# Judicial review does not need legislative reform

Michael Zander on what the authors of *De Smith* have told the Government's inquiry

The Independent Review of Administrative Law (IRAL), chaired by Lord Faulks QC, has been asked by the Government: 'Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?' It would be naïve to ignore the reality that the question comes with a heavily loaded political agenda. The inquiry closed the portal for submissions on 26 October 2020 and is asked to report by the end of the year.

The authors of the leading work on the subject, *De Smith's Judicial Review* (Sir Jeffrey Jowell QC, Ivan Hare QC, Catherine Donnelly SC and Lord Woolf), have, at my request, very kindly allowed me to publicise their 19-page submission to the Faulks inquiry. (To read the *De Smith* response in full please visit *https://bit.ly/2GoTGkZ*.)

## Codification?

**The Review asks: 'Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute?'**

*De Smith* reply (paras 9-11): 'The grounds of judicial review have to apply to the entire range of reviewable administrative action. This covers the immense variety of exercises of public power . . . The very breadth of administrative law therefore means that the principles of judicial review must be stated at a high level of generality to ensure that their application can be matched appropriately to the particular context in which they arise in a given challenge. Secondly, codification can involve an assumption that the common law grounds will not need to develop further in the future. . . .

We consider it would be regrettable if current and future judges were prevented from contributing responsibly to that development. A third concern about codification is that it can lead to an increase in litigation about what are the precise limits of the codified definition. This form of satellite litigation is a common feature of codified systems and leads to wasted costs and delays for cases of real substance. . .

[W]e firmly believe that the codification of the amenability of public law decisions and the grounds of public law illegality should not now be done.'

## Justiciability

**The Review asks: 'Whether the legal principle of non-justiciability requires clarification?'**

*De Smith* reply (paras.12-21): The question raised constitutional and institutional issues.

'The constitutional limits of courts arise out of the democratic principle of separation of powers, where Parliament debates and enshrines in legislation the policy formulated by the executive and the courts fulfil the role of interpretation of the scope of legislation and the application of legal and constitutional principle.

It is not for judges therefore to make utilitarian calculations of social economic or political preference (such as whether a new airport should be built or whether Trident warheads should be abandoned). The sensitivity of the courts to these issues is illustrated by a recent decision considering whether the pension age of women could be raised to the level of men and then raised once more. The Court of Appeal held that the matter was not for them to decide on the ground that it involved "macroeconomic policy" (*Delve and Glynn v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199).

However, the courts may have a secondary constitutional function even when a policy issue is in dispute. They are entitled to decide whether the decision, albeit the subject of which is a matter of policy, is within the scope of the relevant power or duty conferred on the decision-maker or was improperly made, or made with an ulterior motive or for an improper purpose.

An example is *Miller v Prime Minister* [2019] UKSC 41 where the Supreme Court held that the prorogation of Parliament by the Prime Minister was unlawful. Although this case was seen by some as judicial interference with the political system, it applied standard and familiar judicial review principles. Lady Hale for a unanimous Court noted (at [49]) that "although the court cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts not to consider it".

The courts' institutional limits arise when it is not possible for judges to formulate objective standards which can be applied within the limits of the forensic process. This may be because the discretion is properly exercised on very broad grounds or where the limits of the gathering and testing of evidence in court cannot yield a clear answer. The adversarial nature of a judicial hearing also imposes limits on the courts, especially in relation to allocative or polycentric problems.

Fundamentally, this is not an area which requires legislative reform: the courts have consistently revealed themselves to be well-aware of both the constitutional and institutional limits on their powers and have shown no desire to extend their reviewing function into areas outside their proper function or their institutional competence or expertise. . . We do not believe that it is possible to clarify in any code or other document the different elements of justiciability as outlined above. Context is all here, and the potential contexts are many. . .

Nor do we believe that it is desirable for the executive or legislature to set out the parameters of justiciability. No government is ever pleased by challenges to its exercise of power, but any instruction as to what issues the courts could not determine on the basis of justiciability risks offending the separation of powers and the rule of law. Justiciability is a matter best for the courts to determine, with due respect to the relative functions of government in the area of policy and with due deference where the government's institutional capacity is greater than their own.

There will always be cases that some will consider too activist or too restrained, but it is a mark of a mature and functioning democracy that the Executive accepts judicial decisions which define the legal scope of its powers and the judiciary respects the extent to which the Executive must be free to formulate and implement its policies within the law.'

## Grounds of review

**The Review asks: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.**

*De Smith* reply (paras.22-29): '. . . we have answered your question above about possible codification of the grounds of review and repeat our doubts here both about the possibility of including all the different specific grounds in any one code, and about the desirability of so doing. In answer to your question about which grounds the courts "should be able to find a decision to be unlawful", we again caution against any instructions on this matter, by the executive or legislature, either to increase or reduce the grounds presently employed through the incremental development and wisdom of the common law.'

## Process & procedure

**The Review asks: Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and; (g) on costs and interveners.**

*De Smith* reply (paras.30-37): Para.15-075 of de Smith states 'As a matter of principle, the underlying test for all reforms to judicial review procedures is that they should maintain or enhance the ability of the courts to review the legality of the exercise of public power. This is fundamental to upholding the rule of law and protecting individual rights. There are further procedural elements to the normative assessment of any proposed reforms: that they should be based on adequate and objective evidence and should be preceded by an appropriate period of consultation.

We proceed to articulate a "strong impression" that some of the most recent reforms to the judicial review procedure (including those contained in the Criminal Justice and Courts Act 2015) were motivated principally by central government hostility towards judicial review and were based either on no objective evidence or an entirely inadequate evidential basis. In this respect we make three further comments on procedural reforms generally.

First, the 2015 reforms were introduced without taking into account the major reduction in the caseload of the Administrative Court which was bound to follow the transfer of most asylum and immigration cases to the Upper Tribunal. In light of this reduction (from more than 15,000 applications in 2014 to 3,400 in 2019), there can be no resource-based case for introducing further restrictions on access to the Administrative Court for those matters which remain within its jurisdiction.

Second, it is of the utmost importance that any procedural reforms have the informed consent of the senior judiciary whose task it will be to enforce them. The decision to proceed with aspects of the 2015 reforms in the face of judicial hostility proved pointless since the judges retained the exclusive power to interpret and apply the new restrictions.

Thirdly, and to a greater extent than in other areas of civil procedure, central government stands to be the principal beneficiary of any further restrictions on access to judicial review since it is (especially through the Ministry of Justice and Home Office) the most frequent defendant to judicial review proceedings. This should encourage great caution on the part of the Executive before the introduction of further restrictions which are bound to tip the balance further against the vindication of the rule of law and the protection of individual citizens against the state.'

## Standing

'As a result of the decision of the House of Lords in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses* [1982] A.C.167, standing in domestic public law has ceased to exist as a matter distinct from the merits of the challenge (save in the case of the meddlesome busybody) since it is now considered along with the entire legal and factual context of the case. As a result, there are few, if any, reported cases in which the challenge is found to be meritorious, but the claim is rejected on grounds of standing. . . In fact, it is clear that the current approach to public interest standing has greatly benefitted the principled development of public law and has enabled the judicial control of unlawful action which did not have a greater impact on any single citizen than on the public at large.' NLJ

### The Independent Review of Administrative Law (IRAL)

- For the Review's terms of reference and its 12-page call-for-evidence see *https://bit.ly/3oTHaLy*.
- The panel members are: Lord Faulks QC, Panel Chair; Professor Carol Harlow QC; Vikram Sachdeva QC; Professor Alan Page; Celina Colquhoun; and Nick McBride.

**Michael Zander QC** is a *NLJ* columnist and Emeritus Professor, LSE