Submission to House of Commons General Committee on Judicial Review and Courts Bill 152 2021-22 (Prospective Quashing Orders)

Samuel Beswick
Allard School of Law at the University of British Columbia, beswick@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs

Part of the Law Commons

Citation Details

This Response or Comment is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in All Faculty Publications by an authorized administrator of Allard Research Commons.
I am an Assistant Professor of Law at the University of British Columbia in Vancouver, Canada. I previously practised and taught law in London, England. My scholarly research concerns the overlapping doctrines of Prospective Quashing (i.e. judicially quashing government acts with non-retrospective effect) and Prospective Overruling (i.e. judicially overruling court precedents with non-retrospective effect).

In light of my research, I disagree with the proposal in Clause 1(1)(29A)(1)(b) to create prospective-only remedies in judicial review, because:

a. **Prospective Quashing violates Professor A.V. Dicey’s canonical three meanings of the Rule of Law:** Subsection (1)(b) allows unlawful executive action to govern past events without remedy, enabling rule by arbitrary power rather than rule by the regular law; (ii) Equality before law: Subsection (1)(b) gives the Government a remedial shield in litigation that is not available to ordinary people, which violates the principle of equality under law; (iii) Ordinary law: Subsection (1)(b) undermines the aspiration of law that ‘where there is a right, there is a remedy’, by abolishing the ordinary retrospective remedies for rights-violations.

b. **The premise of Subsection (1)(b), ‘that legal certainty, and hence the Rule of Law, may be best served by only prospectively invalidating’ impugned acts,** is contradicted by the leading mainstream theories of adjudication in the common law world, including those advanced by Professors H.L.A. Hart, Joseph Raz, John Finnis, Ronald Dworkin, and John Gardner. Subsection (1)(b) ushers in a radical change to the judicial method without any adequate theoretical or Rule-of-Law justification.

c. **Prospective Quashing draws judges into making policy and encourages judicial activism.** This statutory reform has roots in an American doctrine developed by

---


reformist jurists who sought to untether US judges from the constraint of retrospective judicial decision-making as a way to facilitate more radical judicial changes in the law. The technique leads to more uncertainty, instability, and inefficiency in the law, and more policy balancing in the courts, not less.

d. **Prospective Quashing is inconsistent with the English common law judicial method and the declaratory theory of adjudication that underpins common law reasoning.** Subsection (1)(b) 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.’ He warned that to cross that Rubicon—as Subsection (1)(b) does—‘would be to make a profound constitutional change with incalculable consequences’.

e. **Prospective Quashing is doctrinally unprincipled and has been denounced by prominent apex courts around the common law world.** The High Court of Australia has rejected the doctrine of judicial non-retrospectivity as ‘inconsistent with’ and ‘a perversion of judicial power’. The United States Supreme Court has abandoned it. In Canada it is a rarely-invoked exceptional resort. Subsection (1)(b) is an unprecedented reform. It would isolate the courts of the United Kingdom from influencing, and drawing influence from, comparable common law jurisdictions.

f. **Prospective Quashing is unnecessary and has been rejected by scholars who have analysed the doctrine in England.** When the Government disagrees with the reasoning or outcome of a judgment, the preferable and available solution is to enact legislation changing the law (if necessary, with retroactive effect).

1.3. Regarding the specific provisions of Clause 1, I favour:

a. removing subsections (1)(b) and (4) entirely;

b. in any event, removing subsection (9) so as to leave the exercise of this new power to the discretion of the judge having regard to the context of each case.

Assistant Professor Samuel Beswick

3 November 2021

---


