What is judicial review for and what should we expect of it?

This is a commentary by Simon Halliday on a chapter ('The Effectiveness and Impact of Judicial Review') published in M Elliot and R Thomas 'Public Law' (Oxford: Oxford University Press, 2014)

In this commentary, I focus on a key point that Mark Elliott and Robert Thomas make at various points in this chapter: that the courts are only one institution within the reasonably crowded accountability landscape that surrounds governmental decision-making. This point is important, I would suggest, because it leads us to two significant questions that should help us in analyzing the effectiveness of judicial review: (1) What is judicial review for? (2) What, realistically, should we expect from judicial review?

# What is Judicial Review For?

Elliott and Thomas warn us at the beginning of this chapter that the concept of the ‘effectiveness’ of judicial review is a complex one. They rightly point to three different aspects of the concept: (1) the accessibility of judicial review to potential claimants; (2) the competence and capacity of the courts to review administrative action; and (3) the ability of judicial review to affect the behavior of government agencies. Underpinning that analysis is the fundamental question of what judicial review is for. What is/are judicial review’s purpose(s) within the UK constitution? In order to be able to answer the question of how effective judicial review is, we must answer a preliminary issue: ‘effective to what ends or purposes?’ For example, when we compare judicial review in the UK with judicial review in other countries, we can see that the purpose of judicial review varies by constitutional context.[[1]](#footnote-1) A particularly stark example would be a comparison of the UK with the USA. Whereas judicial review in the UK focuses more on decision-making within governmental bodies, judicial review in the USA focuses more on rule-making by regulatory agencies that are largely independent of government.

However, even within the UK, the purposes of judicial review can change over time. This is partly to do with increasing institutional complexity within our constitution – shifts in the accountability landscape of which courts are a part. The role that judicial review plays in our constitution is sensitive to the roles played by other accountability mechanisms. The courts have in the past complained that judicial review is a process ill-suited to the resolution of ‘bureaucratic’ disputes where individuals challenge decisions of governmental ‘street-level bureaucrats’ affecting them.[[2]](#footnote-2) Judicial review, it has been argued, is better reserved for ‘high profile’ cases that concern issues of wide public interest.[[3]](#footnote-3) This is an argument that has, to an extent, found favour in policy circles. As Elliott and Thomas pointed out with the example of immigration and asylum disputes, the growth of the tribunal system in the UK has had the effect of transferring much of this ‘bureaucratic’ dispute resolution function out of the court’s jurisdiction or preventing it from falling within its jurisdiction.

# What Should We Expect from Judicial Review?

There is, perhaps, a tendency amongst law students (encouraged by a few textbooks) to focus too heavily on judicial review when thinking about the legal accountability of government. The section above was intended to stress the point that, to answer the question of what judicial review is for, we need to situate it within a broader accountability landscape including, as Elliot and Thomas point out, tribunals, inquiries and ombudsmen. We shouldn’t expect judicial review to be “all things to all men”. Another common mistake, however, is to imagine that, even within a modest sense of judicial review’s purposes, it can be fully effective in fostering legal compliance by governmental bodies. One of the hardest lessons that law students must learn is that, *inevitably*, law is much more ineffective than we imagine it, or would like it to be. Most of us are guilty of expecting too much from law. Like many societal institutions (such as politics, religion and the family), law is bound to disappoint as well as inspire. The empirical research on governmental decision-making reviewed in this chapter demonstrates that there is much to prevent governmental compliance with public law.

Of course, it would be too pessimistic to hold that judicial review *never* succeeds in encouraging public officials to comply with law. Yet, equally, it would be a mistake to look only to judicial review to do that job. This would be another sense in which we expect too much from judicial review. Judicial review is a form of external supervision of government. The impetus towards legal compliance, however, is likely to come from a combination of both external supervision *and* internal control. *The Judge Over Your Shoulder* is an example of public officials not only educating themselves about what law requires of them, but also of encouraging each other to comply with law. It is framing legal compliance as a professional value, in other words. There is an important role for professional bodies (of which there are many in the public sector) to both educate and encourage in relation to legal compliance. Indeed, evidence of the potential of professional communities to be effective in this regard is beginning to emerge.[[4]](#footnote-4) At the same time, other supervisory bodies that exist alongside courts in the accountability landscape (such as public auditors and regulators) may also play a role here.[[5]](#footnote-5)

# Conclusion

Many textbooks on public law, perhaps even most of them, overlook the topic of the effectiveness and impact of judicial review. Elliott and Thomas’ excellent analysis in this chapter is, accordingly, particularly welcome. But more significantly, their analysis is important for our understanding of public law. Law generally, including public law specifically, is not some kind of introspective academic exercise. It is, rather, a profoundly *social* phenomenon. In the case of public law, it is concerned with the regulation of relations between citizens and the state and between the various organs and institutions of the state (at various levels). Public law has aims and ambitions, if you like. And as Elliot and Thomas point out, to ignore the extent to which these aims and ambitions are fulfilled would be to cut short our enquiry into public law.

1. Cane, ‘Understanding Judicial Review and Its Impact’, in Hertogh and Halliday (eds). [↑](#footnote-ref-1)
2. E.g. *R v Hillingdon London Borough Council ex p Puhlhofer* [1986] 2 WLR 259 [↑](#footnote-ref-2)
3. Cane, ‘Understanding Judicial Review and Its Impact’, in Hertogh and Halliday (eds). [↑](#footnote-ref-3)
4. Halliday, ‘The Governance of Compliance with Public Law’ [2013] PL 312. [↑](#footnote-ref-4)
5. ibid [↑](#footnote-ref-5)