Subjecting contracted-out public services to judicial scrutiny

This essay argues that legislation is needed to ensure the principles of judicial scrutiny are applied to contracted-out public services.

It argues that the increase in the courts' ability to scrutinise government decisions over the last two decades has collided with a simultaneous growth in the contracting-out of public services which are immune from judicial scrutiny.

The courts' reluctance to address this means that the government should now legislate to do so, or risk the rule of law being undermined by a situation in which crucial legal remedies are only available to certain citizens.

Concurrent growth of judicial scrutiny and public private partnerships

The last twenty years have seen an expansion of the courts' power to judicially review government decisions, and this has been augmented recently with the introduction of the Human Rights Act which enables the domestic courts to hold government accountable for their responsibilities under the European Convention on Human Rights.

However, since the 1980s there has also been a growth in the contracting-out of public services, initially in local authorities but more recently in central government which has begun to contract-out the provision of infrastructure and

services, with the management of some prisons, road schemes, transport systems and benefit administration being delivered by private companies, and schools and hospitals being built and run by private companies under the Private Finance Initiative. The exclusion of such services from judicial review has created a potentially serious problem for the rule of law.

The limits of judicial review of public contracts

There have always been constraints on the scope of judicial review. It has traditionally been restricted to the exercise of statutory power. Therefore judicial review applies only to a public authority's capacity to contract and not the terms of the contract itself. So the Mayor of London was able to mount a legal challenge (albeit unsuccessfully) to the Government's capacity to enter into a Public Private Partnership contract for the London Underground on the grounds that it would fetter his control of the Underground's assets[1], but the terms of the London Underground contract itself cannot be unpicked by the courts.

The refusal of the courts to judicially review those areas governed by contract was made explicit in *R v Fernhill Manor School* [2] concerning an application for judicial review of a private school's decision to expel a pupil, an application the court refused because the relationship between the applicant and the school was contractual.

[1] *R (on the application of Transport for London) v London Underground Ltd and another* [2001] EWHC (Admin) 637
[2] *R v Headmaster of Fernhill Manor School and Another, Ex parte Brown* (1992) Times, 5 June

The exclusion of contractual law from the remit of judicial review leaves many users of contracted-out public services without a remedy. Privity of contract means that only those who are party to a contract can enforce it. Public service contracts differ from commercial contracts in that the ultimate consumer of the service is not a party to the contract and so cannot enforce his rights under it.

Although contractual matters have remained immune to judicial review, in other areas there has been a radical expansion of judicial review from its previous confinement to the exercise of statutory power.

In a series of decisions including *Ex parte Lain*[3] and *CCSU*[4] the courts challenged the traditional immunity of non-statutory prerogative powers from judicial review. In *CCSU* the House of Lords held that delegated powers emanating from a prerogative power were not necessarily immune from judicial review and that the test for amenability to judicial review should not be the source of the power but its subject matter.

This was taken further still in *Datafin*[5] which abandoned the link between judicial review and statutory bodies. The case concerned a complaint to the Panel on Takeovers and Mergers by Datafin, a company competing with another to takeover McCorquodale Plc. Datafin felt that the decision by the Panel on Takeovers and Mergers was unfair and sought to have it judicially reviewed.

---

[3] *R v Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 All ER 770
[4] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374
[5] *R v Panel on Take-overs and Mergers, Ex parte Datafin plc* [1987] QB 815

The Panel was not established by statute nor did it derive its powers from prerogative. It was a voluntary scheme established by the financial sector and described by Lord Donaldson MR as '*without visible means of legal support*'[6]. Datafin's challenge thus flew in the face of conventional wisdom on the type of body whose decision is amenable to judicial review, but the court decided that its decisions could indeed be subject to judicial review. The Master of the Rolls argued that it was:

'*clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the panel as the centrepiece of his regulation of that market.*'[7]

Lord Donaldson MR felt that the courts should not be restricted to the traditional test of whether a public power is statutory before subjecting it to judicial review, but should take a practical approach towards the location of power. This is a radical departure from precedent, and since *Datafin* the courts have subjected other non-statutory bodies to judicial review, such as the Bar Council[8] and the pharmaceutical industry's code of practice committee.[9]

The developments in judicial review exemplified by *CCSU* and *Datafin*, suggest that the courts are prepared to push back the boundaries of what they will subject to judicial review, challenging the traditional link to statute and taking a more flexible approach that acknowledges the modern reality of public power.

---

[6] Ibid, p824
[7] Ibid, p838
[8] *R v General Council of the Bar, Ex parte Percival* [1990] 3 All ER 137
[9] *R v Code of Practice Committee of the British Pharmaceutical Industry, Ex parte Professional Counselling Aids Ltd* (1990) Times, 7 November

However, this expansion of judicial review has so far not penetrated the area of public contracts so that while the scope of judicial review expands in one area it is in effect shrinking in another area, because of the growth of contracted-out services, immune from judicial scrutiny.

The courts did not take the opportunity to extend judicial review into the area of public contracts in *Servite*[10], a case concerning elderly people assessed to be in need of residential accommodation by Wandsworth Council which had then contracted-out this statutory duty to Servite, a charitable housing association. Servite decided to close the home, but the court held that the functions performed by Servite did not have a sufficiently statutory basis to enable judicial review of this decision.

Moses J suggested that public law has failed to keep pace with the development of contracting-out and that the solution lies either in rendering the decisions of contractors carrying out public functions susceptible to judicial review or extending the controls on public authorities' capacity to contract.

He felt his own powers did not extend to imposing public law standards on a private body, although he expressed sympathy for the applicants and concern that they were without a remedy, indicating that legislation was needed:

[10] *R v Servite Houses and the London Borough of Wandsworth Council, Ex parte Goldsmith and Chatting* [2001] LGR55

'*Whether the solution lies in imposing public law standards on private bodies whose powers stem from contract or in imposing greater control over public authorities at the time they first make contractual arrangements may be for others to determine.*'[11]

Review under the Human Rights Act

If the courts were not prepared to impose public law standards on private bodies, it may have seemed that the introduction of the Human Rights Act in October 2000 would offer an alternative way of holding decisions by such bodies to account in the courts. However, in practice the application of the Human Rights Act to public services has also been limited by the phenomenon of contracting-out.

The Human Rights Act applies to public authorities, described in s6(3)(b) as '*any person certain of whose functions are functions of a public nature*'. There are two ways in which a body may fall within this description, usually described as either 'core' or obvious public authorities who are covered in respect of everything they do, and functional public authorities, which are only bound in respect of those of their functions which are of a public nature.

In *Donoghue*[12] the court held that statutory authority is not on its own determinative of a public act, nor is public authority supervision of the acts, but that these are two of a number of factors that, taken together, can determine

[11] Ibid at 85
[12] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595

whether the function being carried out is a public one for the purposes of the Human Rights Act.

In *Leonard Cheshire*[13] the court applied the test in *Donoghue* to conclude that a charity providing residential care for patients placed by social services or local health authorities was not a public authority for the purposes of the Act.

Lord Woolf held that:

'*If the authority itself provides accommodation, it is performing a public function. It is also performing a public function if it makes arrangements for the accommodation to be provided by LCF. However, if a body which is a charity, like LCF provides accommodation to those to whom the authority owes a duty* […] *it does not follow that the charity is performing a public function.*'[14]

The issue was examined again in *Re YL*[15], in the context of care homes. By a three to two majority the House of Lords followed *Leonard Cheshire*, deciding that a care home providing accommodation and care to a resident, YL, according to arrangements made with her local authority under the National Assistance Act 1948, was not performing functions of a public nature for the purposes of section 6(3)(b) of the Human Rights Act.

---

[13] *R (on the application of Heather and others) v Leonard Cheshire Foundation and another* [2002] EWCA Civ 366
[14] Ibid, p15
[15] *YL (by her litigation friend the Official Solicitor) v Birmingham City Council and others* [2007] UKHL 27

Lord Scott thought that designating a private care home a hybrid public body would make every contractor with a local authority a public authority for the purposes of section 6(3)(b) including lifeguards at swimming pools and individual nurses in care homes.

Professor Craig argues that the correct response to concerns about the burden that public law duties would place on public contractors is to be found in the marketplace:

'*the costs of such obligations are externalities that ought to be taken into account when deciding whether it is more efficient to provide a service in house as opposed to contracting-out.*'[16]

Lord Scott also argued that it was a term of the contract that the care home observe the Convention rights of residents and any breach would give YL a cause of action for breach of contract under ordinary domestic law.

However, it is suggested that on the facts of *YL* redress against the local authority would have been of little use when the decision the applicant wanted overturned was one made by the care home.

In her dissenting judgment, Baroness Hale took a purposive approach, arguing that the service provided by the care home was '*pursuant to statutory*

[16] P P Craig, *Contracting Out, the Human Rights Act and the Scope of Judicial Review,* LQR 2002, 118 (OCT) p555

arrangements, at public expense and in the public interest'[17] and as such was a function of a public nature.

The Secretary of State for Constitutional Affairs intervened in *YL* to argue that the Human Rights Act should directly bind private and voluntary care homes providing residential care under contract to a local authority. Since the ruling the government has indicated that it is considering steps to ensure all care home residents are afforded the same protection under the Human Rights Act. Responding to questions about the case in the House of Lords Baroness Ashton said:

'*my present approach is to look with some urgency at what we might do within the care standards framework. The noble Lord will be aware that one of the issues considered in the judgment was whether the Human Rights Act applied only to those citizens in care homes that were publicly funded. My ambition is to cover all elderly people in care, and I intend to do so.*'[18]

Whilst this shows the government recognises the anomalies of the current situation, this essay now argues that rather than limiting its response to care home residents, the government should go further, legislating to ensure that all consumers of public services have the same recourse to public law when things go wrong.

Governments escaping judicial control

[17] Ibid, p73
[18] House of Lords Hansard, 27 June 2007, column 597

It has been argued that the expansion of judicial review and increased accountability under the Human Rights Act have been undermined by the limits on their application to the growing area of contracted-out services, removing key legal remedies from some citizens. This may have been an unintended consequence of changing methods of public service delivery but in future governments may come to consider the immunity of contracted-out services from judicial scrutiny as beneficial and therefore deliberately contract out areas of law they do not want scrutinised.

This danger is underlined by Lord Donaldson's dicta in *Datafin*[19] that the then government had not legislated for take-overs and mergers precisely because of the existence of the Panel. Whether the government made a conscious decision not to interfere with an arrangement that left the area of monopolies and mergers effectively immune from judicial review, the decision in *Datafin* means that a government could no longer use such an arrangement to exempt an area of policy from judicial review.

Nonetheless, Lord Donaldson's comments suggest the potential utility to a government of constitutional arrangements that can leave the exercise of power unchallengeable in the courts. There exists at least the possibility that a government may deliberately seek to escape judicial scrutiny by contracting-out contentious areas of policy.

---

[19] See [7]

For example, the legislation currently before Parliament relating to identity cards includes provisions to contract-out the establishment and administration of a National Identity Register. The administration of such a register would have a significant impact on citizens in this country and yet it is possible that they would not be able to challenge the decisions of a successful contractor in this area.

In other contentious areas, such as immigration policy, which saw an increase of almost 50% in applications for judicial review between 2000 and 2005[20], a future government may consider it a benefit of contracting-out functions in this area that it would limit the scope of judicial review which is costly to the government in terms of both time and money. Indeed the Immigration, Asylum and Nationality Act 2006 makes provision for the contracting-out of some functions of the immigration service.[21]

Legislation to make the delivery of all public services amenable to judicial review and the Human Rights Act would ensure a government could not escape judicial control in this way.

Conclusions

Judicial review holds government to account on the grounds of illegality, irrationality, procedural impropriety and proportionality, while the Human Rights Act enables citizens to enforce their rights under the European Convention on Human Rights. The immunity of contracted-out services from these principles

[20] Judicial Review: A short guide to claims in the Administrative Court, House of Commons Library, Research Paper 06/44 p47
[21] s40, Immigration, Asylum and Nationality Act 2006

creates a situation where recourse to these principles is available to some citizens and not to others, challenging the rule of law.

Precise definitions of the rule of law can be contentious, but most would agree with Lord Bingham's recent statement that it should include provision:

'*that the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation*'[22]

The current position of contracted-out services means that some citizens have access to the laws of the land on judicial review and human rights, while other citizens do not. This is not because of any objective differences between them, but because of differences in practical arrangements made for delivering these services.

In cases like *Servite*, *Leonard Cheshire* and *YL* the courts have deprecated the fact that they are unable to offer some citizens a remedy. However, they have not felt it appropriate to address this in a ruling that all public services should be subject to the same judicial scrutiny, however they are delivered.

In the absence of such a ruling, and given the reliance of all recent administrations on contracted-out services, it is now incumbent on the government to address this problem if the rule of law, a crucial requirement of our constitutional arrangements, is to be upheld.

[22] '*The Rule of Law*', a lecture by Lord Bingham, Centre for Public Law, 16 November 2006

The government has indicated that it recognises the injustices to which the current situation gives rise and is looking at how it might be addressed in the care home sector. But this still leaves open the real possibility that this problem will recur elsewhere.

In these circumstances, the government should go further and ensure that all public services are amenable to judicial review and the Human Rights Act regardless of how they are provided. This will require legislation to redefine the term public authority so that contracted out services can be brought within the scope of the Human Rights Act. And the Government should explore how to extend the scope of judicial review into the provision of contracted-out services. These measures would be an important step to rebuilding one of the central foundations of the rule of law, that the laws of the land should apply equally to all.

[2989 words]

Louise Bloor