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Submission to the Ministry of Justice on Judicial Review: Proposals for Reform – ‘Prospective Invalidation/Overruling’

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Judicial Review Reform Consultation
Ministry of Justice
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Submission on Judicial Review: Proposals for Reform – ‘Prospective Invalidation/Overruling’

1. Executive Summary

- 1.1. The Government proposes at paragraphs [60]–[65] of its [Consultation Report](#) to provide judges a discretionary power to grant prospective-only remedies in judicial review proceedings. It further proposes at paragraphs [66]–[68] to legislate a presumption or a requirement of prospective-only remedies when statutory instruments are quashed. The Government’s Report relies on arguments made in Sir Stephen Laws QC’s [IRAL Submission](#) advocating for prospective-only judicial remedies. My submission responds to the content of both documents.
- 1.2. The proposed prospective-only judicial remedies are known by various labels—‘prospective invalidation’, ‘prospective overruling’, ‘prospective revision’, and ‘non-retrospective judicial law-making’—but they all mean the same thing: that a judicial decision will determine the law for future cases but its holding will not govern past or current cases. In this submission I use the label ‘Prospective Invalidation’.
- 1.3. The Government should abandon its proposal to legislate in favour of Prospective Invalidation in the judicial review context (and in any other context) because:
 - a. Prospective Invalidation violates the rule of law as propounded by Professor Albert Venn Dicey in his seminal treatise on *The Law of the Constitution*.
 - b. Prospective Invalidation is inconsistent with the English common law judicial method and the declaratory theory of adjudication that underpins common law reasoning.
 - c. Prospective Invalidation effects bad policy. The Government’s interest in this doctrine is surprising given that the Prospective Invalidation doctrine is well-recognised to be

the ultimate instrument of ‘judicial activism’.¹ The doctrine was developed by jurists who favour judicial activism and who sought to implement radical judicial changes in the law untethered from the usual retrospective effects of judicial decision-making. It leads to more uncertainty and instability in the law, not less.

- d. Prospective Invalidation has been denounced by prominent apex courts around the common law world, even while it has increasingly found acceptance with civilian and European courts. The Government’s proposal would isolate the courts of the United Kingdom from comparable common law jurisdictions. It would push UK judges to adopt reasoning and remedies more commonly employed by European courts.
 - e. Prospective Invalidation is unnecessary and has been rejected by scholars who have analysed the doctrine in England.
- 1.4. Instead of Prospective Invalidation, if the Government considers that the burdens of a particular judgment against it are too great to bear, the preferable alternative is for the Government to rely on remedial retroactive legislation in response.
- 1.5. Instead of Prospective Invalidation, there may be merit in providing judges a discretion to quash government acts with suspended effect as considered at paragraph [69] of the Government’s Consultation Report. Suspended Quashing Orders should be *discretionary*, not presumptive or mandatory. Any legislation in favour of Suspended Quashing Orders should clarify that it is only the *remedy* that is suspended, not the reasons underlying the order.
- 1.6. Finally, I agree with the proposals at paragraphs [98] and [99] of the Government’s Consultation Report regarding the desirability of reforming the time limits for bringing a judicial review claim.

2. Credentials

- 2.1. This submission is made in my capacity as a legal academic and not on behalf of my academic institution.
- 2.2. I am an Assistant Professor of Law at the Peter A. Allard School of Law, The University of British Columbia in Vancouver, Canada. I previously resided and practised law in London, England, and taught at the Dickson Poon School of Law, King’s College London. I hold a master’s and a doctorate of laws from Harvard Law School and undergraduate degrees in law and economics from The University of Auckland. I am admitted to the roll of Barristers and Solicitors in New Zealand.
- 2.3. My academic specialisations concern civil liability, the temporal effects of judicial decisions,

¹ Keith Mason QC (Solicitor-General for New South Wales), ‘Prospective Overruling’ (1989) 63 Aust LJ 526, 530.

and statutes of limitations. I have published on these subjects in leading British law journals² and other law reviews around the common law world. I teach a seminar on [Law's Temporal Dimensions](#) at Allard Law.

- 2.4. I analysed the doctrine of Prospective Invalidation in my doctoral dissertation at Harvard Law School, demonstrating how it is unprincipled and effects bad policy. My work was awarded the HLS Constitutional Law Prize and was published in the leading US law review.³
- 2.5. In light of my research on the subject, I emphatically disagree with the proposal to legislate in favour of either discretionary or mandatory prospective-only remedies in judicial review. The Government's proposal will not curb judicial quashing of laws. It may well exacerbate it.

3. Retrospective Invalidation does not violate the rule of law

- 3.1. The Government's Consultation Report at paragraph [68] and Sir Stephen's IRAL Submission at paragraph [119] assert that retrospective judicial invalidation of legislation violates the rule of law, and that prescribing a doctrine of Prospective Invalidation will better serve the rule of law. Neither documents cite scholarly, judicial, or any other authority in support of this assertion.
- 3.2. What the Government proposes is an exception to the norm of judicial retrospectivity. Prospective Invalidation is an unorthodox doctrine, which is why it is not already widely employed by courts.
- 3.3. Judge-made law is part of the British constitution. According to Professor A.V. Dicey, the British constitution '*is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law*'.⁴
- 3.4. Retrospectivity is a feature of judge-made law. That is because judicial decision-making entails interpreting what the law was that applied to disputes that arose in the past and are now being litigated. This is widely recognised and in most cases is wholly uncontroversial. Retrospectivity is one of the features that distinguishes judge-made law from statute law

² E.g. S. Beswick, 'The Overpaid Tax Litigation: Roadblocked' [\(2021\) 84 Modern Law Review](#) ; S. Beswick, 'Discoverability Principles and the Law's Mistakes' [\(2020\) 136 Law Quarterly Review 139](#).

³ S. Beswick, 'Retroactive Adjudication' [\(2020\) 130 Yale Law Journal 276](#). For an English perspective and critique, see my forthcoming article (currently under review) which will be uploaded to <https://ssrn.com/abstract=3820990>.

⁴ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, Liberty Classics, reprint 1982) [116](#); see M.D. Walters, A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind (Cambridge: Cambridge University Press, 2020) 253–254. Sir Stephen Laws QC's IRAL Submission ([EIN 71, 12 March 2021](#)) mischaracterises the role of the judiciary in democratic society and the nature of judicial decision-making. At paragraph [2] he contrasts '*on the one hand, the two "political institutions" of the constitution that have democratic legitimacy*' with '*on the other, the courts and the judiciary*'. But an independent judiciary has democratic legitimacy and is fundamental to democracy and the rule of law. Sir Stephen's IRAL Submission cites no authority supporting his radical proposals to legislate in favour of prospective-only remedies.

(which is presumptively prospective-only).⁵

- 3.5. Prominent theorists of English law, including Professors H.L.A. Hart, Joseph Raz, John Finnis, and John Gardner, have shown that judicial retrospectivity does not presumptively violate the rule of law even when it involves overruling or invalidating rules.⁶
- 3.6. To suggest, as Sir Stephen does at paragraph [119] of his IRAL Submission, that retrospective judicial invalidation of legislation imposes ‘*a form of injustice and unfairness that is wholly incompatible with even the narrowest versions of the concept of the rule of law*’ not only misunderstands the British constitutional position. It impugns the legal systems of the UK’s closest common law allies. Courts in the United States, Canada and Australia (among many other democratic countries) have long routinely exercised a power to quash primary and secondary legislation with retrospective effect. These countries have the rule of law.⁷

4. Prospective Invalidation violates Dicey’s rule of law

- 4.1. Professor A.V. Dicey penned the definitive account of the rule of law in Britain. Dicey characterised the rule of law as having three meanings:⁸

[a.] It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. ...

[b.] It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the “rule of law” in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; The notion ... that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies ... is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.

⁵ J. Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2017) 41–42; *cf* Laws (n 4) [125].

⁶ H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2nd ed, 1994) 276; J. Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979) 198; J. Raz, ‘Facing Up: A Reply’ (1989) 62 S Cal L Rev 1153, 1209–1212; J.M. Finnis, ‘The Fairy Tale’s Moral’ (1999) 115 LQR 170, 174–175; J.M. Finnis, ‘Judicial Law-Making and the “Living” Instrumentalisation of the ECHR’ in N.W. Barber, R. Ekins and P. Yowell (eds), *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016) 79; Gardner (n 5) 41–42; see also L.L. Fuller, *Anatomy of the Law* (New York: FA Praeger, 1968) 89–103; T.A.O. Endicott, *Vagueness in Law* (OUP 2000) 193; T. Endicott, ‘Adjudication and the Law’ (2007) 27 OJLS 311, 317–320, 326; M. Kramer *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007) 119–122; P. Jaffey, ‘Authority in the Common Law’ (2011) 36 Austl J Leg Phil 1, 27; P. Jaffey, ‘Two Ways to Understand the Common Law’ (2017) 8 Juris 435, 456; P. Jaffey, ‘Policy and Principle and the Character of Private Law’ (2020) 11 Juris 387, 400.

⁷ A.V. Dicey considered that ‘*The rule of law is as marked a feature of the United States as of England*’, notwithstanding the US courts’ powers of strong judicial review, which were well-recognised at the time Dicey wrote: Dicey (n 4) [119](#).

⁸ Dicey (n 4) [120–121](#); see further *ibid* [110–119](#); see also Walters (n 4) 247–255.

[c.] The “rule of law,” lastly, may be used as a formula for expressing the fact that with us the law[s] of the constitution ... are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

4.2. The proposal to legislate in favour of Prospective Invalidation violates all three of Dicey’s conceptions of the rule of law:

- a. **Supremacy of Law:** The proposal expands the scope for unchecked government discretion by shielding executive decisions and secondary legislation from the full consequences of a judicial finding of invalidity. Executive decisions and secondary legislation that are made without lawful authority or without following the proper process will continue to govern past events as ‘pretended laws’, rather than being quashed for invalidity and cases being determined on the basis of a court’s understanding of the proper governing law. The proposal essentially allows and forgives unlawful executive action. Sir Stephen suggests that government officials ‘*only inadvertently*’ act outside of the law⁹—yet for such conduct to go unremedied violates the prohibition on arbitrary power. Sir Stephen also recognises that Prospective Invalidation carries the risk ‘*perhaps, that government would take the opportunity to make ultra vires instruments in bad faith, with a view to waiting to see if they will be overturned, while remaining content that they will be effective in the meantime*’.¹⁰ This is an obvious possible risk that illustrates how Prospective Invalidation violates the rule of law.
- b. **Equality before Law:** The proposal creates more favourable juridical rules for government that do not apply to ordinary citizens. Ordinary disputes are resolved by courts determining the proper interpretation of the law and applying their decision to parties retrospectively. A party is not shielded merely because a court’s decision takes it by surprise. It would violate the principle of equality under law for the Crown to be shielded from the retrospective effect of judicial decisions when other defendants are not so shielded. Unequal treatment is further illustrated by Sir Stephen’s suggestion that the burden should fall on claimants to rebut a presumption in favour of non-retrospectivity of judicial decisions concerning government,¹¹ rather than placing the burden on the Crown to demonstrate why exceptional treatment is warranted.
- c. **Ordinary Law:** The maxim *ubi jus ibi remedium* (‘where there is a right, there is a

⁹ Laws (n 4) [132].

¹⁰ Laws (n 4) [131].

¹¹ Laws (n 4) [135].

remedy'), according to Dicey, '*runs through the English constitution*' reflecting '*that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation*'.¹² The Government's proposal provides for rights *without* remedies, violating this fundamental maxim of English law. Claimants who successfully challenge the validity of some regulation that affected them would be prevented from seeking to undo its impact on them.

Dicey saw the suspension by Parliament of ordinary judicial recourse as a potentially grave violation of the rule of law. Dicey considered that '*in England the law of the constitution is little else than a generalisation of the rights which the Courts secure to individuals*'.¹³ He continued, '*The constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution*.'¹⁴

- 4.3. In debates accompanying the passage of the *European Union (Notification of Withdrawal) Bill*, Mr Jacob Rees-Mogg MP proclaimed that with Brexit '*Dicey's constitution has been restored*'.¹⁵ Regrettably, the Government's proposal to legislate in favour of Prospective Invalidation violates the rule of law under the British constitution as formalised by Dicey.

5. Prospective Invalidation is unprincipled

- 5.1. The Government's proposal would fundamentally change the nature of judging in the UK. The idea that judges can separate the forward-looking precedential effects of their decisions from the backward-looking retrospective effects contravenes orthodox understandings of the common law judicial method. Lord Devlin thought such a proposal '*crosses the Rubicon that divides the judicial and the legislative powers. It turns judges into undisguised legislators*'.¹⁶ He warned that to cross that Rubicon—as the Government now proposes—'*would be to make a profound constitutional change with incalculable consequences*'.¹⁷
- 5.2. The responsibility of judges is to decide cases within the constraints of the declaratory theory of adjudication. Professor John Finnis has given the best contemporary explanation of the declaratory theory. It bears setting out:¹⁸

The declaratory theory of law is not and never was put forward as a description of the history of our law—a history that includes many changes in the common law and

¹² Dicey (n 4) [118](#).

¹³ Dicey (n 4) [119](#).

¹⁴ Dicey (n 4) [120](#); see Walters (n 4) 253–254, 297–298.

¹⁵ Second Reading of European Union (Notification of Withdrawal) Bill ([Hansard vol. 620, col. 907](#), 31 January 2017).

¹⁶ Lord Devlin, 'Judges and Lawmakers' (1976) 39 MLR 1, 11.

¹⁷ *Ibid.*

¹⁸ Finnis, 'Judicial Law-Making' (n 6) 76–79, quoting Finnis, 'The Fairy Tale's Moral' (n 6) 172.

in interpretations of statute law, changes which may go beyond development to abrogation. Rather, it is a statement of the judge's vocation and responsibility. ...

Adjudication is the effort to identify the rights of the contending parties *now* by identifying what were, in law, the rights and wrongs, or validity or invalidity, of their actions and transactions *when entered upon and done*. If those [actions and transactions] rested on a view of the law then widely settled, the judge may nonetheless have the duty now to take and act upon a contrary view of the law if (a) adhering to that former view would conflict with other elements of our law—notably with principles of law and other judicially cognizable policies and standards—applicable then and now to the parties, (b) departing from that former view would not collide with duties specific to the judge (for example the duty to follow a recent decision of the court immediately superior in the hierarchy), and (c) departing from the formerly settled view would not be an injustice to the parties before the court. ...

[Judges'] determinations of the law will in reality be applied to past dealings and inter-relations of the parties before the court, and can only be just and properly judicial if they state law that can reasonably be said to have been the law that, *all things now considered*, was properly applicable at the time (even if not then generally recognised as such). ...

For doing justice *according to law*—the peculiarly judicial responsibility—is a matter neither of mediating nor of legislating, but of finding the law that is applicable to the *lis* because it was the law governing the parties as they interacted (at the relevant past time(s)) in a way allegedly giving rise to a cause in action, and then by applying that law so as to give to each their legal entitlement. ...

- 5.3. Judges may only quash rules and decisions that are recognised as having been contrary to the law that '*was properly applicable at the time (even if not then generally recognised as such)*'. That is why judicial retrospectivity is justified and compatible with the rule of law. The judge's decision sets out the law that properly governed the parties at the time they acted. It resolves their dispute.
- 5.4. A rule is not a law merely because it is found in a statutory instrument. It is a law if it has been validly enacted. It is the judicial role to say when a rule has not been validly enacted and is not law. This is not '*only legal tradition*' and '*historical feature*', nor '*only adherence to long-established legal rules*', as Sir Stephen asserts.¹⁹ It is, as Professor Finnis says, '*the judicial responsibility*'.²⁰
- 5.5. Prospective Invalidation contravenes the common law judicial method by preventing the court's considered understanding of the law that governed the parties before it from actually applying to the parties' dispute. It empowers judges to declare what they think the law *should be* going forward, rather than constraining judges to declare what the law *is*. Prospective

¹⁹ Laws (n 4) [123] and [201].

²⁰ Finnis, 'Judicial Law-Making' (n 6) 76; see also J. Finnis, 'Judicial Power: Past, Present and Future' in R. Ekins (ed), *Judicial Power and the Balance of Our Constitution* ([Policy Exchange, 2018](#)) 30–33.

Invalidation affords judges quasi-legislative power, which they do not and should not exercise.

6. Prospective Invalidation effects bad policy and encourages judicial activism

- 6.1. The Government's Consultation Report errs in assuming at paragraph [70] that Prospective Invalidation will '*provide clarity and certainty to the use of executive powers, while also providing for clear safety valves by which the courts can find the appropriate and just outcome where required*'.
- 6.2. Prospective Invalidation will not improve certainty, reliance, or efficiency in the law. Rather, these values weigh in favour of rejecting the Prospective Invalidation doctrine.
 - a. **Certainty:** The claim that Prospective Invalidation is necessary to preserve certainty and stability in the law rests on a false premise: namely, that '*It is inherent in anything of a legislative nature (whether primary or secondary) that, once it is in place, it will be relied on, and assumed to be valid, by those subject to it*'.²¹ People do not uniformly assume that rules are valid merely because they have been enacted. At most, we can say concerning controversial rules that people may hold different views as to whether some rule is valid law or not. In a democratic society people have the right to test the *vires* of rules affecting them before the courts. In the sorts of cases that have influenced the Government's proposal on this subject, courts have quashed rules because (at least some) people believed those rules were *not* valid law. When a court quashes a rule, it is vindicating the rights of those people who believed—correctly, it turns out—that the rule was not valid law. Judicial quashing orders are a response to instability and uncertainty in the law that already exists. They are the necessary solution to the conflicts in views in society that can arise as to the validity of rules.

The best way for a court to restore stability and certainty in the law is for the court to determine the proper state of the law and apply its decision to parties retrospectively. Prospective Invalidation exacerbates confusion as to the validity of an impugned rule by curtailing courts from saying what the law was that governed the parties before it.

- b. **Reliance:** Retrospective invalidation of legislation does not '*impose injustice and unfairness on those who have reasonably relied on its validity in the past*'.²² The reason that an impugned rule (which some people will have relied on) may be quashed is because it conflicts with another superior rule of law (which other people will have relied on). Parties on both sides may reasonably place reliance on their respective positions regarding the rule: that it is either valid, or that it is invalid. It is the court's

²¹ Laws (n 4) [118].

²² *cf* Laws (n 4) [119].

job to say who is right. If a court quashes a rule for being invalid, then we can say the reliance interests of those who opposed the rule were stronger (and more reasonable) than the reliance interests of those who acted on the basis of the impugned rule.

In litigation there are winners and losers. Those who succeed on the merits are entitled to have their case resolved according to the properly governing law. Prospective Invalidation undermines the reliance and expectation interests of successful parties to litigation by giving them a hollow victory. It recognises the correctness of their legal position but denies them the remedies that would vindicate the claims on which they relied. As the Government recognises at paragraph [61], its proposal ‘*could*’ (surely, would) ‘*lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy*’. It essentially turns the doctrine of legitimate expectations on its head by privileging the interests of government above individual claimants.²³

- c. **Judicial efficiency:** The great merit of judicial retrospectivity is that it discourages radical judicial changes in the law. Since judges have to justify their interpretations of the law governing past disputes, when presented with an opportunity for law-making judges must ‘bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into’.²⁴

The Prospective Invalidation doctrine unshackles judges from having to think about the retrospective consequences of their decisions. It thereby frees judges to engage in more ambitious and creative decision-making. The doctrine’s major feature ‘is its capacity to encourage judicial activism’.²⁵ If the Government enacts its proposal, it will counterintuitively enable judges to quash rules more readily.

- d. **Governmental efficiency:** The extent to which a quashing order will cause administrative or fiscal chaos will vary depending on the circumstances of each case. A one-size-fits-all presumption or requirement of Prospective Invalidation is overkill. It is also unpersuasive that the burden of a drafter’s or an administrator’s error should fall on those individuals affected by it, as opposed to being borne by the Crown and spread across society as a whole. Finally, to the extent that special protection for the Crown is thought to be necessary, exceptional cases can be curtailed by resort to (exceptional) retroactive legislation, which is a preferable alternative to Prospective Invalidation (discussed further at Section 10. below).

²³ cf G. Weeks, ‘What Can We Legitimately Expect from the State?’ in M. Groves and G. Weeks (eds), *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017) 147–164.

²⁴ *Practice Statement on Judicial Precedent* [1966] 1 WLR 1234 (HL).

²⁵ Mason (n 1) 531.

6.3. The Government’s proposal is unnecessary. Judicial quashing orders do not unsettle transactions and arrangements perpetually into the past. The law already draws a principled line between justiciable cases and those closed off by time-bars, defences, and the doctrines of justiciability, *res judicata*, and *estoppel*.

7. English judges have not endorsed Prospective Invalidation

7.1. The Government’s Consultation Report at paragraph [62] intimates that ‘*Judges have recognised the benefit of prospective-only remedies*’ and it quotes as supporting authority *R (Hurley and Moore) v Secretary of State for Business Innovation & Skills* [2012] EWHC 201 (Admin) [99] (Elias LJ). This judgment did not result in the quashing of a regulation and the quoted paragraph does not support the asserted claim. The paragraph has not been quoted in full. Nowhere does Elias LJ suggest that a just outcome can be reached by judges using prospective-only remedies to avoid ‘*administrative chaos*’. Elias LJ does not consider prospective-only remedies at all. To the contrary, in the second half of paragraph [99], which is missing from the quotation in the Government’s Consultation Report, Elias LJ intimates that retrospectively quashing invalid regulations *would* be a just remedy, ‘*however inconvenient that might be*’.

7.2. There is a wealth of judicial dicta affirming and justifying the retrospectivity of judge-made law²⁶ and denouncing the doctrine of Prospective Invalidation.²⁷ The leading House of Lords decision considering the doctrine, *Re Spectrum Plus*, was ultimately circumspect about the doctrine’s merits. Lord Scott in that case considered that even if prospective overruling of *judgments* might be acceptable, it would never be proper to apply the technique to the interpretation of *statutes*.²⁸ *Re Spectrum Plus* has more recently been interpreted by Supreme Court judges as affirming the orthodoxy that when a court concludes that an earlier rule was wrong, ‘*then it will overrule it, and with retrospective effect, with little scope for considering the risks to the security of settled transactions*’.²⁹

8. Prospective Invalidation has been denounced by comparable common law courts

8.1. The Prospective Invalidation doctrine originated in the United States and reached its heyday in the 1960s. The Supreme Court of the United States has since abandoned the doctrine. The leading precedent on the temporal effect of judicial decisions in non-criminal cases is a 1993

²⁶ E.g. *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Comrs* [2020] UKSC 47, [2020] STC 2387, [273] *per* Lord Briggs and Lord Sales; *Samsoondar v Capital Insurance Company Ltd* [2020] UKPC 33, [13] *per* Lord Burrows; *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 86, [35] *per* Lord Hope, [76] *per* Lord Brown, [121] *per* Lord Reed.

²⁷ See cases cited in *R (Wright) v Secretary of State for the Home Department* [2006] EWCA Civ 67, [42] *per* Ward LJ.

²⁸ *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680, [127]; see *Samsoondar* [2020] UKPC 33, [13].

²⁹ *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Comrs* [2020] UKSC 47, [2020] STC 2387, [293] *per* Lord Briggs and Lord Sales; see *ibid* [99] *per* Lord Reed and Lord Hodge.

judgment (concerning claims for restitution of *ultra vires* taxes), which held that:³⁰

When [the Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule.

- 8.2. The High Court of Australia has also rejected the doctrine as inimical to the judicial method.³¹
- 8.3. In a 2007 case a majority of the Supreme Court of Canada endorsed use of the doctrine in exceptional cases,³² but in practice Prospective Invalidation is almost never used as Canadian courts prefer to invoke the doctrine of Suspended Declarations of Invalidity instead.³³
- 8.4. A majority of the Supreme Court of New Zealand in its leading case considering the doctrine declined to take up the opportunity to address whether New Zealand courts have, or should have, the power to exercise it.³⁴
- 8.5. The Prospective Invalidation doctrine has found comparatively greater acceptance among European national and supranational courts.³⁵ Whereas Brexit could usher ‘renewed vigour and inspiration in our common [Commonwealth] common law heritage’,³⁶ the Government’s proposal would isolate UK courts from comparable common law jurisdictions and push UK judges to adopt reasoning and remedies more commonly employed by European courts.

9. Prospective Invalidation is rejected by leading common law scholars on the subject

- 9.1. The leading analyses of this doctrine as it arises in English law are Professor Charles J.G. Sampford, *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006) 209–227 and Dr. Ben Juratowitch, *Retroactivity and the Common Law* (London: Bloomsbury Publishing Plc, 2008) 209–218.³⁷ Professor Sampford finds the doctrine controversial and

³⁰ *Harper v Virginia Dep’t of Taxation*, [509 US 86](#), 97 (1993), affirmed in *Landgraf v USI Film Prods.*, [511 US 244](#), 279 n.32 (1994); *Reynoldsville Casket Co v Hyde*, [514 US 749](#), 752 (1995); see W. Baude, “‘Retroactive’ Liability after *Barr v. AAPC*” ([The Volokh Conspiracy, 20 April 2021](#)) (summarising a recent US federal district court judgment applying *Harper*).

³¹ *Ha v New South Wales* [[1997\] HCA 34](#), (1997) 189 CLR 465, 504, affirmed in *Bell Lawyers Pty Ltd v Pentelow* [[2019\] HCA 29](#), [55] *per* Kiefel CJ, Bell, Keane and Gordon JJ, [94]–[98] *per* Edelman J.

³² *Canada v Hislop*, [2007 SCC 10](#), [2007] 1 SCR 429, [81]–[108] *per* LeBel and Rothstein JJ; *cf* [140] *per* Bastarache J.

³³ L. Smith, ‘Canada: The Rise of Judgments with Suspended Effect’ in E. Steiner (ed), *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (Cham: Springer, 2015) 254–257.

³⁴ *Chamberlains v Lai* [[2006\] NZSC 70](#), [2007] 2 NZLR 7, [95] *per* Elias CJ, Gault and Keith JJ; *cf* [140] *per* Tipping J, [205] *per* Thomas J; see *Department of Corrections v Gardiner* [[2017\] NZCA 608](#), [2018] 2 NZLR 712, [17] *per* Miller J.

³⁵ See discussions of the Prospective Invalidation doctrine in various European jurisdictions in P. Popelier and others (eds), *The Effects of Judicial Decisions in Time* (Cambridge: Intersentia, 2014) and E. Steiner (ed), *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (Cham: Springer, 2015).

³⁶ Lord Philip Sales, ‘Implications of Brexit and Covid-19 for UK Law’ ([New Zealand Senior Courts Judges’ Conference, Tauranga, 15 April 2021](#)).

³⁷ See also B. Juratowitch, ‘The Temporal Effect of Judgments in the United Kingdom’ in P. Popelier and others (eds), *The Effects of Judicial Decisions in Time* (Cambridge: Intersentia, 2014) 178; B. Juratowitch, ‘Questioning Prospective Overruling’ [2007] NZ L Rev 393, 414–415.

dubious. Dr. Juratowitch (now QC) concludes that Prospective Invalidation is constitutionally impermissible, contrary to the rule of law, and not a legitimate technique for English judges.

- 9.2. Professor Michael D.A. Freeman, the learned editor of *Lloyd's Introduction to Jurisprudence* (8th ed., London: Sweet & Maxwell, 2008), has also considered the doctrine and rejected it.³⁸ My own scholarship in the *Yale Law Journal* and elsewhere concludes similarly.³⁹

10. Retroactive legislation is a preferable alternative to Prospective Invalidation

- 10.1. Prospective Invalidation is unnecessary. Judges are not well-placed to assess the factors listed in the Government's Consultation Report at paragraph [64] in order to determine when the Crown might need special protection. The Government, however, is. If the Government considers that the burdens of a particular judgment against it are too great to bear, the Government has the power to introduce remedial retroactive legislation in response.
- 10.2. The now-President of the Supreme Court, the Right Hon Lord Reed of Allermuir, affirmed in *AXA General Insurance Ltd v Lord Advocate* that remedial retroactive legislation can be legitimate, stating:⁴⁰

[T]here can be no doubt that justification for [legislation which alters rights and obligations retrospectively] sometimes exists. It may exist, in particular, when the legislation has a remedial purpose. As [Professor Lon] Fuller remarked, at p 53:

“It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.”

As I shall explain, this point has also been noted by the Strasbourg court. In particular, because judicial decisions normally operate retrospectively in accordance with the declaratory theory of adjudication, such decisions may upset existing expectations or arrangements

In such circumstances, retrospective legislation which restores the position to what it was previously understood to be may not be incompatible with legal certainty or the rule of law.

11. Discretionary Suspended Quashing Orders may be a meritorious alternative

- 11.1. The Government's Consultation Report at paragraph [69] proposes legislating in favour of Suspended Quashing Orders. The Government proposes that judicial decisions to quash government acts should either be (a) presumptively suspended for a period of time, or (b) mandatorily suspended, subject to a public interest exception.

³⁸ M.D.A. Freeman, 'Standards of Adjudication, Judicial Law-Making and Prospective Overruling' [1973] CLP 166, 207.

³⁹ Beswick (n 3).

⁴⁰ [\[2011\] UKSC 46](#), [2012] 1 AC 86, [121] *per* Lord Reed; see *ibid* [93] *per* Lord Mance; see also Dicey (n 4) [142–145](#).

11.2. I agree that Suspended Quashing Orders may be a meritorious alternative to Prospective Invalidation, subject to the following caveats:

- a. I disagree with the Government's proposals that such orders should be either presumptive or mandatory. They should be *discretionary* and *exceptional*. Whether a quashing order is to be suspended, and for how long, should be left to the discretion of the presiding judge, who is best-placed to tailor the remedy to the circumstances at hand. There is a wealth of precedent from Canadian courts (where such orders have become routine) that can provide guidance as to when a quashing order should be suspended, as well as to the length of the period of suspension.⁴¹
- b. Any legislation in favour of Suspended Quashing Orders should clarify that it is only the *remedy* that is suspended, not the reasons underlying the order. The purpose of suspending a quashing order is to allow the Government time to respond by passing remedial legislation or regulations. After the period of suspension expires, judicial remedies should apply in the ordinary way, *unless* they have been retroactively curtailed or ousted by the Government's remedial legislation or regulations during the period of suspension.⁴²

12. Time limitation reform is appropriate

12.1. Finally, I agree with the Government's proposals at paragraphs [98] and [99] of its Consultation Report regarding the desirability of reforming the time limits for bringing a judicial review claim.

12.2. As to paragraph [98]: I agree that the requirement for bringing a claim 'promptly' as set out in CPR 54.5(1)(a) should be removed. It is unnecessary and likely causes more cost than it avoids.

12.3. As to paragraph [99]: I submit that the time limit for bringing a judicial review claim should be extended from three months to at least six months. Three months is a very short amount of time to assess one's legal position and may contribute to claims being brought prematurely. A longer time limit would encourage pre-action resolution outside of the courts.

13. Conclusion

13.1. The Government should abandon its proposal to legislate in favour of Prospective Invalidation. My answers to Questions 4 and 5 of the Government's Consultation are: No, I do not agree with the proposed amendments to section 31 of the *Senior Courts Act*.

⁴¹ Smith (n 33) 254–257; B. Bird, 'The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity' (2019) 42 Man LJ 23.

⁴² Juratowitch, 'The Temporal Effect of Judgments in the United Kingdom' (n 37) 177; Smith (n 33) 254; Bird (n 41) 36.

- 13.2. If the Government considers that the burdens of a particular judgment against it are too great to bear, the preferable alternative is for the Government to rely on remedial retroactive legislation in response.
- 13.3. Any legislation in favour of Suspended Quashing Orders should ensure that such orders are made at the *discretion* of the presiding judge and that it is only the *remedy* that is suspended, not the reasons underlying the order. My answer to Question 6 of the Government's Consultation is: No, I do not agree there is merit in requiring suspended quashing orders, but I do think there may be merit in giving judges a discretion to exercise such orders.
- 13.4. The requirement for bringing a claim 'promptly' should be removed from CPR 54.5(1)(a), and the time limit should be extended from three months to at least six months. My answers to Questions 9 and 10 of the Government's Consultation are: Yes, I agree.

Assistant Professor Samuel Beswick

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