Haldane Society of Socialist Lawyers submission to the Independent Review of Administrative Law

Introduction

Judicial Review (JR) seeks to provide an independent mechanism within the jurisdiction of the judiciary, for the review and remedy of flawed administrative and executive decisions. The aim of JR quite simply is to redress power imbalances between those subject to the controls and discretion of these institutions' decision makers, and those endowed with the tools and protections of state-sanctioned power.[1]

JR serves as a vital independent check-and-balance for the challenge of government, public bodies and corporations with significant control over socially vital resources in that jurisdiction, within the bounds of Wednesbury reasonableness.

The Haldane Society of Socialist Lawyers, founded in 1930, provides a well-respected and knowledgeable forum for the discussion and analysis of law and the legal system, both nationally and internationally, from a socialist perspective. We are independent of any political party and our membership comprises lawyers, academics, students and legal workers as well as trade union and labour movement affiliates. Our President is Michael Mansfield QC. Our Vice-Presidents are Geoffrey Bindman QC, Louise Christian, Liz Davies, Tess Gill, Tony Gifford QC, John Hendy QC, Helena Kennedy QC, Imran Khan QC, Catrin Lewis, Gareth Pearce, Estella Schmidt, Jeremy Smith, Frances Webber, Richard Harvey and David Watkinson.

Our members and vice-presidents include noteworthy experts on areas including the rule of law, access to justice, administrative law, human rights, extradition law, disability rights, amongst other areas. The contributions in this submission therefore

[1] Government bodies often routinely and arbitrarily break the law outside of the high profile cases which go to trial. It is the work of socialist lawyers and other public law practitioners to hold the Government to account in the 'big' cases and 'recurrent' cases. Often, a pre-action protocol letter can be sufficient to show how the behaviour is simply and clearly unlawful so these cases routinely settle, as the Government Legal Service know that the lawyers are right and the judges will find against the Government. We especially commend the Child Action Poverty Group and the Public Law Project for their work and organisation in this respect. Accountability of government officials, such as Dominic Cummings, is a matter of widespread public concern and is a legitimate area for judicial review. We are not aware that the GLD keep records of cases that are settled and the impact on ordinary individuals - this is an important source of data, which should be monitored and the Haldane Society reserves its position regarding making freedom of information requests of every government department for these statistics. Accordingly, public bodies should welcome the intervention of lawyers in judicial reviews who are acting in the public interest. This is the considered view of Professor Paul Craig of Oxford University, who emphasises the importance of judicial review for the Rule of Law and how it is helpful to clarify the scope of the legal powers and responsibilities of government departments. We are aware that he is making a separate submission and we adopt his arguments where they do not differ from the rationale of those points that have been outlined in this submission.

draw upon significant professional expertise and offer a public-interested perspective into the proposed consultation.

Our responses to this consultation are informed by a context where successive governments have misused neoliberal narratives of cost, streamlining and efficiency to effectively curtail and erode rights within the judicial system, particularly within the past decade. These curtailments and reductions have resulted in an increase in the burden on those who are both lacking in power and in most need of judicial remedy.

The broader political context is also noteworthy in the stark contrasts of power between those with control over executive and administrative mechanisms as well as presence in the public discourse. This discourse is of course influenced by a lack of media plurality, lobbying from those with deep pockets, commercial pressures that limit other modalities of surfacing injustice and powerful politicians' public positions that seek to curtail the scope and independence of the judiciary and express a marked distaste for the work of so-called "activist lawyers" and critical challenge. This is coupled with the use of procedural tools to limit the ability of the judiciary to opine on issues of relevance, as well as limiting the remedies available.

Other alternatives to JR including administrative reviews continue to be limited by obvious factors, such as power dynamics within the executive and administrative arms, but also underlying factors such as group-think within the institutions themselves and the need for trustworthy, independent and unbiased review of decisions made by those with institutional access to power and resources.

The Haldane Society of Socialist Lawyers have intervened on behalf of the public interest throughout its history. We were particularly prescient in our warnings regarding the impact of legal aid cuts in 2011.[2] It is a shame that the findings of the Commission on legal aid were not considered; many of the problems within the legal system, and within British society, including the abuse of public power, can be traced to the short-sighted austerity measures cutting legal aid funds and reducing its scope. We set out our specific concerns regarding the potential problems with relevant constitutional blindspots or, indeed, the conscious ideological agenda of Tory legislators below.

[2] The Haldane Society and Young Legal Aid Lawyers released an independent report arguing that cutting legal aid is "a false economy" ahead of expected government announcement on legal aid reforms. A panel of independent experts concluded that cutting legal aid would not bring the savings to Government spending that Ken Clarke hoped. "UNEQUAL BEFORE THE LAW? THE FUTURE OF LEGAL AID" set out the findings of a 'Commission of Inquiry into Legal Aid'. The Commission comprised Evan Harris, former Liberal Democrat MP, Diana Holland, the then assistant general secretary of the trade union, Unite, and the Reverend Professor Nicholas Sagovsky, the former canon of Westminster Abbey. These three non-partisan and independent-minded experts, each with a long track record of promoting social justice, considered the cases both for and against legal aid. Their purpose was to consider objectively, at a time of cuts to public spending including proposals to remove £350 million from the £2.1 billion legal aid budget, the value of the safety net which our legal aid system provides for the ordinary people, sometimes poor and usually vulnerable, who rely upon it.

Specific responses

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.**

   The Haldane Society avers that in the current public law context the judiciary is best placed to independently consider the amenability of public law decisions to JR. In the current context, we oppose any attempts to pre-define and pre-determine which grounds are meritorious for judicial review.

The amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be considered in the context of a constituent assembly and / or constitutional convention, preferably resulting in a socialist republic, but in any event, a republic. We do not accept the premise of the existing constitutional settlement and will not accept the inevitability of this. Indeed, there was previously a fundamental hierarchy in English law which comprised (1) European legislation (subject to parliamentary supremacy) (2) primary legislation, (3) subordinate secondary legislation[3] and (4) decision-making. Illegality can occur

[3] We adopt the criticisms of the abuse by the present government of secondary legislation outlined in the recent report, "Plus ça change: Brexit and the flaws of delegated legislation system" by Alexandra Sinclair and Dr Joe Tomlinson, Public Law Project, October 2020. The authors show that the UK's withdrawal led to a 'tsunami' of delegated legislation in the form of statutory instruments (SIs). These are laws which, unlike Acts of Parliament are often not debated or scrutinised, cannot be amended, and are virtually impossible for MPs to stop. Concerns raised by the report include:

Volume:

During the 2017-2019 parliamentary session, 1,835 instruments were laid in total. 622 of those were Brexit SIs, representing 34% of all instruments during that session. The Word count of Treasury and HMRC SIs increased by 300% between 2009-2019 & 2017-2019. The average page length of an EU Exit SI was 18 pages; that is almost double the average for 2015-2016.

Poor and non-existent impact assessments:

There was no impact assessment made on massive changes to the UK chemicals regime which makes up 7% of UK GDP. The Secondary Legislation Scrutiny Committee relied on a BBC News article to assess the impacts of the legal changes of the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019

Henry VIII powers:

142 of the 622 Brexit instruments were used to amend primary legislation that had already been passed by Parliament.

Lack of debate:

The Government used the urgency procedure 30 times. This process gives SIs legal effect immediately, before they have been debated. The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 were 26 pages, made 36 different amendments to existing legislation and was debated for 11 minutes in the Commons.

where any of these is inconsistent with the parameters imposed by a superior source of law.[4] With the withdrawal of the UK from the European Union, judicial review goes to the heart of contested power in our society and the constitutional relationship with the entity and purported constituent part of the United Kingdom known as "Northern Ireland" and especially the rights of Irish citizens under the Good Friday Agreement.[5] As Whitten argues, "If the 1998 Agreement is understood in the UK as merely a political agreement it may be judicially unenforceable; if it is understood in the EU as a UK-Ireland treaty, certain provisions of which are underpinned by an EU-UK treaty, it will be judicially enforceable. Which means, the dispute over the [United Kingdom Internal Market] is probably only the start."[6]

The Haldane Society of Socialist Lawyers is concerned about the restrictions judges face when reviewing decisions engaging questions of socio-economic policy and rights. An example of such caution can be found in the developing interpretation of Article 14 ECHR in discrimination cases: in a line of cases, the requirement for a decision causing discrimination to be "manifestly without reasonable foundation" has

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Errors and mistakes:

In the 2017-2019 session, the proportion of instruments needing correction more than doubled. 97 SIs were laid before Exit Day to fix the mistakes of earlier SIs.

[4] Indeed, Thomas de la Mar QC has recently provided a devastating critique of the Government's misuse of statutory instruments, pessimistically concluding about the Tory regime that, "Sadly there is no prospect of this Government or this Parliament taking any such steps toward curtailing or structuring its extravagant powers. Forget the turkeys not voting for Christmas, turkey breeders don't vote to abolish Christmas." https://www.blackstonechambers.com/news/statutory-instruments-unseen-constitutional-crisis/

[5] The courts are reluctant to entertain challenges to decisions relating to the internal procedures of the United Kingdom Parliament and challenges to decisions of the superior courts of England and Wales (e.g. the High Court, Court of Appeal and Supreme Court). Challenges to decisions relating to the validity of Acts of Parliament have traditionally been outside the remit of judicial oversight although there are certain areas, such as compliance with European Community law, which the courts may investigate. "In R (Miller) v Secretary of State for Exiting the European Union ('Miller') the Supreme Court was asked to determine if provisions of the 1998 Act "read together with the Belfast Agreement and the British-Irish Agreement" [126] placed any constraint on executive power to trigger article 50 of the Treaty on the European Union ('Article 50'). While the Court acknowledged the 1998 Act to be "the product of" the 1998 Agreement and a "very important step" in the peace process which established institutions and arrangements to "address the unique political history of the province" it proceeded to ignore that history by interpreting the question only through the lens of its "relevant commonality" with devolution arrangements in Scotland and Wales [128]. Having already determined in their deliberations on the "main issue" [5] in Miller that primary legislation would be required prior to triggering Article 50, the Court determined "it [was] not necessary to reach a definitive view on the first referred question" [132] concerning constraints placed by the 1998 Agreement and 1998 Act on the executive's use of prerogative power. The 'unique political history', cited in but ignored by the Court in Miller, sets Northern Ireland as a constitutional place apart in ways that are of pressing relevance to contemporary political machinations yet are not often subject to detailed scrutiny." See L. C. Whitten, 'The Belfast 'Good Friday' Agreement & Unconstructive Ambiguity', U.K. Const. L. Blog 16th Sept. 2020) (available at https://ukconstitutionallaw.org/).

[6] Ibid.

been imported from ECtHR caselaw into domestic caselaw so as to allow broader scope to the executive in its decision making powers. The test was inappropriately imported, intended to apply to the "margin of appreciation" which applies to European member states, and not any of the grounds of domestic judicial review.[7] This appears to be a reaction to high profile criticism of perceived judicial interference with government decision making.

In codifying the grounds of review, the following observations should be taken into account.

Judicial review is currently concerned with whether decisions are taken lawfully and fairly and not with the merits of decisions. We reject the premise of the concept of public law illegality insofar as the case law has evolved assuming that we, as citizens, are content with the current constitutional settlement. As socialists, and as lawyers, we do not accept the legitimacy of the Monarchy or the Privy Council.[8] This offends our concept of equality, democracy and fairness. The perpetuation of royal powers as manifested in prerogative powers and patronage, including the unrepresentative House of Lords, has many consequences which perpetuate inequality and discrimination in our society. We do not accept the concept of an established Church of England and the discrimination that this enshrines in our (so-called 'unwritten') constitution.

The concept of *ultra vires,* the most obvious ground for illegality, was imported from company law, the enactment of which is premised on the interests of Capital as opposed to Labour in the United Kingdom. There are instances where we are gravely concerned with the way in which company law in the UK is formulated in a way that ensures the prioritisation of the interests of capital providers in corporations over the interests of other stakeholders, including workers, the environment and the community.[9] This also occurs in the intersection of insolvency law with workers' rights.

Decisions taken for improper purposes may also be illegal. So, for example, the decision of a council not to do business with Shell on the grounds that Shell had interests in apartheid South Africa was held to be unlawful (*R -v- Lewisham London Borough Council, ex parte Shell UK Ltd* [1988] 1 ALL ER 938). While it would have been "legitimate" for the decision to be taken merely on the basis that it would improve race relations in Lewisham, in this case it had also been taken to exert

[7] See Lord Kerr's dissent in R (DA) and R(DS) v Secretary of State for Work and Pensions, [2019] UKSC 21 and Jed Meers, 'Problems with the 'manifestly without reasonable foundation' test' (2020) JSSL 27(1).

[8] The Constitutional Role of the Privy Council and the Prerogative, Patrick O'Connor QC, Justice, 2009

[9] See the discussion in D Plesch and S Blankenburg, How to Make Corporations Accountable (Institute of Employment Rights, 2008).

pressure on Shell to end its involvement in South Africa. This constituted an "improper purpose" according to the Court. This was, and is, frankly, ridiculous and the correct position was that advocated by Lewisham London Borough Council. The grounds of public law illegality should encompass standards of international law and human rights which, in this case, was the position advocated for decades by socialists, namely the ending of apartheid with the 'proper purpose' of racial equality in South Africa. A similar decision was the case of Bromley LBC v Greater London Council, [1983] 1 A.C. 768, where a manifesto commitment was held to be an improper consideration in deciding to subsidise transport fares. This was similarly ridiculous and failed to understand the importance of politicians being held accountable for their election promises.

A similar position to the historical position in South Africa exists under the administration of judicial review and current UK Government policy so as to seek to prevent socialists campaigning for Boycott, Divestment, Sanctions (BDS), a Palestinian-led movement for freedom, justice and equality. BDS upholds the simple principle that Palestinians are entitled to the same rights as the rest of humanity. Israel was formed in 1948 through the brutal displacement of nearly 800,000 Palestinians and the destruction of more than 530 towns and villages. This pre-meditated ethnic cleansing is known as al-Nakba, the catastrophe. Since then, Israel has implemented a regime of settler colonialism, apartheid and occupation. over the Palestinian people.[10] Apartheid was wrong in South Africa and it is wrong in Israel, despite the doctrine of "improper purpose" expounded *R -v- Lewisham London Borough Council, ex parte Shell UK Ltd*.

A further category of illegality is where a body either abdicates or delegates responsibility for a decision or impermissibly fetters its discretion. It has been accepted that it is a practical necessity of administration that responsibility be devolved (rather than delegated) in certain cases (so, for example, it is permissible for a duly authorised civil servant to exercise a power granted to his or her Minister) *Carltona Ltd -v- Commissioner of Works and Others* [1943] 2 All ER 560. A good recent example of the operation of this principle and the positive use of judicial review was *R v Adams (Northern Ireland)* [2020] UKSC 19.

Lord Kerr reached the following conclusions. First, even if a presumption exists that Parliament intends *Carltona* to apply (which Lord Kerr doubts in obiter in the context of his analysis of McCafferty's Application), it was clearly displaced on the facts by

[10] On 10 December 2019, Lawyers for Palestinian Human Rughts submitted an evidence-based human rights complaint against JCB to the UK National Contact Point for the OECD Guidelines for Multinational Enterprises (situated in the Department of International Trade). The complaint is being brought under the OECD Guidelines for Multinational Enterprises (OECD Guidelines). The primary evidence submitted with LPHR's complaint that substantiates the material use of JCB products in demolitions, relates to incidents in ten villages or areas in the occupied Palestinian territory, covering the period 2016-2019. In total, 89 homes are identified as having been demolished, resulting in the displacement of at least 484 individuals, including children and the elderly.

the proper interpretation of article 4(1) and 4(2), read together. Second, the fact that the power invested in the Secretary of State by article 4(1) was a momentous one provides an insight into Parliament's intention, which was that such a crucial decision should be made by the Secretary of State personally (in agreement with Staughton LJ's view in Doody). Third, that there was no reason to apprehend that this would place an impossible burden on the Secretary of State further lent itself to the conclusion that it was intended that the Secretary of State should make the decision personally.

For these reasons, Lord Kerr concluded that Parliament's intention was that the power under article 4(1) of the 1972 Order should have been exercised by the Secretary of State personally. The making of an interim custody order in respect of the appellant was, therefore, invalid and his convictions for attempting to escape from lawful custody had to be quashed.

The codification of judicial review goes to the heart of people's ability to challenge executive authority and decision-making. It follows that the democratic legitimacy of such a process would depend on it being conducted by means of a democratically constituted constituent assembly and constitutional convention. The importance of civil participation in decision-making processes has been recently emphasised by the Council of Europe. For example, in its report following a fact finding visit to Ireland, the Conference of INGOs of the Council of Europe reflected on the recent use of citizens assemblies in Ireland in the deliberation of important constitutional issues. The report highlighted the need to 'draw international attention to the need of the deliberative democracy' and recommended the 'dissemination of the Citizens' Assembly as one of the best practices to implement.'[11]

Illegality also extends to circumstances where the decision-maker misdirects itself in law.[12] When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

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.**

[11] The Conference of INGOs of the Council of Europe, 'Civil Participation in the Decision-Making Process. Fact Finding Visit to Ireland 24-26 April 2017' p.18 https://rm.coe.int/report-visit-of-the-conference-of-ingos-to-ireland-final/168072abd9.

[12] Bondy, V., Platt, L. and Sunkin, M., (2015). The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences. Public Law Project. 9781898421160

The Haldane Society avers that it would undermine the principles of judicial independence to allow the government to be the arbiter of whether the exercise of a public law power should be justiciable.

In *R (Witham) v Lord Chancellor* [1997] EWHC Admin 237, [1998] QB 57, it was held that the increase in court fees and the omission of previous exemptions for those on income support effectively prohibited access to justice and impeded the rule of law. Sumption, writing extra-judicially, criticised this decision on the basis that the question was one of resource allocation and therefore non-justiciable. We do not accept that the principle of non-justiciability is valid in a democracy. Decisions relating to all areas of the life of a citizen made by state agencies should be subject to judicial review. We should not be subjects of a monarch but citizens with free standing rights not subject to dilution by the whim of a political party which may, for example, seek to revoke the Human Rights Act 1998[13] in breach of the Good Friday Agreement and international law. A strong judiciary is needed to hold the Executive and, indeed the Legislature, to account. This is particularly the case where we have an elision of the purported separation of powers where the Monarch as Head of State through prerogative powers can appoint ministers, the judiciary and members of the House of Lords.

The invalidity of the principle of non-justiciability was well demonstrated in the following cases, where it was held that, given the engagement of a fundamental right or constitutional principle, a decision regarding socio-economic policy was nevertheless justiciable:

- In R (UNISON) v Lord Chancellor, [2017] UKSC 51, it was held that fees for applicants' use of the employment tribunal effectively prevented access to justice, and that the constitutional right of access to justice was inherent in the rule of law.

- R (ex parte Adam, Limbuela and Tesema) v Secretary of State for the Home Department [2005] UKHL 66 a decision regarding the refusal of subsistence benefits to certain asylum-seekers overruled given it caused breach of article 3 of the HRA 1998 (prohibition on inhumane or degrading treatment and torture).

The Haldane Society of Socialist Lawyers believes that fundamental rights long recognised in the Universal Declaration of Human Rights and sought to be implemented through instruments such as the European Convention on Human Rights should be proper;y transposed into the law in the United Kingdom (as

[13] The Human Rights Act 1998 in section 6 (1) provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right". This may provide an independent ground for judicial review, which could be lost if the Act is repealed for a so-called 'British' bill of rights, whatever that might mean..

currently constituted). Such fundamental rights should not be vulnerable to political expediency, as we believe is the case under the UK's uncodified constitution, where, as Professor John Griffith memorably stated, the constitution is "no more and no less than what happens."[14] It is particularly unsatisfactory that a 'Declaration of Incompatibility' may be left for redress at the behest of the wrong-doer party, i.e the party then with executive power in the British Government, which may have chosen to ignore certain rulings that it dislikes because it is politically unpopular to legislate upon yje,.[15]

The Haldane Society of Socialist Lawyers calls for full implementation of the Equality Act 2010, including class and social background as protected characteristics. Indeed, practise areas and human rights issues overlap, engaging multiple issues, and the role of the court is to determine which area takes precedence. If certain areas were deemed inherently non-justiciable (including economic and social rights, which seems to be the practice of British judges despite the UK's membership of the Council of Europe's European Committee of Social Rights (ECSR) and obligations under the jurisdiction of the reporting procedure the ECSR assessed compliance with the European Social Charter[16] and ratification of the International Covenant on Economic, Social and Cultural Rights), the ability to determine which lens through which to view a case may not be open to the Court. This would have disproportionate effects in decisions engaging both resource allocation and fundamental rights or constitutional principles, and likely cause the overriding of such rights or principles. On the other hand, if the power to decide through which lens to view the case remains open to the court, any such clarification would be mere guidance and would add little to current judicial practice.

3. **Whether, where the exercise of a public law power should be justiciable:**

(i) on which grounds the courts should be able to find a decision to be unlawful

Grounds enumerated pursuant to judicial rights that would be democratically agreed following a constituent assembly and constitutional convention.

(ii) whether those grounds should depend on the nature and subject matter of the power

[14] J.A.G. Griffith, 'The Political Constitution', The Modern Law Review Volume 42 January 1979.
[15] Hirst v United Kingdom (No 2) (2005) ECHR 681
[16] https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-publishes-report-on-the-united-kingdom-focusing-on-scottish-prisons
https://www.coe.int/en/web/portal/-/united-kingdom-experts-report-considerable-progress-on-regional-and-minority-languages

No. This question alludes to areas of political sensitivity such as national security. It is our view that the state must face scrutiny over its decisions in all areas so that it does not act unlawfully.

(iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.

Subject to the outcome of a constituent assembly and constitutional convention, under the existing constitutional setlement, there should be greater respect and entrenchment accorded to a Declaration of Incompatibility under the Human Rights Act 1998 to ensure that there is additional power to order the Executive to take programmatic action to address unconstitutional behaviour or deficiencies in the maintenance of the rights of citizens or, indeed, the human rights of any person under universal jurisdiction of international human rights law.

4. **Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular:**

   The Haldane Society of Socialist Lawyers challenges the premise that the process needs streamlining

(a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government

The maze of prerogative powers and the disproportionate power of an elected legislature under the misguided principle of 'Parliamentary Sovereignty' inevitably create complexity. Disclosure is not a burden but a responsibility of the relevant party. The Government should not seek to shirk its responsibilities - it will not be a "burden" if the Government did not take wrong decisions which led to judicial review applications in the first instance. If wrong decisions are taken or citizens legitimately challenge misuse of government power, it can never be a burden on the well-resourced government lawyers to fulfil their disclosure obligations under the Civil Procedure Rules.

(b) in relation to the duty of candour, particularly as it affects Government

There is a particular responsibility on Government to abide by the duty of candour. It should not resort to national security considerations or purported data protection concerns as a means of litigation strategy.[17]

(c) on possible amendments to the law of standing

It should be easier for citizens to challenge governmental power and, as highlighted above, legal aid should be extended in scope and increased in rate to achieve this objective. Law Centres and legal aid law firms should be adequately funded as a public service and force for good that actually save the state money and give greater scope for human flourishing. Furthermore, a rigid and narrowly-defined law of standing leads to absurd results where otherwise valid legal arguments fail on mere technicalities. A clear example of this is the 2018 Supreme Court decision on the legality of Northern Ireland's abortion law where, in a 144-page judgment, the majority elaborated on the ways in which the law violated European Convention rights but nonetheless dismissed the appeal brought by the Northern Ireland Human Rights Commission for lack of standing.[18] With the complexity of data and disclosure, the British Government should abide by the principle of open justice and adopt a human rights based approach to data, as developed by the OHCHR.[19]

(d) on time limits for bringing claims

Time limits should be extended from 3 months to 3 years (including after release of Government papers under the 30 years rule) in light of the complexity of some judicial review cases.

(e) on the principles on which relief is granted in claims for judicial review

Judicial review, as currently conceived, is not intended to provide a means for the merits of decisions to be challenged. Because of this, only the following remedies are available:

- mandatory orders require the body under review to do something;
- prohibitory orders restrain or prevent the body from doing something; and

[17] The Covert Human Intelligence Sources (Criminal Conduct) Bill would enshrine in law not only the right for spycops to commit the abuses that have caused so much public outrage, but much more besides. There has been a well-documented history of state surveillance of lawful trade union activity and justice campaigns in recent years, including links with the criminal blacklisting of trade union members. These revelations have been admitted by the police, as has the appalling conduct of undercover police in pursuing surveillance of legitimate civil society organisations, including anti-racist, family justice and environmental groups. These are still subject to the Undercover Policing Inquiry, which is due to commence on 2 November 2020.

[18] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review*, [2018] UKSC 27

[19] https://www.ohchr.org/Documents/Issues/HRIndicators/GuidanceNoteonApproachtoData.pdf

- quashing orders set aside the decision of a body on the basis that it is invalid

A successful judicial review may result in a quashing order and an order that the matter be remitted to the decision-making body for reconsideration. **However**, this will not necessarily result in a different outcome from the original decision.

Where the original decision was unreasonable or unlawful, then the same outcome may be precluded. **However**, where there has been a procedural defect it is possible that the same decision will be reached again. In certain instances, a successful judicial review may leave a claimant in a **worse** position than it was in originally.

It is a principle of judicial review that remedies are discretionary. Therefore, a claimant may be able to show that a decision-maker has acted improperly **but** the court may decline to grant the remedy sought.

The court may make a declaration or order an injunction where "it would be just and convenient" in "all the circumstances of the case".

There is **no right** in judicial review to claim damages for losses caused by unlawful administrative actions. It is only possible to receive damages in judicial review claims **if** there is another established cause of action, separate to the ground for judicial review, such as breach of statutory duty, misfeasance in public office or a private action in tort. For example, where a decision-maker takes into account an irrelevant decision, as well as providing grounds for quashing the decision on the basis of illegality, this **may** create a right to damages for misfeasance in public office **if** it can be proved that the action complained of was done knowingly or maliciously. **If** a separate cause of action accrues, the claim for judicial review may include a claim for damages to avoid the need to bring parallel proceedings.

Presently, while damages are not available, the Haldane Society is conscious that the publicity associated with a judicial review claim may rightly encourage a public body to retract a decision or settle the dispute. It is our view that the damages awards should be greatly increased and the principles behind the award of damages need to be radically overhauled to be more in line with those in the United States where citizens are properly compensated for abuse of rights by the state. The Court should have mandatory powers to compel the relevant government department to act and not defer to budgetary considerations of the relevant department.

(f) on rights of appeal, including on the issue of permission to bring JR proceedings

A judge will usually consider the claimant's application for permission on paper. If permission is refused, the claimant has the right to request an oral hearing by way of appeal. Under reforms introduced and effective from 1 July 2013, a claimant is

denied such an oral hearing if the court, having reviewed the application for permission, determines the claim to be "totally without merit". These reforms should be reversed and it should be easier to appeal and the time limit should be extended.

(g) on costs and interveners

Costs should be awarded against the Government on an indemnity basis for any breach of citizens rights following a judicial review. It should be easier for interested parties to intervene and the costs of doing so should be borne by the state.

Conclusion

The Haldane Society of Socialist Lawyers ultimately disagrees with the premise of the existing constitutional settlement, which seems to be unquestioned in the terms of this consultation.[20] We also question why the deadline for submissions of 19 October 2020 should come before the deadline for the call for written evidence for the Government's 'Constitution, Democracy and Rights' Commission, which is on 16 November 2020.[21] We shall be submitting evidence for this call in any event. The interests of working class people and society at large demand nothing less.

[20] "The Independent Review of Administrative Law (IRAL) exists to consider options for reform to the process of Judicial Review. These options will then be presented to the Lord Chancellor and the Chancellor of the Duchy of Lancaster, who will decide which, if any, options for reform should be brought forward into law."
https://www.gov.uk/government/groups/independent-review-of-administrative-law

[21] "At the last election, the Government committed, in its first year, to setting up a "Constitution, Democracy & Rights Commission" to look at "the broader aspects of our constitution" and "come up with proposals to restore trust in our institutions and in how our democracy operates". The Government outlined a range of areas the Commission would focus on:

- the relationship between the Government, Parliament and the courts;
- the functioning of the Royal Prerogative;
- the role of the House of Lords;
- access to justice for ordinary people;
- the ability of our security services to defend us against terrorism and organised crime;
- ensuring a "proper balance between the rights of individuals, our vital national security and effective government" by updating the Human Rights Act; and
- judicial review: ensuring its availability "to protect the rights of the individuals against an overbearing state" but "ensuring that it is not abused to conduct politics by another means or to create needless delays". (Conservative Party Manifesto, p. 48)."

https://committees.parliament.uk/call-for-evidence/251/the-governments-constitution-democracy-and-rights-commission/