Joint Committee on Human Rights

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From Rt Hon Harriet Harman MP, Chair

The Lord Faulks QC
Chair of the Independent Review of Administrative Law

20 October 2020

Dear Lord Faulks,

I am writing with our submission to the Independent Review into Administrative Law on behalf of the Joint Committee on Human Rights. The Committee's submission is focused on the implications of potential changes to judicial review for those who wish to enforce their rights. The connection between human rights and judicial review has been of interest to this Committee for some time. Most recently in the Committee's 2018 report, *Enforcing Human Rights.* Building on this work, and to inform our submission to your inquiry, the Committee took evidence on Judicial Review and Enforcing Human Rights on 12 October 2020 from a panel of witnesses including lawyers, an academic, and a former Supreme Court Judge. The transcript of their evidence is appended to this letter.

Judicial Review and the Rule of Law

Judicial Review enables individuals to vindicate their rights and in doing so ensures that public authorities obey Parliament's intentions. It therefore plays a crucial role in ensuring the sovereignty of Parliament. Witnesses told us that Judicial Review gives Parliament "real power", because it enables individuals to use the courts to ensure that the Government acts in accordance with the laws passed by Parliament.[1] They also questioned the purpose of Parliament enacting laws in the absence of a mechanism for ensuring that they are subsequently enforced.[2] Professor Young of Cambridge University told us that the courts play an important role alongside the legislature in protecting human rights, by applying the principles that Parliament has determined in specific circumstances, through judicial review.[3]

Any attempt to remove areas of public law decision making from the supervision of the courts would be damaging to the rule of law. It risks creating a category of laws which the Government could breach without consequence. It would reduce a crucial check on executive action and undermine the principle that the law applies equally to the Government as it does to everyone else.

Enforcing rights

The importance of judicial review as a means of enforcing rights does not lie only in the landmark judgments on matters of constitutional principle, but in its use as a systematic means of ensuring that administrative decisions, which impact on people's everyday lives, are taken on a lawful basis.

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[1] Oral evidence taken before the Joint Committee on Human Rights on 12 October, HC (2019–21) 871, Q3 [Polly Glynn]

[2] Q1 [Polly Glynn]

[3] Q1 [Alison Young]

In addition to the role that judicial review claims play in securing remedies for individuals affected by unlawful decisions and actions by public bodies, the availability of judicial review in its current form has the capability to improve decision making by public bodies. Policy makers anticipate possible challenges when formulating policy and therefore seek to ensure that laws and policies are rights compliant. As Polly Glynn, Partner at the law firm Deighton Pierce Glynn and founder of the 'PAP Project'[4] told us, judicial review is not about providing compensation after failures have happened, but about getting things right in the first place.[5]

Judicial review provides a mechanism for enforcing rights that is effective even without litigation reaching the courts. We were provided with various examples where the threat of judicial review had led to a change in policy or the reversal of a decision. Alison Pickup, Legal Director at the Public Law Project, told us that many cases, possibly up to 60%, were resolved through pre-action letters, and that once cases have started they are often resolved before a hearing.[6] Polly Glynn told us that the PAP Project sees a reversal of the public body's decision in 80-85% of cases following a PAP letter.[7]

The role of the courts: justiciability

The Review's terms of reference raise questions about the issue of justiciability. It was clear from our witnesses that in the vast majority of judicial review claims this issue does not arise, but in those cases where it does we accept that the line between the questions that may be suitable for judicial resolution and those that are not may be difficult to define. However, we heard from our witnesses that any attempt to address this issue through codification risks reducing clarity and upsetting the balance of our constitutional settlement. The courts are accustomed to dealing with issues of justiciability and are sensitive to the political context in which challenges arise. Judges recognise that there are areas where the executive or legislature has expertise, such as national security, and apply deference in these cases.

Questions about justiciability in the Review's terms of reference appear to have been prompted by a desire to limit the ability of the courts to question the lawfulness of executive action in the political sphere. However, the fact that decisions are taken in a political context, or have political consequences, does not necessarily make them political decisions not suitable for judicial review.

Lord Dyson, Former Master of the Rolls and Head of Civil Justice, and Former Justice of the Supreme Court, told us that judges are well aware that they are not elected, and that there are "no go areas". The problem comes with identifying them.[8] He also made the point that cases raising difficult questions about non-justiciability are very rare, but that there was little that could be done to clarify how to deal with this small minority of cases. Any attempt at codification would have to be "at a high level of abstraction and generality" which would then have to be interpreted by judges.[9] We heard from Professor Young that whilst the issue of non-justiciability might appear unclear at times, the case law shows that there are lines that judges will not cross. Lord Dyson suggested to us that the real issue underlying the debate

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[4] In reference to 'pre-action protocol' letters
[5] Q1 [Polly Glynn]
[6] Q3 [Alison Pickup]
[7] Q3 [Polly Glynn]
[8] Q4 [Lord Dyson]
[9] Q5 [Lord Dyson]

about justiciability was cases in which politicians and some media outlets disliked the outcome. This is not a basis upon which to alter the law.

Even if there was a need to attempt it, it seems likely that there would be difficulties in seeking to codify this area of the law. Justiciability is governed by principles, which the courts apply in specific circumstances. Prof Young and Lord Dyson suggested that if these principles were codified, the courts would still be required to interpret them in specific circumstances, which would result in a body of case law much like the existing position.

Previous Reforms

Extensive procedural reforms to judicial review were introduced between 2010 and 2015 under the Coalition Government. They included moving certain categories of case to the upper tribunal and introducing new fees and time limits

Furthermore, changes to the legal aid regime have meant that when an application is rejected, lawyers are not entitled to be paid for work done until that point. As applications are only granted in around 20 percent of cases, this has disincentivised legal aid lawyers from taking on this type of work. Lord Dyson characterised the reforms as "trying to reduce judicial review".[10]

We know that previous reforms have reduced the number of judicial review cases. Worryingly, the proportion of successful claims has stayed the same, suggesting that meritorious claims may have been deterred.[11] Our witnesses were unaware of any more detailed research into the effects of these reforms, which have only had a few years to bed in. It is our view that insufficient time has passed for the impact of these reforms to be fully understood, making it much too early to make further changes.

Potential areas for improvements

There are measures that might reasonably be taken to improve the efficiency and effectiveness of judicial review and increase access to justice for victims:

- The availability of other complaints mechanisms could be improved, thus reducing the need for judicial review.
- There could be a general duty for administrative bodies to give reasons for their decisions, with narrowly defined exceptions. This would allow claimants to make better informed decisions on whether to bring judicial review claims. It would also aid the courts when assessing the lawfulness of decisions, making the whole process more efficient.
- The risks for public interest claimants, and even third party interveners, of being forced to pay their opponents' substantial costs, dissuade parties from accessing judicial review and represent a real barrier to it fulfilling its potential in enforcing rights.

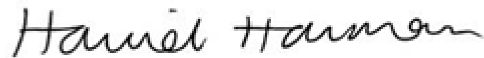
[10] Q1 [Lord Dyson]

[11] Q10 [Alison Pickup]

Next steps

It would have been very helpful if the review had set out what it saw as evidence of the need for reform. For example, we heard from our witnesses that the processes already in place for weeding out unmeritorious claims are sufficient, but it is unclear whether the Government disputes this. Once the Review puts forward its proposals, we expect there to be an opportunity for stakeholders, including this Committee, to respond to them. This consultation should set out the evidence for any proposed reforms.

Yours sincerely



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