential challenges to – and questions about – the role of the Lord Chancellor.

Conclusion

Proposals to restrict judicial review have the potential to significantly alter the constitutional balance of power. It is possible that this may be what the government wants to do, in the sense of increasing its power over the judiciary.

However, such reform proposals have the potential to alter the constitutional balance in ways in which the government and Parliament may not have anticipated. For example, if the judiciary were to feel compelled in extreme circumstances to resist statutory measures which it thought prejudiced the courts' ability to protect the rule of law, judges may in practice not implement such measures. This could arguably have the opposite effect to that which the government may intend, namely increasing the effective power of the judiciary in the constitutional balance. The government and Parliament may then need to escalate the power required in response in order to right the balance. The result could be a constitutional crisis of uncertain effect and proportions.

Such a scenario is speculative and extreme. But judicial review is at the heart of our constitutional balance and the courts are likely to take any threat to their ability to maintain the rule of law seriously. It may therefore be considered entirely appropriate to imagine what might happen in extreme situations and exercise caution when considering reform. The President of the Supreme Court, Lord Neuberger, has also advised caution to those considering reform of judicial review:⁶¹

61 *Justice in an Age of Austerity*, JUSTICE Tom Sargant memorial annual lecture 2013 given by Lord Neuberger of Abbotsbury, President of the Supreme Court, on 15 October 2013, paragraphs 37–38

I should mention the Government's recent paper on judicial review in this context. It contains proposals intended to cut down the cost and delay involved in JR applications. The desire to discourage weak applications is understandable, even, laudable, and the desire to reduce delay and expense is plainly right, at least in principle. However, one must be very careful about any proposals whose aim is to cut down the right to JR. The courts have no more important function than that of protecting citizens from the abuses and excesses of the executive – central government, local government, or other public bodies. With the ever-increasing power of Government, which now commands almost half the country's GDP, this function of calling the executive to account could not more important. I am not suggesting that we have a dysfunctional or ill-intentioned executive, but the more power that a government has, the more likely it is that there will be abuses and excesses which result in injustice to citizens, and the more important it is for the rule of law that such abuses and excesses can be brought before an impartial and experienced judge who can deal with them openly, dispassionately and fairly.

While the Government is entitled to look at the way that JR is operating and to propose improvements, we must look at any proposed changes with particular care, because of the importance of maintaining JR, and also bearing in mind that the proposed changes come from the very body which is at the receiving end of JR.

This report does not purport to provide an exhaustive analysis of the potential constitutional implications of the proposed reforms. Rather, it has intended to highlight the existence in principle and broad nature of such implications. This topic could properly form the terms of reference for an independent inquiry which could fully inform the government and Parliament about the possible and likely constitutional effects of reforms to judicial review.

The following table sets out possible courses of action for the government and Parliament, along with potential constitutional implications.

OPTIONS	POTENTIAL IMPLICATIONS
1. Do nothing – no change to judicial review	<ul style="list-style-type: none"> • System remains as it is. • Assessment of merits of this option will depend on detailed consideration of any deficiencies in the current system.
2. Take forward efficiency-based reform of judicial review	<ul style="list-style-type: none"> • Potential improvement to efficiency of judicial review system. • Unforeseen constitutional consequences may arise unless such reform is taken forward with the benefit of a very careful review of the potential implications. Such review could include consideration of what meaning of the rule of law should be adopted for the purpose of judging judicial review reform proposals against it. It may be thought the review should consider how reforms can best be made consistent with that principle.
3. Take forward reform of judicial review which may include, but goes beyond, efficiency reforms (to include, for example, proposed reforms on standing, protective costs orders and procedural defects)	<p>As 2, plus:</p> <ul style="list-style-type: none"> • Potential to improve judicial review in the government's opinion. • Anticipated potential to worsen judicial review in the opinion of others. • Potential for significant constitutional implications, including a disagreement between the government and Parliament on the one hand, and the judiciary on the other, about whether the reform is consistent with the rule of law, with the risk that the judiciary may find means of not implementing the will of Parliament. Such disagreement could disrupt the current constitutional balance in unforeseen ways, and could cause a constitutional crisis of uncertain effect and proportions. For this reason, it may be thought that great caution should be exercised.

In evaluating these choices, the government and Parliament face more than a simple and narrow question of which course of action they consider would best meet the public interest. This paper has highlighted a key tension as to which branch of state – whether the government and Parliament on the one hand, or the judiciary on the other – is best placed to protect the public interest in judicial review. Both sides have legitimate claims to be protectors of the public interests: the government and Parliament may legitimately have in mind a majoritarian conception of the public interest, whereas the judiciary may prioritise the need to identify enduring values which protect all, including minorities.

There may be a case for saying that society needs a combination of these two understandings of the public interest. They will often – perhaps usually – co-exist without conflict. Where there is the potential for conflict, there may be a case for those potentially involved in such conflict to recognise that, to a significant extent, the current balance in our constitutional arrangements is maintained because restraint is exercised, where the assertion of one side's better ability to protect the public interest may cause a crisis. Whether to exercise restraint may be a question for both the government and Parliament on the one hand, and the judiciary on the other.

Summary

Proposals to restrict judicial review have the potential to significantly alter the constitutional balance of power. Such reform proposals have the potential to alter the constitutional balance in ways which the government and Parliament may not have anticipated. The result could be a constitutional crisis of uncertain effect and proportions. Reform of judicial review could properly form the terms of reference for an independent inquiry which could be used to inform the government and

Parliament about the possible and likely constitutional effects of such reforms. There are three possible courses of action. First, the government or Parliament may decide to do nothing. Secondly, efficiency reforms may be taken forward, potentially following a review to consider how best to introduce reforms consistent with the rule of law. Thirdly, judicial review reform may go beyond efficiency, including measures which have the potential to destabilise existing constitutional arrangements and understandings and even to provoke a constitutional crisis. It may be thought, therefore, that great caution should be exercised in relation to option three. Both government and Parliament on the one hand, and the judiciary on the other, may have competing claims as to how best to protect the public interest in relation to judicial review. Ultimately, restraint from at least one or the other may be required in order to avert a crisis.

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