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Written Submission: Judicial Review and Courts Bill 2021 Public Bill Committee

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[1] I write in relation to Clause 1 of the Judicial Review and Courts Bill which, if passed, will make statutory provision for courts in judicial review proceedings to grant suspended and prospective-only quashing orders.

[2] I am a Professor of Law at the University of Melbourne, where I am also Director of the Centre for Comparative Constitutional Studies. I have written extensively on the topics of public law, private law and remedies. I have had significant involvement in the reform process that has culminated in the judicial review reforms proposed in the Judicial Review and Courts Bill, having made submissions to IRAL and the Government Consultation, participated in academic roundtables on the reforms hosted by the Ministry of Justice, and given oral evidence to the Public Bill Committee on 2 November 2021.

[3] In my view the remedies reforms are justified as they provide for remedial flexibility in judicial review proceedings. The reforms introduce a nuanced approach to judicial review remedies, which will provide courts with the tools necessary to calibrate remedies to the exigencies of the particular case before them.

[4] In this way the reforms are an important corrective to the Supreme Court's increasingly blunt approach to remedial decision-making, which allows no room to account for the practical consequences of remedial decisions or important interests of third parties or the public good.

[5] More generally, the reforms offer a clear and coherent framework of legal principle to guide judicial decision-making in relation to remedies. This is welcome as the courts have in general neglected issues pertaining to remedies, resulting in an unsatisfactory remedial jurisprudence.

[6] While I consider the reforms to be justified in general, I do consider five amendments could improve the proposed legislative scheme:

a. Subs 1(a) should be amended to make clear that subs 1(a) and (b) can be used cumulatively so that courts can combine suspended and prospective quashing. As subs 1(a) is presently drafted it is unclear whether the remedies can be so combined, yet in some cases it would be desirable for the remedies to be deployed in combination. **[35]-[37], [71]**

b. The presumption in subs 9 should be removed, with the consequence that subs 10 should also be deleted. Subs 9 undermines the very premise of reform, which is to afford greater remedial flexibility. **[27], [43]**

c. The public interest should be added as a factor in subs 8 that courts must consider in determining whether to grant suspended or prospective relief. As presently drafted subs 8 does not require courts to consider important public interests such as the national economic interest and national security, yet such interests can be significantly impacted by remedial decisions. **[55]-[56]**

d. For reasons of clarity subs 8(a) should be amended so that it refers to the seriousness or gravity of the defect or unlawfulness. **[57]-[58]**

e. Prospective quashing orders should be ruled out where they would negative otherwise good private law claims or criminal law defences, or deprive persons of effective redress for HRA violations. Alternatively the legislation could provide for a default, that prospective quashing orders do not affect such claims, unless the court considers there is an overwhelming case for departing from that default position. **[74]-[78]**

[7] I oppose the introduction of an amendment to provide for a novel remedy of administrative compensation. The topic of administrative compensation is a fraught one and such an amendment is in any case unnecessary because government can give an undertaking to make an ex gratia payment and the court would be required to consider this under subs 8(e). **[62]-[63]**

[8] This submission:

a. Explains the general case for remedies reform. **[9]-[26]**

b. Discusses why the presumption in subs 9 should be deleted. **[27], [43]**

c. Explains why statutory provision for suspended and prospective relief is necessary. **[28]-[40]**

d. Examines the statutory factors in subs 8 in relation to suspended relief (**[44]-[66]**) and prospective relief (**[67]-[79]**). This analysis illustrates the types of cases in which suspended and prospective relief can play a valuable role. The analysis also demonstrates that concerns that have been expressed in relation to these remedies do not represent a sound basis for rejecting the reforms, as such concerns will be factored into judicial decision-making on a case-by-case basis. **[41]-[79]**

WHY REFORM IS JUSTIFIED: REITERATING REMEDIAL DISCRETION

[9] The reforms are highly significant, and to be welcomed, because they make clear that courts on judicial review have a *choice* as to the remedial consequences that follow from a finding of unlawfulness. Specifically the reforms make clear that a court may choose between (i) voidness ab initio/nullity, which involves immediately voiding an impugned act with retrospective effect; (ii) suspended quashing, which postpones nullification to a future date;

and (iii) prospective quashing, which involves removing or limiting any retrospective effect of nullification. Exercise of this remedial discretion is to be guided by enumerated factors.

Judicial Review Remedies Are Discretionary

[10] In providing for this framework the reforms reassert and reiterate the traditional remedial discretion on review, and that remedial consequences should be the product of reasoned deliberation in light of relevant considerations. As such, the reforms effectuate IRAL's preferred view of remedies: '[t]he better route … is to give courts the freedom to decide whether or not to treat an unlawful exercise of power as having been null and void ab initio'.[1]

[11] The reforms are prompted by a series of Supreme Court decisions over the last decade, including *Ahmed*, *UNISON*, and *Miller II*, in which the Court has asserted that legal errors, or certain types of error, invariably lead to nullity.[2] In other words the Court has acted as if it has no remedial discretion.

[12] This is striking as these cases have features which would ordinarily lead not only to consideration of remedial discretion, but exercise of that discretion to avoid or mitigate the consequences of nullity. For example in *UNISON* an entire system of tribunal fees was struck down with retrospective effect. There was no consideration of the fact that retrospective invalidation would result in a legal black hole, likely cause huge administrative instability, that it would take time for government to promulgate a new scheme, and that government would be exposed to significant restitutionary liability.

[13] Yet it is clear that courts have wide discretion to modulate the remedial consequences of a finding of unlawfulness as recognised by IRAL – remedies are 'fundamentally discretionary'[3] – and by the courts.[4] This discretion can be exercised to refuse relief entirely,[5] there is scope to impose terms and conditions and allow for variation of relief[6] – and there is authority for prospective-only and suspended invalidation, as discussed below (at [30]-[34]). Indeed, Lord Carnwath has suggested that had he sat in *Unison* he might have called for submissions on the possibility of suspending invalidation to allow time for the consequences of the judgment to be worked out and to promote certainty, until a new acceptable scheme was put in place.[7]

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[1] IRAL [3.64].
[2] *HM Treasury v Ahmed (No 2)* [2010] UKSC 5; *R (Unison) v Lord Chancellor* [2017] UKSC 51; *R (Miller) v Prime Minister* [2019] UKSC 41.
[3] IRAL [3.60].
[4] *Walton v Scottish Ministers* [2012] UKSC 44; *R (Champion) v North Norfolk District Council* [2015] UKSC 52, [55]-[61]; *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [61]; *Moseley v London Borough of Haringey* [2014] UKSC 56, [33].
[5] *R v Monopolies and Mergers Commission, ex p Argyll Group Plc* [1986] 1 WLR 763, 774-775; *R (Hurley and Moore) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201, [99].
[6] *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28, [35]; *Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment (Trinidad and Tobago* [2017] UKPC 37, [53].
[7] Lord Carnwath, 'Where Next for Judicial Review? Some Lessons from Eight Years in the Supreme Court' [2021] JR 321, [43].

[14] Even leading scholars who normatively favour a strict approach to remedial consequences acknowledge that albeit unlawfulness may generally lead to nullity, that consequence can be negatived or modulated through discretion.[8] And even judges who have made strong statements that it will be a rare case where discretion is exercised to withhold relief nevertheless accept there is such discretion.[9] This is supported by judicial practice: 'there are plenty of examples of cases' where unlawfulness 'does not lead to an ineluctable conclusion' of nullity.[10]

[15] There are good reasons for remedial flexibility. Remedial discretion provides an outlet for courts to consider the ramifications of remedial outcomes. A consequence such as nullity may cause serious prejudice to vital public interests and third parties, cause administrative upheaval, and undermine certainty and finality. Along with other discretions built into the machinery of review, such as those going to permission, standing, disclosure and oral evidence, remedial discretion 'may be important in maintaining the overall balance of public interest in appropriate cases'.[11]

[16] Of course, nullification of unlawful action serves to strongly uphold the principle of government under law, and the normative force of legal constraints. But this is not the only way to vindicate legality; for example, suspended quashing would uphold the rule of law, as such orders will be premised on an explicit finding of unlawfulness and the impugned act would ultimately be voided. In any case legality is not the only game in town. Review would soon lose its legitimacy if it were dogmatically focused on legality to the exclusion of all other interests or became detached from ordinary practicalities.

The Supreme Court's Blunt Remedial Approach

[17] And herein lies the problem with the line of Supreme Court decisions which treat voidness ab initio as automatic and inevitable. The approach inexplicably ignores remedial discretion. And it is a blunt approach which makes no allowance for the practical consequences of invalidation for important public and other interests.

[18] In *Unison*, *Miller II* and *EU (Legal Continuity) Bill*[12] the Court sought to rest remedial consequences on an asserted distinction between legal errors going to the scope of power, and legal errors going to exercise of power. The distinction seemingly contradicts the post-*Anisminic* idea of a single category of legal errors.[13] Indeed one could be forgiven for thinking that the distinction is a re-animated version of the distinction between jurisdictional and non-jurisdictional errors, which *Anisminic* is taken to have interred. That distinction was laid to rest for good reason: it was wholly uncertain and easily manipulable. The scope/exercise distinction has the same problems. In cases such as *Unison* and *Miller II* the legal error is presented as one of scope, resulting in nullity. But in both cases the Court's

[8] Wade and Forsyth, *Administrative Law*, 11 ed (OUP) 249-250.
[9] *Berkeley v Secretary of State For The Environment* [2001] 2 AC 603, 608, 616.
[10] IRAL [3.60].
[11] *Walton* supra [103].
[12] *The UK Withdrawal from The European Union (Legal Continuity) (Scotland)* [2018] UKSC 64.
[13] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

whole inquiry revolved around the qualities of the given exercise of powers – in *Miller II* the Court asked whether the Prime Minister's advice had a reasonable justification and in *Unison* the Court asked whether the fees regime was a proportionate interference with access to tribunals.[14] The mode of legal inquiry smacks of substantive review – which according to the Court goes to exercise of power – but the Court semantically framed the given errors as going to scope, so that nullity indubitably followed.

[19] In any case, the distinction does not suggest a rational basis for organising remedies. An error categorised as going to scope could be very minor or technical, yet it would inevitably lead to nullity, notwithstanding the practical consequences of such an outcome. Whereas unlawfulness going to exercise could involve patent unreasonableness, yet voidness would not automatically follow.

Re-asserting Remedial Flexibility

[20] The better approach is one based in the courts' longstanding remedial discretion, as envisioned by the Bill and IRAL. Review remedies should be determined on the basis of good reasons, not manipulation of an uncertain conceptual division of questionable normative significance. As Lord Carnwath observed in *Privacy International*, a 'flexible', 'pragmatic and principled' approach is to be preferred to 'elusive concepts [such] as jurisdiction (wide or narrow), ultra vires, or nullity'.[15]

[21] The reforms reinforce flexibility by providing that courts have discretion whether to suspend the consequence of nullity, and to modulate any retrospective effects of nullity. The Bill also provides for relief to be given on terms (subs 2). By providing explicitly for discretionary factors (subs 8) the Bill reiterates that remedies ought to rest on reasoned decision-making calibrated to the facts of the case, which accounts for important interests such as good administration. This framework will ensure consistency of principle, and militate against remedial principles being reinvented from one case to the next. The transparent articulation of factors and the imperative that these factors 'must' be taken into account militates against cherry-picking of factors; a court must work through the prescribed factors. The statement of factors affords fair warning to litigants, in a clear and transparent way, as to those concerns that will shape remedial decision-making.

[22] Importantly, this framework can provide a more general and much needed blueprint for a coherent and consistent approach to judicial review remedies, helping to bring order to an unruly remedial jurisprudence. While remedial decision-making in fields such as equity is characterised by well-known and well-defined discretionary principles, which provide reasonable certainty and predictability, the judicial review case law on remedies is chaotic. This is partly due to the field being characterised by conflicting statements of principle, and thus the lack of a clear and consistently-applied framework. And it is in part due to a general judicial neglect of remedies. Remedial consequences are typically addressed in a few sentences at the end of a judgment, or not addressed at all. In terms of remedial discretion,

[14] JNE Varuhas, 'The Principle of Legality' [2020] 79 CLJ 578, 606-613.
[15] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [128]-[132].

one must go back to the 1980s to find serious judicial attempts to articulate a framework of principle.[16]

[23] Some argue remedial flexibility will encourage courts to expand the grounds of review, in the knowledge they can modulate the consequences of unlawfulness through discretion. But it is clear the courts already have remedial discretion. The problem is that the Supreme Court has completely ignored its discretion. And yet the Court has significantly expanded the grounds of review anyway, including in ways that challenge the supervisory conception of review.[17]

[24] As such the reforms could play a fundamental role in reasserting remedial discretion as an important counter-balance to the expansionary phase of judicial legal development over the last few years.[18]

The Supreme Court's New Support of Remedial Flexibility

[25] The strength of the foregoing argument for remedial flexibility is reinforced by two very recent Supreme Court decisions. These cases signal a striking change of direction for the Court. In *Majera* Lord Reed stressed that unlawfulness does not necessarily result in nullity, that the practical consequences of remedial choices require a flexible approach which accounts for important public interests, and that discretion may be used to modulate the effects of nullity.[19] In *TN* the Court held that albeit an entire administrative system was unlawful, it did not follow that the large cohort of administrative decisions made pursuant to that system were unlawful: re-opening all of those decisions would undermine certainty and finality.[20] This is an example of a court limiting the retrospective remedial effects of a finding of unlawfulness (which is what is envisioned by subs 1(b)).

[26] The Supreme Court's recent turn away from the strictures of the approach that has characterised its jurisprudence and recognition of the importance of remedial discretion reinforces the case for a remedial scheme that institutionalises remedial flexibility. The reforms contained in the Bill will, if passed, provide an endorsement of this changed approach and ensure it 'sticks', equip the courts with the remedial tools necessary to effectuate such approach, and enact a concrete framework for the principled development of the Court's jurisprudence along this new, promising trajectory.

THE PRESUMPTION

[27] In my view the presumption in subs 9 should be deleted, along with subs 10. First of all, the presumption is so weak as to be meaningless: it applies unless there is 'good reason' for it not to apply. And yet its inclusion could very well subvert the premise of reform – which is

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[16] See *Argyll* supra 774-775.

[17] See my submission to IRAL https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3884673 and see IRAL p130 [7].

[18] IRAL [3.50].

[19] *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46

[20] *R (TN (Vietnam)) v Secretary of State for the Home Department* [2021] UKSC 41.

to reiterate remedial flexibility, and thus that remedial decisions should be based on reasoned analysis of all relevant factors implicated on the facts. Instead of such approach the effect of subs 9 could be that litigants and courts start with and fixate on the tests in that clause, specifically the touchstone of 'adequate redress', to the exclusion of other factors, such as the public interest. 'Adequate redress' could in practice become the ultimate test for relief. Consider: how likely is it that a court will grant suspended or prospective relief when it has concluded such relief is inadequate? More generally a presumption makes little sense given the leitmotif of reform is flexibility. As the Bill's explanatory note states: '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'.[21]

SUSPENDED AND PROSPECTIVE ORDERS

[28] The Bill explicitly confers on courts powers to grant suspended and prospective quashing orders. A suspended order postpones nullification of an impugned administrative act until a future date, while a prospective order limits or removes any retrospective effect of nullification.

[29] This section makes two important points in regard to these orders. First, these types of remedies are not the dangerous novelties some portray them to be: there is authority supporting such relief at common law. Second, reform is nonetheless necessary to make clear such relief is available and that, if given, such orders shall be effective. The next section considers the types of cases in which suspended and prospective relief can play an important role, and thus when courts are likely to grant such relief.

Prospective and Suspended Relief are Known to the Common Law

[30] Neither remedy is novel.

[31] Prospective nullification is known to the common law. Within the much-debated void/voidable division – which was thought by some to map on to the old division between jurisdictional and non-jurisdictional errors – where an unlawful administrative act was merely voidable, and the court exercised its power to void the act, that consequence would only operate prospectively, so anything that had been done pursuant to the impugned act would 'remain good'.[22] In terms of more recent jurisprudence, it would seem the corollary of the Supreme Court holding that errors going to scope are automatically void ab initio, is that errors going to exercise are voidable.

[32] Thus, the reforms, in providing for prospective-only relief, do not introduce a foreign concept, but rather make the choice between nullity and prospective-only quashing depend on reasoned consideration of relevant factors, rather than dubious conceptual distinctions. And indeed at common law there is precedent for reviewing courts utilising remedial

[21] Judicial Review and Courts Bill Explanatory Notes at [21].
[22] *R v Paddington Valuation Officer, ex parte Peachey Property Corporation Ltd* [1966] QB 380, 402-403; *DPP v Head* [1959] AC 83, 111-112.

discretion to limit retrospective effects. Lord Phillips in *Mossell* said: 'There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others'.[23] Tellingly, this passage is quoted with apparent approval in the recent Supreme Court decision in *Majera*.[24] Prospective-only relief has also been a characteristic feature of the remedial approach in the context of judicial review of financial regulation, as discussed below.[25]

[33] There is less authority in relation to suspended orders, but there is authority nonetheless. *Peachey* concerned a challenge to the legality of a valuation list.[26] A majority of the Court of Appeal considered that if the list were unlawful, the defendant should be mandated to produce a new list. In addition the majority considered it was within the court's discretion to hold that the old list, if unlawful, would remain valid while the new list was developed, and quashed upon adoption of the new list. Thus, 'certiorari could be postponed'.[27] The case demonstrates that the idea of suspended quashing is not foreign to the common law.

[34] There is now statutory precedent for suspended relief in s 102 of the Scotland Act 1998. And there are also instances where mandamus and prohibition have been suspended.[28] And there are examples of suspended nullification in comparative jurisprudence. Australian courts have held administrative action will be set aside by a given date if certain steps are not taken by the defendant, and there are examples of courts effectively suspending nullification by temporarily staying the court's orders.[29]

Cumulative Use of Suspended and Prospective Quashing

[35] *Peachey* also demonstrates that suspended and prospective-only quashing should not necessarily be seen as alternatives. Lord Denning MR considered certiorari could be suspended, to afford government time to formulate a new list, and that when the old list was ultimately invalidated, this would operate prospectively only, to avoid chaos that would otherwise be caused by retrospective invalidation.[30]

[36] A similar approach was taken in the Privy Council case of *Fishermen*.[31] The Board ordered the defendant to promulgate a new fees-system and the Board's orders were without prejudice to the validity of anything done or fees collected under the unlawful scheme, and

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[23] *Mossell (Jamaica) Ltd (t/a Digicel) v Office of Utilities Regulations* [2010] UKPC 1, [44]; *R (British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 2041 (Admin) [12]-[21].
[24] *Majera* supra [31], and see [37]-[42].
[25] See [68] below.
[26] *Peachey* supra.
[27] Ibid 418.
[28] *R v Hereford Corp, ex p Harrower* [1970] 1 WLR 1424; *R v Greater London Council, ex p Blackburn* [1976] 1 WLR 550.
[29] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 363; *Applicants A1 & A2 v Brouwer* [2007] VSCA 139, [95].
[30] *Peachey* supra 401-403.
[31] *Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment* [2017] UKPC 37, [53].

to its continued operation until the new scheme took effect. Thus, the remedial package involved *both* suspended and prospective-only invalidation.

[37] These examples are pertinent because as presently drafted subs 1(a) of the Bill may suggest suspended and prospective relief are alternatives, given the use of 'or' at the end of that clause. Yet it is not the Government's intention to so limit remedial flexibility.[32] Thus, an amendment is needed to make crystal clear that suspended and prospective quashing may be used cumulatively.

Why Statutory Provision for Suspended and Prospective Relief is Necessary

[38] Despite there being precedent supporting both suspended and prospective-only quashing, the reforms are necessary to put beyond doubt that such remedies are (i) available; and (ii) effective.

[39] In terms of (i) the reforms are necessitated by recent Supreme Court decisions presenting nullity as an inevitable consequence which the courts are powerless to avert. Subs 1, by providing for suspended and prospective quashing, along with subs 8 which enumerates the discretionary factors, reasserts that there is discretionary choice as to remedial outcomes.

[40] In terms of (ii) subs 3-5 make clear that suspended quashing orders will be effective to suspend invalidation, and that prospective orders will be effective in limiting or removing any retrospective effects of nullification. These provisions are important given the reasoning in cases such as *Ahmed*,[33] which suggests that where an administrative act is a nullity, a quashing order is irrelevant because there is not and never was an administrative act to be quashed – the impugned act never existed in law.[34] The Bill responds to such reasoning by providing that in the case of a suspended order the impugned administrative act will be 'upheld' – that is, treated as valid and unimpaired by the given legal defect – until the date prescribed in the order. The Bill thus renders such orders effective to suspend invalidation. The Bill similarly provides that where an order removes or limits any retrospective effect of nullification, the impugned act shall be upheld to the extent the retrospective effect of quashing is removed or limited.

GRANT OF SUSPENDED AND PROSPECTIVE RELIEF: DISCRETIONARY FACTORS

[41] This section considers when suspended and prospective relief are likely to be granted by a court, and the types of considerations that will factor into whether a court decides to grant or withhold such relief

[42] The analysis demonstrates that suspended and prospective relief can play an important role in upholding and protecting important interests and principles. The analysis also re-

[32] Judicial Review and Courts Bill Explanatory Notes at [86], [89].
[33] *Ahmed (No 2)* supra.
[34] For an example of ongoing uncertainty in relation to suspended relief see: *R (D4) v Secretary of State for the Home Department* [2021] EWHC 2179 (Admin).

emphasises that grant of such relief will depend ultimately on the balance of considerations on the facts of the case. This reinforces the centrality of subs 8 in the proposed statutory scheme, which enumerates factors courts must consider in making remedial decisions. The analysis also demonstrates that while suspended and prospective relief can give rise to concerns, these can be accounted for by a court in its exercise of discretion, and the way orders are drafted.

[43] By demonstrating that suspended and prospective relief are only relevant to a subset of cases, the analysis also reinforces that the presumption in subs 9 is unjustified. It is irrational to enact a presumption of general application when the presumed relief will not be relevant in the generality of cases.

Suspended Quashing Orders

[44] A suspended quashing order postpones nullification of an unlawful act to a future date, typically to allow government time to respond to the judgment. Such relief can play an important role in certain classes of case, such as those raising constitutional matters or where invalidation would create a legal black hole.

[45] It is notable that provision for suspended orders will make it relatively less likely a court will have recourse to prospective-only relief or refuse relief altogether, remedial responses which raise rule-of-law concerns. Factors such as prejudice to the public interest or good administration have grounded such remedial responses in the past. But in some cases it may be possible to accommodate such concerns by affording government time to react. It follows there would then be no reason not to ultimately invalidate the impugned act.

[46] Thus, suspended relief will ensure some relief, which serves to vindicate the principle of government under law, in circumstances where relief may otherwise have been refused.[35]

i. Constitutional matters

[47] One of IRAL's core reasons for recommending suspended relief, was that such orders could play an important role in prompting parliamentary involvement in matters of high constitutional importance.[36] IRAL observed that some of the concerns that attended cases such as *Evans*,[37] *Unison* and *Miller II*, 'would have been substantially allayed had the remedy in those cases consisted of a suspended quashing order'.[38] What unites these cases is that they form part of a trend by which the Supreme Court has begun to identify 'constitutional' norms, and define – and thus limit – the scope of legislative and prerogative powers by reference to these norms.[39]

[48] This emergent practice is controversial. First, it is questionable whether it is for courts to decide what rights or values are constitutive of the polity; given judges disagree about which values are fundamental, members of society are likely to as well, so that the fairest

[35] *Peachey* supra 418; IRAL [3.53]-[3.54].
[36] IRAL [3.64].
[37] *R (Evans) v Attorney General* [2015] UKSC 21.
[38] IRAL [3.50].
[39] JNE Varuhas, 'The Principle of Legality' [2020] 79 CLJ 578.

and most respectful way to resolve these disagreements is through open, democratic processes. Second, as IRAL observed,[40] the jurisprudence on constitutional norms does not seem to rest on any determinate or intelligible principle; for example, why is access to tribunals a constitutional right, but not the right to life?[41] Third, in terms of statutory powers, important decisions such as *Evans* and *Unison* raise questions as to whether courts are giving effect to or subverting parliamentary intention.[42]

[49] The corollary of these concerns is that in constitutional cases it is legitimate and desirable for Parliament to make its voice heard. First, Parliament, given its democratic legitimacy, ought to play an active, and indeed the principal role, in determining what values are fundamental to British society. Second, the involvement of Parliament (with the advice of its committees, such as the Lords Constitution Committee)[43] could provide a much-needed steer to the courts as to which norms are properly characterised as constitutional, on what basis, and what the ramifications of such classification are. Third, where legislation touches on fundamentals and there are questions over what Parliament intends, Parliament should be prompted to clarify its intention.

[50] Thus, in a case of constitutional significance, government could undertake to put the matter before Parliament within a given timeframe (undertakings are relevant factors under subs 8(e)), and the court could order that the impugned administrative act will be invalidated by a given date, unless Parliament legislates otherwise.

ii. Good administration

[51] Immediate invalidation of regulations or policies, as general measures, could create a legal black hole, leaving entire fields of activity unregulated, and thus creating significant uncertainty and instability within administrative systems. Not only this but such a blunt remedial response could undermine good policy-making going forward and be counterproductive in terms of engendering lawful government action. Immediate nullification will leave government scrambling to put together a new regulatory scheme, including transitionary arrangements, in slapdash fashion in complex policy fields. Because government may not have time to fully unpack the implications of the court's judgment, the result might very well be a new scheme once again tainted by unlawfulness.

[52] Thus, it is unsurprising courts have contemplated suspended relief specifically in cases of general measures.[44] A suspended order could provide for example that the impugned measure will be rendered invalid in three months, to allow government time to bring forward a replacement scheme.

[53] In other cases government may be able to easily cure an identified defect, such as a procedural error, so that it would be disproportionate to invalidate the impugned measure,

[40] IRAL [3.29]-[3.34].
[41] Compare: *Unison* supra and *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10.
[42] Note: IRAL [3.52].
[43] IRAL recommended the Constitution Committee could play an important role in helping to determine what constitutes a constitutional right, value or principle: IRAL [3.34].
[44] eg *Peachey* supra 401-403; *Fishermen* supra [53].

especially where this would cause severe administrative disruption.[45] Here the order would provide that the impugned act will be invalidated by date X, unless the defect is cured by that date. This way administrative practice is brought into compliance with legal norms, and administrative disruption is avoided.

[54] Good administration concerns are brought into consideration by subs 8(b), and are an established feature of discretion at common law.[46]

iii. Public interest

[55] Suspended relief might be justified where instantaneous nullification could seriously harm the public interest. Consider a case where terrorist asset freezing orders are held unlawful. Immediate invalidation could leave assets available for nefarious ends, potentially prejudicing national security and public safety. Consider also a situation where a large infrastructure project is initiated on the basis of a flawed process. Unwinding the project could render expended resources wasted, undermine the confidence of commercial partners, expose government to significant contractual liability, and the expected economic gains associated with the project could be squandered.[47] Suspended relief could allow government the opportunity to avoid these consequences, for example by curing the procedural defect if possible, or proposing legislation.

[56] Surprisingly, the public interest does not find explicit recognition in subs 8, as presently drafted. This is a significant omission. The factor is plainly relevant to suspended relief and well-established at common law.[48] The concept encompasses important principles such as certainty and finality,[49] which are plainly relevant to prospective relief. Moreover the public interest has been neglected in important cases concerning remedies, such as *Ahmed*, despite nullification potentially prejudicing important public interests such as national security.[50] The reforms provide an opportunity to reassert the factor's salience.

iv. Gravity of unlawfulness

[57] Even if, on given facts, there are factors favouring suspended relief, the gravity of the unlawfulness, which includes consideration of whether the impugned acts were deliberately or recklessly unlawful, may warrant immediate nullification, to reinforce the importance of legal constraints. The corollary is that in cases of 'substantial compliance' or where a breach is technical/minor or made in good faith,[51] and there are reasons supporting suspended relief, such relief is likely to be given.

[58] The qualities of the unlawful act are rendered salient by subs 8(a), which directs attention to 'the nature and circumstances of the relevant defect'. The clause would be clearer if it referred to the seriousness or gravity of the defect or unlawfulness; this drafting coheres

[45] IRAL [3.64].
[46] *Argyll* supra 774-775.
[47] *Walton* supra [104]-[105], [114].
[48] *Walton* supra [103], *Argyll supra* 774-775.
[49] *TN* supra [58]; *Majera* supra [32].
[50] *Ahmed (No 2)* supra.
[51] *Argyll* supra 774-775; *Hurley* supra [99]; *Berkeley* supra 616; *Champion* supra [58].

more closely with the provision's intended meaning.[52] The 'circumstances of the relevant defect' is a rather ambiguous phrase. If it simply refers to the factual circumstances it is otiose. Subs 8 is concerned to pick out those particular aspects of the circumstances which are legally salient, to provide guidance to courts and parties.

v. Individual protection (and compensation?)

[59] At common law it is well-established that one factor relevant to remedial discretion is 'the legitimate interests of individual citizens'.[53] This factor finds reflection in subs 8(c).

[60] First, if a person's private law rights, or HRA rights, are subject to ongoing unlawful interference, it is wholly unlikely a court would suspend relief. Thus, if a person were being held in immigration detention unlawfully, the court would be expected to order their release at once as the right to liberty is at stake.

[61] Second, courts have considered individual hardship in exercising remedial discretion.[54] Hardship could tell against postponing relief, such as where this would prolong the unlawful withholding of a welfare payment. Alternatively, the hardship factor could favour suspended relief. If a court finds that a pub's alcohol licence was unlawfully renewed, invalidation could be suspended while the decision-maker reconsiders the matter, so as to avoid the pub having to cease operations in the interim.

[62] Third, some have argued that the Bill should be amended to provide for administrative compensation.[55] Compensation would be relevant to the hardship factor: individual prejudice as a factor telling against suspended (or prospective) relief could be neutralised if the individual is compensated for any prejudice they suffer by suspended quashing. Such compensation would also be relevant to the assessment of 'adequate relief' in subs 9 (and see subs 10), if that clause is retained.

[63] Administrative compensation is a fraught issue, as illustrated by the Law Commission's ill-fated project on that topic.[56] In my view, the issue's complexity means a Bill on quashing orders is not the place for it to be considered, especially at this late stage in the reform process. And it is unnecessary because government can undertake to make an ex gratia payment to a claimant (and their class), and this would be a relevant consideration under subs 8(e). Reviewing courts have been willing to take account of such monetary 'accommodations'.[57] Further, if the common law has a tradition of administrative compensation it is one based in ex gratia payments.[58] As such, statutory provision for

[52] Judicial Review and Courts Bill Explanatory Notes at [92].
[53] *Argyll supra* 774-775
[54] eg *R v Dairy Produce Quota Tribunal for England and Wales, ex p Caswell* [1990] AC 738, 749-750.
[55] J Morgan, 'IRAL's Missing Remedy: Compensation for Unlawfulness', UK Const L Blog (12th October 2021) (available at https://ukconstitutionallaw.org/).
[56] Administrative Redress: Public Bodies and the Citizen https://www.lawcom.gov.uk/project/administrative-redress-public-bodies-and-the-citizen/
[57] *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, [82]; *R (Bibi) v London Borough of Newham* [2002] 1 WLR 237, [56].
[58] C Harlow, 'Rationalising Administrative Compensation' [2010] PL 321.

administrative compensation would represent a radical change. In any case, in many, if not all judicial review cases, more will be at stake than the claimant's pecuniary interests.

vi. Continuous supervision

[64] One risk associated with suspended relief is that it could give rise to what is known in equity as the problem of 'continuous supervision'.[59] That is, courts may be drawn into micro-managing the defendant towards compliance. This phenomenon is problematic generally but in public law the issues are exacerbated because it is not the court's role within a supervisory jurisdiction to 'monitor, regulate or police the performance [of] statutory functions on a continuing basis'.[60] Recent 'litigation sagas' illustrate the danger of courts being drawn into the policy creation process almost as active participants. Consider the slew of *ClientEarth* challenges to various iterations of the air quality plan, including drafts.[61]

[65] Where an order simply provides that invalidation will be postponed until a given date, no issue of continuous supervision arises, because the date provides a clear, final cut-off. But the problem could arise where conditions are attached. For example, an order could state that an impugned regulation shall be invalidated on a given date, unless an environmental impact assessment is undertaken. The defendant may carry out an assessment, but the claimant may launch proceedings disputing whether the assessment addressed all relevant risks.

[66] All of this is to say, courts will need to consider the potential for continuous supervision in deciding whether to grant suspended relief and in drafting orders. In particular, concerns over continuous supervision can be addressed through clear and precise drafting of orders.

Prospective Quashing Orders

i. When might prospective relief be justified?

[67] The best guide as to the types of cases in which prospective relief can play a useful role are those cases where such relief has been given at common law.

[68] Prospective relief has featured prominently in the context of financial regulation. In *Datafin* the Court of Appeal held that relief would typically be prospective in relation to certain types of regulatory decisions, given the importance of certainty in regulated markets; third parties may have relied on and entered transactions on the basis of impugned acts; and market actors should not be kept in suspense as to the validity of regulatory acts: finality and decisiveness are to be prioritised in the financial setting.[62] Thus, the role of remedies would be educative, identifying past errors so lessons could be learned moving forward.

[59] *Co-operative Insurance Society Ltd v Argyll Stores* [1998] AC 1.
[60] *R(P)* [2004] EWHC 2027 (Admin) [32]-[33], [39].
[61] eg *ClientEarth* [2013] UKSC 25; [2015] UKSC 28; [2016] EWHC 2740; [2016] EWHC 3613; [2017] EWHC 1966; [2018] EWHC 398; [2018] EWHC 315.
[62] *R v Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] QB 815, 840-842. And see also: *Argyll* supra 774-775.

[69] More generally third-party reliance (see subs 8(d)) is a recurring theme in cases where courts have favoured prospective relief or refusal of relief.[63] In this connection, the case for prospective quashing will be strengthened where a claimant has unduly delayed in initiating proceedings; the more time that has passed since enactment of a measure, the more likely third parties will have formed expectations on the basis of it, and the greater the prejudice that may be caused by retrospective quashing.[64]

[70] The Bill also provides the flexibility to modulate the retrospective effects of invalidation: subs 1 refers to 'removing' *or* 'limiting' retrospective effects. This is important when it comes to the 'domino' problem. Consider a case such as *TN* where many individual decisions were made over a significant time-period pursuant to a decision-procedure that was subsequently found unlawful.[65] This finding could in principle have the effect that all individual decisions are automatically invalidated. But this may undermine certainty and finality, prejudice the expectations of those who have relied on the decisions, undermine confidence in public administration, and impose significant administrative burdens, as past cases are thrown open. As such a court could invalidate the decision-procedure while saving the pre-existing decisions. As *TN* recognises, individual decisions could still be challenged on other grounds.

[71] The situation of an unlawful system is also a good example where suspended and prospective relief might be usefully combined.[66] Invalidation could be suspended to avoid a legal black hole, and allow government time to promulgate a new system. The court could also provide that when the old system is ultimately invalidated, this is without prejudice to the validity of individual decisions.

ii. Concerns raised by prospective orders

[72] Prospective relief does raise rule-of-law concerns, as it involves treating the past effects of unlawful administrative action as permanently valid. These concerns will undoubtedly be accounted for in judicial practice: courts will take a cautious approach to grant of such relief.

[73] A second concern is that prospective relief might rob the claimant of the fruits of their victory. This issue can however be addressed by the court including a carve-out in its order, so as to alleviate any effects of unlawfulness in the claimant's case. This could be justified on the basis that the claimant took the risk of litigation, and should thus reap the reward, and that they have served the public interest by uncovering unlawfulness.

[74] A third concern is that prospective relief could rob individuals of otherwise good claims in private law, or good defences in criminal law. This would be a very serious consequence, affecting basic rights such as individual liberty. If a person is to be denied vested rights or a criminal defence, this should be on the basis of a clear democratic mandate in statute, not an exercise of judicial discretion.

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[63] *British Academy of Songwriters* supra [12]-[21]; *Hurley* supra [99]; *TN* supra [58].
[64] See Senior Courts Act 1981, s 31(6); *Caswell* supra 749-750.
[65] *TN* supra.
[66] *Peachey* supra 401-403; *Fishermen* supra [53]. See above at [35]-[37].

[75] Similarly, prospective quashing could result in denial of effective redress for victims of HRA violations. This would be a serious consequence given the fundamental nature of HRA rights, and the demands of Article 13 ECHR, which requires that effective remedies be given for rights-violations.

[76] The foregoing matters would be considered by a court pursuant to subs 8(c), which addresses individual interests. Where such serious consequences for individuals would follow it is unlikely courts would grant prospective relief, or they would likely frame the court's order so that it is without prejudice to otherwise good private law claims and criminal law defences. Even if a court considered exceptionally that there might be a case for prospective relief despite the effects on private law claims or criminal proceedings, it would, under subs 1(a), have the option of granting suspended relief instead so as to prompt Parliament to make the call.

[77] But ultimately I consider there is a case for amending the Bill to explicitly rule out prospective relief which would rob individuals of otherwise good private law claims or defences in criminal law, or effective redress for HRA violations (or at the least there should be a default setting that prospective relief does not have these effects, unless there is an overwhelming justification).[67]

[78] Notably, while IRAL did not address prospective orders, it went out of its way to stress that any new remedial regime should not prejudice such collateral challenges.[68]

[79] Lastly, in a case of serious unlawfulness a court would likely refuse prospective-only relief. The dominant concern in such a case would be strong vindication of legal norms – to be achieved by immediate retrospective nullification.

[67] See similarly, T Hickman, 'Quashing Orders and the Judicial Review and Courts Act', UK Const L Blog (26 July 2021) (available at https://ukconstitutionallaw.org/).
[68] IRAL [3.65]-[3.67].