Response from the Faculty of Advocates
To the
Independent Review of Administrative Law

---

1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

1.1. There is an overarching premise embedded in the questions to be posed to government departments to the effect that the discharge of central or local government functions is impeded by decision makers having to have regard to the law and that it is open to the executive and the legislature to seek to 'rebalance' that issue by preventing or restricting, through legislation, the recourse of citizens to the courts. We profoundly disagree with such premise.

1.2. It is recognised, of course, that good administration entails a general expectation of finality in administrative decision-making. When viewed through the eyes of a decision-maker, the bringing of judicial review proceedings is bound to be an "impediment" to the extent that ongoing administration may be inconvenienced by the need to reflect upon, and potentially revisit, past decisions. It is precisely for this reason, however, that decision-makers do not enjoy the privilege of insulating themselves against criticism. There is no serious basis in a modern democracy for the view that public bodies and government authorities are entitled to operate without accountability for material mistakes of law or fact in their actions (or inactions). Such a consideration betrays a misunderstanding of the rule of law and runs contrary to the fundamental principles of democracy. It is undoubtedly true that the 'rule of law' does not mean the rule of lawyers or courts.

1.3. As has been noted by Lord Drummond Young in *Cherry & Ors v Advocate General for Scotland* [2019] CSIH 49, 2020 SC 37 at paras 100-1:

> "The rule of law
>
> [100] The importance of the rule of law should be self-evident: a system of democratic government that pays proper respect to the rights of citizens must be based on a system of rules, and those rules must be properly interpreted and consistently applied. Otherwise government is liable to descend into tyranny or anarchy. The doctrine of the sovereignty of Parliament emerged from the constitutional conflicts of the seventeenth century, and in particular from the settlement effected by the Revolution of 1688–90.
>
> The principle was recognised in various statutes that followed the Revolution, notably the Claim of Right Act 1689 (c 28) in Scotland, the Bill of Rights 1688 (1 Will & Mar Sess 2 cap 2) and the Act of Settlement 1700 (12 & 13Will 3 cap 2) in England and Wales, and the Acts of Union of

1706 (6 Ann cap 11) and 1707 (c 7) in England and Wales and in Scotland respectively. Central to the Revolution settlement, however, was the principle of the rule of law.

Thus the introductory clause of the Claim of Right Act refers to King James VII's invading the fundamental constitution of the kingdom, altering it from 'a legall limited monarchy to ane Arbitrary Despotick power', and asserting an absolute power to annul and disable laws. The Bill of Rights likewise refers to the King's assuming and exercising a power of dispensing with and suspending laws without the consent of Parliament. Those two statutes reflect the fact that the rule of law is fundamental to the constitutional system of the United Kingdom.

[101] The maintenance of the rule of law — determining what the law is and ensuring that it is consistently applied and if necessary enforced — is a primary function of the judiciary. That is a task that must obviously be carried out with scrupulous impartiality and objectivity. Judicial independence is central to that function. The executive cannot be judge of its own powers; independent courts must be able to consider the exercise of those powers in order to determine whether such exercise is or is not *intra vires*."

1.4. In proclaiming itself to be a democracy – and therefore a polity based on respect for fundamental human rights – the United Kingdom constitution necessarily commits all three pillars of government to what may paradoxically be termed an anti-populist vision of democracy. Democracy involves more than the minimum procedural rights of the right to vote, to elect and be elected. In addition to these formal procedural democratic rights the claim is made that the authorities in a democratic state have an obligation to protect and proclaim the value of human life, and to provide the conditions for each individual's flourishing, even in the case where a majority of the people may favour the deprivation or attenuation of rights for unpopular minorities. It is the duty of the state authorities, especially in democratic systems, to stand up for and protect fundamental rights, often against majority opinion.

1.5. This anti-populist democratic ideal requires high standards of decision-making within government, which must respect the demands of proportionality, reasons and fairness. It promotes the virtue of tolerance. It is capable, also, of making the democratic process more vigorous, by a heightened insistence on freedom of speech and associated political freedoms.

1.6. The questions posed by this IRAL call for evidence seem instead to seek to further a new constitutional programme - the aims of which are to free government from the *legal* restraints properly imposed upon it by being called to answer before the courts to defend the lawfulness of its actions (whether alleged to be in breach of international or domestic law standards).

1.7. The questions focus on the supposed negative side-effects of judicial review, rather than on the actual negative effects of unlawful government action, in respect of which it is the role of judicial review to provide a mechanism of holding a government (or other public body) legally to account. The prospect of being held responsible for one's decision making is an imperative to have regard more generally to the consequences of the decision and the propriety of the process by which it is made. Decision making in the absence of regard to such considerations would not, in fact, lead to effective governance of any kind. Instead, it would lead to impunity for decision makers, and the public would be stuck with bad decisions without any legal way of having them reconsidered.

1.8. Something which appears to be entirely lost in the premise behind the questions posed to government departments is the idea – which is, certainly, a significant factor in judicial review in Scotland – that the court is *not* substituting itself for the decision maker. Judicial review is a review of the procedure whereby the decision was reached, and that is all. If there is found to have been an issue, the court will remit the decision to the decision maker for it to be remade in accordance with the appropriate procedure, and having regard to all (and only) relevant factors. The remedy is, almost invariably, confined to demanding that a public body carries out its functions in a lawful manner. It is, therefore, both illogical and offensive to the concept of liberal democracy to suggest that a requirement to carry out government functions lawfully may 'seriously impede' the functioning of government, or that such an imagined impediment could be a relevant consideration in determining the scope of the right to hold the executive accountable through the courts. There is no entitlement to govern unlawfully.

1.9. What we may take from the line of constitutional case law which led up to, and culminated in, the UKSC decision in *Cherry/Miller* is the following: what is fundamental to our present day UK constitution is respect for, and the preservation of, a liberal constitutional Parliamentary representative democracy[1] in which the national executives in this Union State are accountable to the national legislatures from which they spring (and can exercise the power of government only so long as they maintain the confidence of the legislatures), and the legislatures are themselves accountable to the electorates whom they are entrusted to represent and serve.[2]

---

[1] In *AXA General Insurance Co Ltd v Lord Advocate* [2011] UKSC 46 Lord Reed observed at §§152-3:

> "152… Lord Steyn said in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 at p 591:
>
> > 'Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law.'
>
> 153 The nature and purpose of the Scotland Act appear to me to be consistent with the application of that principle. As Lord Rodger of Earlsferry said in *HM Advocate v R* [2004] 1 AC 462, §121, the Scotland Act is a major constitutional measure which altered the government of the United Kingdom; and his Lordship observed that it would seem surprising if it failed to provide effective public law remedies, since that would mark it out from other constitutional documents. In *Robinson v Secretary of State for Northern Ireland* [2002] NI 390, §11, Lord Bingham of Cornhill said of the Northern Ireland Act 1998 that its provisions should be interpreted 'bearing in mind the values which the constitutional provisions are intended to embody'. That is equally true of the Scotland Act.
>
> Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law…"

[2] As Lord Hope of Craighead noted in *R (Jackson) v Attorney General* [2006] 1 AC 262 at §§125-6 (emphasis added):

> "125 …In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality Dicey [*The Law of the Constitution*, 10th ed. (1959)] at p 3, likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the other. …
>
> 126 As Professor Hart, *The Concept of Law*, p 108, indicates, the categories which the law uses to identify what is law in these circumstances are too crude. There is a strong case for saying that the rule of recognition, which gives way to what people are prepared to recognise as law, is itself worth calling 'law' and for applying it accordingly.
>
> It must never be forgotten that *this rule, which is underpinned by what others have referred to as political reality, depends upon the legislature maintaining the trust of the electorate. In a democracy the need of the elected members to maintain this trust is a vitally important safeguard. The principle of parliamentary*

1.10. What the commitment to democracy and the rule of law also entails is that the common law constitutional principle asserting the sovereignty of the Crown in the Union Parliament[3] does not - and cannot compatibly with the preservation of the rule of law - mean acceptance of any kind of (Westminster) Parliamentary *absolutism*[4] such as was classically expounded and described by Dicey as the "despotism of the King in Parliament" which was "the one fundamental dogma of *English (sic)* constitutional law".[5] The accuracy of this view of the *UK* constitution was questioned

---

sovereignty which in the absence of higher authority, has been created by the common law is built upon the assumption that Parliament represents the people whom it exists to serve."

[3] See *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 at § 43:

> "Parliamentary sovereignty is *a* fundamental principle of the UK constitution … It was famously summarised by Professor Dicey as meaning that Parliament has
>
> > "the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament": *Introduction to the Study of the Law of the Constitution*, 8th ed (1915),p 38.
>
> The legislative power of the Crown is today exercisable only through Parliament. This power is initiated by the laying of a Bill containing a proposed law before Parliament, and the Bill can only become a statute if it is passed (often with amendments) by Parliament (which normally but not always means both Houses of Parliament) and is then formally assented to by HM The Queen. Thus, Parliament, or more precisely the Crown in Parliament, lays down the law through statutes - or primary legislation as it is also known - and not in any other way."

[4] In *R (Jackson) v Attorney General* [2006] 1 AC 262 Lord Hope observed (at page 303-4 **§§** 104, 106)**:**

> "Our [UK] 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 … [E]ven Dicey himself was prepared to recognise that the statesmen of 1707 believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws: *Thoughts on the Scottish Union*, pp 252-253, quoted by Lord President Cooper in *MacCormick v. Lord Advocate*, 1953 SC 396, 412. So here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality."

In *AXA General Insurance Co Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 Lord Hope noted at §50:

> "The question whether the principle of the sovereignty of the Union Parliament is absolute or may be subject to limitation in exceptional circumstances is still under discussion. For Lord Bingham, writing extra-judicially, the principle is fundamental and in his opinion, as the judges did not by themselves establish the principle, it was not open to them to change it: *The Rule of Law* (2010), p 167. Lord Neuberger of Abbotsbury, in his Lord Alexander of Weedon lecture, "Who are the masters Now?" (6 April 2011), said at § 73 that, although the judges had a vital role to play in protecting individuals against the abuses and excess of an increasingly powerful executive, the judges could not go against the will of Parliament as expressed through a statute. Lord Steyn on the other hand recalled at the outset of his speech in *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 §71, the warning that Lord Hailsham of St Marylebone gave in *The Dilemma of Democracy* (1978), p 126 about the dominance of a government elected with a large majority over Parliament. This process, he said, had continued and strengthened inexorably since Lord Hailsham warned of its dangers. This was the context in which he said in § 102 that the Supreme Court might have to consider whether judicial review or the ordinary role of the courts was a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons could not abolish."

[5] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982), 29 and 33:

> "A sovereign may wish to do many things which he either cannot do at all or can do only at great risk of serious resistance, and it is on many accounts worth observation that the exact point at which the external limitation begins to operate, that is, the point at which subjects will offer serious or insuperable resistance to the commands of a ruler whom they generally obey, is never fixed with precision.
>
> …

by the Lord President of the Court of Session, Lord Cooper of Culross, specifically for its incompatibility with the specifically Scottish constitutional tradition.[6] But even within the specifically English constitutional tradition, Blackstone speaks of "civil liberty" and of *popular* rather than Parliamentary sovereignty as foundations of the "British constitution" when discussing the constitutional limitations placed on the prerogative powers of the "king of England" (sic). He notes at the outset of Chapter 7 "Of the King's Prerogative" in Book 1 of his 1765-1769 *Commentaries on the Laws of England* that:

> "one of the principal bulwarks of *civil liberty, or (in other words) of the British constitution*, was the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, *without the consent of the people*, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, *subsists between the prince and the subject*." (emphasis added)

1.11. In a liberal constitutional democracy (such as the UK constitution undoubtedly commits the United Kingdom to be), an independent and impartial judiciary[7] is tasked with upholding the rule of law[8]

> It would be *rash* of the Imperial Parliament to abolish the Scotch Law Courts, and assimilate the law of Scotland to that of England. But no one can feel sure at what point Scotch resistance to such a change would become serious.
> …
> The one fundamental dogma of *English (sic) constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament. But this dogma is incompatible with the existence of a fundamental compact, the provisions of which control every authority existing under the constitution*.".

[6] See the passage from *MacCormick v. Lord Advocate*, 1953 SC 39 IH per Lord President Cooper which is set out in full at §4.3 below.

[7] In *R (Cart) v Upper Tribunal (Public Law Project intervening)* [2011] QB 120, Laws LJ in the Divisional Court observed (at §37) that it is a necessary corollary of the sovereignty of Parliament that there should exist an authoritative and independent body which can interpret and mediate legislation made by Parliament.

[8] See *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 [2019] 2 WLR 1219 per Lord Carnwath at §§ 120-1:

> "[O]f more recent origin, is the express statutory recognition of the 'rule of law' in section 1 of the Constitutional Reform Act 2005. That provides:
>
> '*The rule of law*
>
> This Act does not adversely affect - (a) the existing constitutional principle of the rule of law …"
>
> This court has recognised the special status of such 'constitutional statutes', in particular their immunity from 'implied repeal' : a status which (in the words of Laws LJ in another case)
>
> 'preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes and, now, applying the Human Rights Act 1998) will pay more or less deference to the legislature, or other public decisionmaker, according to the subject in hand.' (*Thoburn v Sunderland City Council* [2003] QB 151, §§ 63-64, approved in *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, § 66.)
>
> In his introduction to *The Rule of Law*, Lord Bingham underlined the significance of section 1 of the 2005 Act to his general discussion of the concept. He attributed the absence of a statutory definition to the probable recognition by parliamentary counsel of the 'extreme difficulty of devising a pithy definition suitable for inclusion in a statute', and their wish instead to 'leave it to the judges to rule on what the term means if and when the question arises for decision', so enabling 'the concept to evolve over time in response to new views and situations' (*op cit*, pp 7-8). Whatever the explanation, Parliament having recognised this 'existing constitutional principle', and provided no definition, there is nothing

and with ensuring the equal protection of the laws to all.[9] Thus, the UK executive is bound by the decisions of the courts, and the executive may not ignore or purport to set aside those court decisions simply because it does not agree with them (politically or legally).[10]

1.12. The scope of judicial review in Scotland is not identical to that in England & Wales. The UK Government must be very careful not to suggest that 'judicial review' is some form of homogenous legal beast throughout the United Kingdom. The defining principles of judicial review in Scots law are set out by Lord Hope in *West v Secretary of State for Scotland* 1992 SC 385 at page 412:

> "The following propositions are intended therefore to define the principles by reference to which the competency of all applications to the supervisory jurisdiction … is to be determined:
>
> 1. The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument.
>
> 2. The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires.
>
> 3. The competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor is it correct in regard to issues about competency to describe judicial review [according to Scots law]… as a public law remedy.
>
> By way of explanation we would emphasise these important points:

---

controversial in the proposition that it is for the courts, and ultimately the Supreme Court (created by the same Act), to determine its content and limits."

[9] In *Ghaidan v. Godin Mendoza* [2004] UKHL 30 [2004] 2 AC 557 s Baroness Hale noted at § 132:

> "Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. …[I]t is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. *Democracy values everyone equally even if the majority does not*."

[10] *R (Evans) v Attorney General* [2015] UKSC 21 [2015] AC 1787 per Lord Neuberger, Lord Kerr of Tonaghmore and Lord Reed at § 52:

> 52 First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, *it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive.* Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well-established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it. And the fact that the member of the executive can put forward cogent and/or strongly held reasons for disagreeing with the court is, in this context, nothing to the point: many court decisions are on points of controversy where opinions (even individual judicial opinions) may reasonably differ, but that does not affect the applicability of these principles."

(a) Judicial review is available, not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted.

(b) The word "jurisdiction" best describes the nature of the power, duty or authority committed to the person or body which is amenable to the supervisory jurisdiction of the court. It is used here as meaning simply "power to decide", and it can be applied to the acts or decisions of any administrative bodies and persons with similar functions as well as to those of inferior tribunals. An excess or abuse of jurisdiction may involve stepping outside it, or failing to observe its limits, or departing from the rules of natural justice, or a failure to understand the law, or the taking into account of matters which ought not to have been taken into account. The categories of what may amount to an excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law.

(c) There is no substantial difference between English law and Scots law as to the grounds on which the process of decision-making may be open to review. So, reference may be made to English cases in order to determine whether there has been an excess or abuse of the jurisdiction, power or authority or a failure to do what it requires.

(d) Contractual rights and obligations, such as those between employer and employee, are not as such amenable to judicial review. The cases in which the exercise of the supervisory jurisdiction is appropriate involve a tri-partite relationship, between the person or body to whom the jurisdiction, power or authority has been delegated or entrusted, the person or body by whom it has been delegated or entrusted and the person or persons in respect of or for whose benefit that jurisdiction, power or authority is to be exercised."

2. Are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

2.1. Our response is principally set out in answer 1 above.

2.2. In addition, however, we would observe that the present three-month deadline for raising proceedings for judicial review forces the proceedings to be raised. That being so, there may be merit in the introduction of a mechanism by which the deadline for challenging a decision could be interrupted without the need to raise proceedings formally. The precise mechanism, such as by way of a formalised "letter of challenge" akin to a more prescriptive form of pre-action letter (such as is used in England) or otherwise, is a matter of detail for consideration. That being said, some form of accepted extra-judicial procedure, whereby the challenger and the decision-maker may be afforded time to seek to settle matters between themselves, without having to incur the costs of litigation, would be welcome.

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

3.1. There is no case for substantive statutory intervention in the judicial review process. Such an intervention risks artificially stymying the development of the law of judicial review. It is recognised there has been statutory intervention in the judicial review process already, in both Scotland and England, but this has not been intended to fundamentally alter the nature of that process. Rather, it has imposed merely procedural requirements (such as ss 27A – D of the Court of Session Act 1988 or s 31(2A) – (2C) of the Senior Courts Act 1981), which have, in a general sense, been welcomed by the respective courts. So, it cannot be said that all statutory intervention is anathema to judicial review. However, in substantive terms, judicial review does not suffer from a lack of clarity, and any attempt to codify it is likely to undermine the very flexibility that renders it effective.

3.2. Indeed, it is, fundamentally, at odds with the independent scrutiny of government actions and the constitutional separation of powers for there to be any statutory intervention that attempts to circumscribe the substantive grounds upon which judicial review may proceed. That is so, even to the extent of any purported codification of the existing law, ostensibly in the interests of certainty or clarity, which would, even on the most benign view of matters, risk ossifying the necessary and continuous development of the law to meet the changing needs of society, and introduce needless ambiguity as to the state of the existing law.

3.3. Judicial review is the exercise by the judiciary of its constitutional power, as a branch of government alongside the legislature and the executive. This constitutional role was expounded recently by Lord Drummond Young in *Wightman v Advocate General for Scotland* 2019 SC 111:

> "[48] The function of the judiciary and its constitutional independence of other organs of government is likewise of fundamental importance in the United Kingdom's constitutional system. The primary function of the courts is to decide the law as it now exists. Judges obviously develop the law, sometimes in important respects. This has always been a feature of the common law, both in Scotland and in England and Wales (where I use the expression 'common law' to denote judge-made law, rather than to distinguish it from the civilian origins of systems such as Scots law). On occasion judicial development of the common law has been far-reaching in its effects; the development of the law of negligence and the law of judicial review during the twentieth century are two obvious examples. Judicial decisions can also develop and modify the meaning of statutes, although in every case the judicial interpretation must find some basis in the terms of the statute itself. Nevertheless, the primary function of the courts is to declare the law as it presently exists, and where necessary to provide mechanisms to enforce that law.
>
> [49] That function is independent of the constitutional functions of both Parliament and the executive. Judicial independence is fundamental to the constitutional arrangements of the United Kingdom, and indeed all other civilised nations."

3.4. The judiciary, in this regard, plays a key and vital role in the governance of the United Kingdom in that it is the body which holds the executive *legally* accountable for its actions and decisions. This role is mirrored in that of the legislature, which is tasked with holding the executive *politically* accountable between general elections on behalf of the public. Thus, any intervention by statute in a manner which is designed to restrain the ability of the judiciary to carry out its constitutional function would be wholly inappropriate and would be a breach of the separation of powers.

3.5. There are, of course, particular decisions for which so-called 'ouster clauses' have been deemed appropriate in order to provide legal certainty. Any such matters should be restricted, however, to those which are absolutely necessary in order to maintain good governance. Any broadening of the use of ouster clauses should not be considered.

3.6. In any event, it is entirely possible that any statutory intervention in the judicial review process would be liable to challenge, of itself, on the basis that it is fundamentally oppressive. In this regard, it may be pertinent to observe the following, somewhat prescient, words of Lord Steyn in *R (Jackson) v Attorney General* [2006] 1 AC 262 at para 102 (words also quoted by Lord Hope in *Axa*; see footnote 4 above):

> "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."

3.7. There is no question of it being appropriate for a government to seek to hamstring the judiciary's powers, in an attempt to make decision making easier, by removing one of the consequences of bad decision making. A procedure for the review of decision making by public bodies needs to be flexible and free from extra-judicial interference.

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision[s] *not* be subject to judicial review? If so, which?

4.1. It is, already, tolerably clear what decisions/powers of Government are subject to judicial review. Whether they are subject to judicial review in any particular case depends on whether those powers are being abused (in the sense of being applied for some purpose other than for which they have been conferred) or otherwise breach the limits of those powers. As was noted by the Lord President (Carloway) in *Cherry and Ors v. Advocate General for Scotland* [2019] CSIH 49, 2020 SC 37 (internal case note references omitted):

> "[50] The decision under review, which seems to have been made by the Prime Minister alone, is that to request HM the Queen to exercise her prerogative to prorogue Parliament. A prerogative decision may be the subject of a judicial review. Whether the issue is ultimately justiciable will depend upon the subject-matter. As a generality, decisions which are made on the basis of legitimate political considerations alone are not justiciable. It is not possible to apply to such decisions the public law tests of reasonableness, impartiality or fettering of discretion. In this case, if the challenge was based upon these judicial review considerations or similar matters, it would not be justiciable. If the reasons for the decision were based upon legitimate political considerations, including a desire to see that Brexit occurs, they would not be challengeable. However, that is not the contention.
>
> [51] The contention is that the reasons which have been proffered by the PM in public (to prepare for a new legislative programme and to cover the period of the party conferences) are not the true ones. The real reason, it is said, is to stymie parliamentary scrutiny of Government action. Since such scrutiny is a central pillar of the good governance principle which is enshrined in the constitution, the decision cannot be seen as a matter of high policy or politics. It is one which

attempts to undermine that pillar. As such, if demonstrated to be true, it would be unlawful. This is not because of the terms of the Claim of Right 1689 or of any speciality of Scots constitutional law, it follows from the application of the common law, informed by applying 'the principles of democracy and the rule of law'."

4.2. There is no case for any decisions being made immune from judicial review, since no power conferred on Government is unlimited. Any such suggestion is chilling. It is the essential province of the judiciary to police those limits. As Lord Drummond Young rightly observed in *Cherry & Ors v Advocate General for Scotland* [2019] CSIH 49, 2020 SC 37 at para 102:

> "The rule of law requires that any act of the executive, or any other public institution, must be liable to judicial scrutiny to ensure that it is within the scope of the legal power under which it is exercised. The boundaries of any legal power are necessarily a matter for the courts, and the courts must have jurisdiction to determine what those boundaries are and whether they have been exceeded. That jurisdiction is constitutionally important, and in my opinion the courts should not shrink from exercising it. Consequently, if the expression 'non-justiciable' means that the courts have no jurisdiction to consider whether a power has been lawfully exercised, it is a concept that is incompatible with the rule of law and contrary to fundamental features of the constitution of the United Kingdom."

4.3. The simple issue is this: in a constitutional democracy, all power is limited. The location of the boundaries of power is a matter of law and, therefore, the task of the courts to explain (*Cherry* at §38). The Scots tradition of sovereignty draws the line in a different place from that of the English tradition. The matter is, perhaps, set out most cogently in *MacCormick v Lord Advocate* 1953 SC 396, per the Lord President (Cooper) at 411:

> "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his Law of the Constitution. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions."

4.4. Indeed, in *Moohan v Lord Advocate* [2014] UKSC 67, Lord Hodge said at §35:

"I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful."

4.5. It is plain, therefore, that the court has a clear constitutional role – which, too, has its limits – and that that role should not become subject to political will or pressure, which will inevitably change from parliament to parliament. Political policy determinations are not the realm of the court, and the court steers clear of those determinations in the same way in which it stays clear of substituting itself for the decision maker. The rule of law requires a branch of government to be responsible for the interpretation of the laws enacted by the legislative branch and to be responsible for the policing of their application. That is the role of the courts.

5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

5.1. Matters of procedure in Scotland are, as we understand it, outwith the scope of this review. However, for the avoidance of doubt, the Scottish court procedures were recently the subject of review, which led to the Courts Reform (Scotland) Act 2014. Those procedures are tolerably clear and, in any event, not for this IRAL review.

5.2. It should be noted, too, that all judicial reviews in Scotland follow the same procedure. There are no separate rules for "UK challenges" and "Scottish challenges". To that extent, there is a danger of over-stepping in the present review, if procedural changes are envisaged.

6. Do you think the current judicial review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

6.1. The right to bring proceedings for judicial review within an impossibly short time limit is not right at all. Any time limit must allow a reasonable period within which to secure appropriate legal advice and funding, and to formulate any claim, and must be balanced against the detriment that arises as a result of delayed challenges to administrative decisions. In Scotland, the period of three months within which judicial review proceedings must (albeit with provision to extend) be raised represents already a significant challenge for would-be litigants. Given the introduction of a permission stage, front-loading of pleadings and gathering of evidence is required, and this presents a tight timescale. It is suggested that any shorter time limit is likely to pose a real and unjustifiable threat to access to justice. In any event, it is not thought to represent an unreasonable burden on government that it may be subject to potential challenge during such a relatively short period, having regard to ordinary periods of limitation or extinction of rights in non-judicial review matters.

6.2. It is recognised that in some areas, notably planning matters, there is somewhat of an anomaly that, in relation to Ministers' decisions, there is a statutory right of appeal within 6 weeks (which cannot be extended) but third party challenges to decisions by local authorities are made by judicial review within 3 months and could in theory be extended.

6.3. Whilst it is appreciated that there may be inconvenient delays for a government being unable to implement new legislation subject to challenge – and the effect of this and the delay that might be caused by lengthy litigation is not sought to be underplayed - arguably, the balance currently imposed by the statutory time limits on judicial review, at least in Scotland, is weighted too strongly in favour of government. The balance between convenience and lawfulness must surely always favour lawfulness. Section 27A of the Court of Session Act 1988 – which is a purely procedural provision – is to the effect that "an application to the supervisory jurisdiction of the Court must be made before the end of … the period of 3 months beginning with the date on which the grounds giving rise to the application *first arise*…". However, as a matter of law and logic, such provisions cannot have the backdoor effect of rendering a form of semi-validity to otherwise void provisions simply because a challenge comes too late. There is, in Scotland a judicial discretion to extend the three-month time limit.

6.4. Further, although there is no reference to continuing acts in the terms of section 27A(1) of the 1988 Act, in principle the three-month time limit for the raising of judicial review cannot begin to run until the wrongful continuing act has ceased: *Somerville v Scottish Ministers* [2007] UKHL 42, 2008 SC (HL) 45 Lord Hope at § 51 approved in *O'Connor v Bar Standards Board* [2017] UKSC 78, [2017] 1 WLR 4833 per Lord Lloyd-Jones at § 30. There is a similar lack of clarity in relation to the time limits applicable in respect of challenges to ongoing "positions" which have been adopted by the Government and others subject to judicial review. In these circumstances, therefore, it may be necessary to seek an extension of the three-month period for proceedings to be raised under the powers afforded to the courts under section 27A(1)(b) of the 1988 Act: qv *Wightman v Advocate General for Scotland (No 1)* [2018] CSIH 18, 2018 SC 388 at § 30 and *Gifford v Advocate General for Scotland* [2018] CSOH 108 per Lady Carmichael, at § 110. It might be better, in the interests of legal certainty, if the position were made clear in legislation, but this is a matter for the Scottish Parliament and not for this IRAL review.

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

7.1. Whilst noting that this is a leading question, apparently designed to elicit a particular answer, there is generally no pattern of over-strictness nor over-leniency when it comes to awards of expenses against an unsuccessful party.

7.2. That being said, the court fees in the Court of Session are considerable. Court fees can, and do, amount to a material barrier to justice: *R (UNISON) v Lord Chancellor* [2017] UKSC 51. The increase in court fees in recent years has been considerable and arguably overlooked as a matter impacting upon access to justice. The overall effect of the short timescale within which to bring proceedings, and the substantial cost involved in doing so, means that, for a large number of potential petitioners (applicants), it is simply not financially viable to proceed with an otherwise legitimate challenge to an administrative decision. The regrettable effect of this is that challengeable decisions regularly go unchallenged.

7.3. It is possible for parties to apply for protective expenses/costs orders, if the court is satisfied that the '*Corner House* criteria' have been satisfied: *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600. These are not used often enough to give rise to any discernible trends as to whether they are effective as an aid to access to

justice. Whilst there is provision for PEOs/PCOs in environmental cases, in particular, the approach of the courts to date has rendered it far from easy to obtain such an order in some cases (see, for example, *Gibson v Scottish Ministers* [2016] CSIH 31, 2016 SLT 675). Even where a PEO is granted, the applicant may not be able to risk seeking interim orders to prevent the development in the meantime because he or she may not be protected from a claim for damages for wrongful interdict if they are ultimately unsuccessful.

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

8.1. The question of standing should not be a question for the panel, as this is a substantive aspect of judicial review that is properly a matter for the courts. See the preceding answers with regard to the proper functioning and accountability of government, subject to proper and independent scrutiny by the courts. That being said, in anticipation that the review will at least to an extent consider standing, it is dealt with in more detail at question 13 below.

8.2. The treatment of 'unmeritorious' claims, in the sense that claims may be deemed by the courts to lack any legal substance, is, likewise, properly a matter for the courts in the exercise of their inherent powers to regulate the proceedings before them. The question of whether a claim is, indeed, 'unmeritorious' is quintessentially a question of law, of itself, within the sole preserve of the courts.

8.3. That being said, and as alluded to in the preceding answer, the costs of judicial review claims are disproportionate, and prohibitive to many applicants by reason of the fear of an award of expenses/costs being made against them. Accordingly, there may be scope to extend the application of 'one way costs shifting' or caps on contra-awards of expenses/costs, as already imposed for environmental cases brought under the Aarhus Convention, to all applications for judicial review in order to ensure effective and universal access to justice.

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

9.1. The question of remedies should not be a question for the panel, as this is a substantive aspect of judicial review that is properly a matter for the courts.

9.2. The existing remedies are sufficiently flexible.

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

10.1. Fully reasoned decisions which clearly demonstrate that they have been made rationally and within the bounds of lawful authority will minimise the need for judicial review. The 'claimant', on the other hand, is powerless to avoid the need to proceed with judicial review against decisions to the contrary effect.

10.2. In some spheres, the introduction of a 'letter before action' procedure (as alluded to above) may assist in identifying whether there may be scope for the decision to be reconsidered without resort to litigation.

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

11.1. Public law cases rarely settle as they very rarely turn on monetary compensation.

11.2. Where there is resolution prior to a substantive hearing, it is very often by full abandonment or concession on the part of one party or the other. If it is to happen, it usually happens before the "doors of court" because of the initial front-loading of expenses and the relatively short duration of a substantive hearing, hence the relative lack of cost-saving of settling at the last minute compared to a proof (trial) in other civil matters.

12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

12.1. Judicial review does not lend itself easily to alternative dispute resolution. The fundamental point of such proceedings is to consider whether an administrative power has been exercised lawfully. That being so, a court ruling is often required in order to ensure that the power is not used improperly in similar circumstances in the future. In the absence of binding precedent to this effect, petitioners (applicants) would be faced with the need to challenge the same mistakes being made by decision makers repeatedly. Judicial review is, therefore, an area of the law where published judicial reasoning leads to a lesser requirement for litigation in the future. Paradoxically, therefore, alternative dispute resolution methods would, in fact, result in *increased* numbers of challenges because there will not be a body of law on which a potential litigant may rely to hold the Government or public authority to account, and on which the Government or public authority may base its decision-making in the future.

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

13.1. As we have mentioned already, the question of standing should not be a question for the panel. That being said, the issue of standing is very commonly raised in judicial review proceedings.

13.2. It is our view that the rules of public interest standing are not treated too leniently by the courts. For environmental matters, in particular, the courts have recognised that, without public interest standing, there would be circumstances in which the environment would be left without anyone to speak up on its behalf and, therefore, public interest standing is of vital importance to the protection of the environment: *Walton v Scottish Ministers* 2013 SC (UKSC) 67 per Lord Hope at §§151-156.

13.3. The present rules allow for a petitioner (applicant) who has sufficient interest – without having to demonstrate any greater impact than upon other persons – to bring a legal issue to the attention of the court and obtain a ruling upon it. The rules on standing prohibit the "mere busybody", to whom

Lord Fraser of Tullybelton referred in *Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 at page 646, from coming to the courts. But the rule of law would *not* be maintained if, because everyone was equally affected, no one was able to bring proceedings to seek clarification of the law: cf *Walton v. Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67 per Lord Reed at § 92. To hold otherwise might impede or disable the court from performing its constitutional function to protect and uphold the rule of law: *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 per Lord Reed at §170.

13.4. The courts exist, as one of the three pillars of the state, to provide rulings on what the law is, and how it should be applied. That is their fundamental function. The principle of access to justice dictates that, as a generality, anyone who wishes to do so can apply to the court to determine what the law is in a given situation: *Wightman v Secretary of State for Exiting the EU* [2018] CSIH 62, 2019 SC 111 per Lord President Carloway at §21. Government must, in a civilised society, be conducted in accordance with the law; and a major function of public law remedies is to achieve that result.

13.5. Procedural niceties should not stand in the way of due observance of the rule of law, and enforcing the rule of law is a vital function of the courts: *Taylor v. Scottish Ministers* [2019] CSIH 2, 2019 SLT 288 per Lord Drummond Young at § 15. The importance of the rule of law should be self-evident: a system of democratic government that pays proper respect to the rights of the individuals present within its territorial jurisdiction must be based on a system of rules, and those rules must be properly interpreted and consistently applied. Otherwise, government is liable to descend into tyranny or anarchy: *Cherry & Ors v. Advocate General for Scotland* [2019] CSIH 49, 2020 SC 37 per Lord Drummond Young at § 100.