The Dickson Poon School of Law

Dr Fergal F Davis |Reader in Public Law

Twitter: @Fergal_Davis
Email: fergal.davis@kcl.ac.uk

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RE: Submission to the Independent Review of Administrative Law

To whom it concerns,

I am grateful for this opportunity to submit evidence to the Independent Review of Administrative Law. I am a Reader in Public Law at the Dickson Poon School of Law and have over 20 years' experience teaching, researching and writing on administrative law.

I have worked in universities in Australia, Ireland and the UK and have a well-established interest in issues surrounding the scope of judicial review.

I understand that the Review Panel are likely to be inundated with submissions and, as such, I will keep my comments brief and to the point. I am also happy to provide supplementary evidence at a later date if that would be of benefit.

Judicial Review skepticism

In broad terms I would characterise myself as a judicial review skeptic. I acknowledge a role for judicial review of administrative action, but I am concerned about the potential for juridification.

Juridification occurs when a political problem – properly resolved through the ordinary operation of politics – is converted into a legal problem – and subject to judicial resolution. This gives rise to concerns about democratic legitimacy, the separation of powers and the sovereignty of Parliament.

The IRAL terms of reference

As a non-practitioner academic I feel that my expertise is most relevant to the first two of the Review's terms of reference.

1. 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.

   If we accept the premise that judicial review has the potential to encroach on the political sphere then codification appears to offer an opportunity to redefine the limits of the role of the courts. I would, however, urge caution.

   Codification is likely to expand rather than limit the scope of judicial review. Once codified in an Act of Parliament the grounds for judicial review will be subject to judicial interpretation. I am unconvinced that codification would constrain the

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development of judicial review. Expansionist interpretations could be attributed to the will of Parliament rather than being a creature of the Common Law.

In discussions of codification reference the Australian example is often cited. Dr Lisa Burton Crawford has published an accessible guide to the limits of Australian administrative law.. The *Administrative Decisions (Judicial Review) Act 1977* (Cth) attempts to codify the grounds and operation of judicial review at the Commonwealth level.

There are a few relevant points to consider regarding the Australian model. Firstly, judicial review of the Federal Government in Australia is shaped not just by the ADJR but also by the Australian Constitution. Australian precedent regarding non-justiciability may appear attractive to some in the UK who seek to limit the operation of the courts in the administrative arena. However, that operation must be contextualised. The strict and narrow interpretation of the separation of powers in the Australian Constitution (and the accepted limits on the role of "Chapter III Courts") is likely to be as significant a limit on the judicial role in Australia as the ADJR.

Secondly, the very different human rights context in Australia (often described as exceptional or unique) impacts on the role of the courts there.

2. Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government.

The interpretation of justiciability in the Australian context is significantly influenced by the Australian Constitution and its interpretation of the separation of powers. Clarifying the concept in the UK is likely to prove difficult.

This issue of justiciability attracted some attention due to the *Cherry/Miller* case (2019 UKSC 41). Prior to that judgment I was of the view that the inability to provide a public law remedy might prove influential. I could not envisage a suitable remedy which the Court might impose on Parliament.

In their unanimous judgment the Court stated:

> it appears to us that, as Parliament is not prorogued, it is for Parliament to decide what to do next. There is no need for Parliament to be recalled under the Meeting of Parliament Act 1797. Nor has Parliament voted to adjourn or go into recess. *Unless there is some Parliamentary rule to the contrary of which we are unaware*, the Speaker of the House of Commons and the Lord

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> Speaker can take immediate steps to enable each House to meet as soon as possible to decide upon a way forward. (2019 UKSC 41 [70])

Arguably, this is not a remedy within the grant of the Court. It might be characterised as a finding of fact that no prorogation had occurred and that, as a result, the Court was advising the Speaker of the Commons and the Lord Speaker to enable each House to sit.

Before drawing a conclusion from *Cherry/Miller* it is worth noting that the case was extra-ordinary in many ways.

It is not at all obvious that the unique circumstances which arose in *Cherry/Miller* justify an attempt to re-interpret justiciability – legislatively or otherwise.

Additional matters

Related to the third issue before the Review Panel I would like to address a few miscellaneous matters.

1. Scrutiny of Automated Administrative Decisions

The decision making process of the Settled Status Scheme for EU citizens was conducted by algorithm via an App. The use of Artificial Intelligence and decision by algorithm is likely to grow in the years ahead. Ensuring effective scrutiny of the operation of such mechanisms will be important. The Public Law Project has conducted some work in this area.

2. Legislative over-ride

In considering the role of Administrative Law it is important not to forget the role of Parliament. Such discussions often focus on the role of the courts and ignore the potential for Parliamentary over-ride.

2(a). The declaration of imcompatability

Critics of judicial review often cite a supposed expansive interpretation of the *Human Rights Act 1998*. In so doing the role granted to Parliament by the s.4 declaration of incompatibility is often overlooked. The 'genius' of the HRA was that it gave the final say on issues to Parliament not the Courts.

In *Momcilovic v The Queen* [2011] HCA 34 the High Court of Australia considered the statement of incompatibility mechanism within the Victorian Charter of Rights as problematic precisely because it purported to involve the courts engaging in a discussion with parliament. All too often UK parliamentarians (including Ministers)

have responded to declarations of incompatibility under the HRA as if they were binding rather than advisory.

Conclusion

Once again, I thank the Panel for their time.

Seeking to codify grounds for review in an attempt to constrain the judiciary is likely to result in unintended consequences. In my view, I would be better to encourage Parliament to reconsider its ability to respectfully over-ride judicial decisions which it finds objectionable.

Yours truly,

Dr Fergal F Davis |Reader in Public Law
The Dickson Poon School of Law
King's College London
Strand | London | WC2R 2LS

https://www.kcl.ac.uk/people/fergal-davis

Twitter: @Fergal_Davis
Email: fergal.davis@kcl.ac.uk

Selected Publications

Fergal Davis, 'Brexit, the Statute of Westminster 1931 and Zombie Parliamentary Sovereignty' (2016) 27(3) *King's Law Journal* pp 344-353.

Fergal Davis & David Mead, 'Declarations of Incompatibility and the Criminal Law' (2014) 43(1) *Common Law World Review* pp 62-84.

Fergal Davis, 'Parliamentary Supremacy and the Re-Invigoration of Institutional Dialogue in the UK' (2014) 67(1) *Parliamentary Affairs* pp 137-150

Fergal Davis, 'The Human Rights Act and Juridification: saving democracy from law' (2010) 30(2) POLITICS pp 91-7.