How and Why to Constrain Interveners and Depoliticise Our Courts

Anthony Speaight KC

Foreword by Lord Wolfson of Tredegar KC

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Policy Exchange

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Foreword

Lord Wolfson of Tredegar KC
Parliamentary Under-Secretary of State for Justice 2020-2022

Von Clausewitz famously said that war was the continuation of politics by other means. Had he been more closely acquainted with the (perhaps rather inaptly-named, given several recent decisions) Good Law Project, he might have said that about many applications for judicial review, too.

This valuable paper focuses on a specific instance of the wider proposition that judicial review is often used to continue what is essentially a political argument. NGOs and other pressure groups are, subject to the rules on standing, able to initiate or support judicial review proceedings either by bringing the proceedings themselves bringing the proceedings or by finding a suitable applicant all by.

However, as Anthony Speight KC shows in this paper, over the last 20 years there has been a considerable increase in the number of judicial review applications in which various NGOs – in particular, Liberty, JUSTICE and Amnesty – have intervened in judicial review proceedings.

The issue of interveners is separate from, although related to, the issue of standing. If NGOs or pressure groups can, within the rules on standing, bring judicial reviews themselves then the case that they be permitted to participate in the argument as interveners is necessarily weakened.

An intervener is not a disinterested party or a form of *amicus curiae*, whose function is impartially to assist the court. An intervener makes no pretension at impartial assistance, but intervenes to provide additional and supportive submissions directed to only one side of the argument.

As an advocate, I know the benefit of having another advocate act as a "sweeper" in the courtroom, to provide additional responses to difficult questions posed by the court or to refocus the debate after the opposing party has made its submissions. It is not always the case in litigation (or in life) that the more lawyers, the better – but there is little doubt that the interveners themselves regard their interventions as significantly benefiting the party in whose support they appear.

The statistics are remarkable, and show a dramatic increase in the number of interveners permitted by the higher courts to participate in litigation between other parties. In 2015, out of a total of 79 cases in the Supreme Court, about one-third included interventions by NGOs. Notably, there appear to have been no interventions by pressure groups (as opposed to individuals) towards the conservative end of the political spectrum.

All of this raises the question whether the courts should permit interveners as frequently as they currently do. One cannot criticise the

NGOs themselves, who legitimately make use of the flexibility and opportunity which the current rules afford them. It is rather a question of reconsidering the rules themselves and perhaps also judicial practice in this area.

NGOs are alive to this issue. In a recent communiqué to its supporters, the Good Law Project noted recent judicial decisions which it said demonstrated a "change in judicial mood", including to the question of standing, and that it would therefore need to "adapt". That adaption might well include seeking to participate more often as an intervener.

This issue is therefore ripe for the Government to consider, and the paper sets out not only the problem, but also a proposed solution based on the Canadian jurisprudence and includes some draft statutory wording.

The recently enacted Judicial Review and Courts Act 2022 made some welcome modifications to judicial review, notably abolishing *Cart* judicial reviews and adding prospective and suspended quashing orders to the judicial remedial toolbox. The NGOs opposed even those modest reforms in apocalyptic terms. But if that piece of legislation turns out not to be the last word from Government in this area, the topic of interveners might be a candidate for future reform.

Any such reform would of course be loudly opposed by the NGOs, who will doubtless (again, and again incorrectly) characterise any change to judicial review procedure as being the death of the review jurisdiction and the immediate introduction of totalitarian government. But that hyperbole should not inhibit sensible reform; if we've learnt anything in the past decade or so, it's that public law is too important to be left only to public lawyers.

Summary

Starting some 20 years ago, pressure groups have been regularly appearing in courts, especially in judicial review proceedings. This has been described by Professor Carol Harlow KC (Hon) as a "partial colonisation of the legal by the political process".

The development of the pressure group as litigator has been facilitated by the senior judiciary in conjunction with pressure groups. Their appearance in the courtroom is attributable to two procedural changes:

> (a) a more relaxed attitude by judges to whether an applicant has "standing" to apply for judicial review; and
> (b) the readiness of judges to allow such groups to present submissions as an intervener.

These changes occurred without any wide public discussion.

The non-governmental organisations who have most frequently been granted permission so to intervene are Liberty, JUSTICE and Amnesty. Such interventions have, in particular, become a regular feature of human rights cases in the Supreme Court. Such interveners do not present a neutral review of the law in the manner of an amicus curiae, but rather present an argument for a particular conclusion. Their contributions have been lavishly praised by the senior judiciary: for instance, Lord Phillips of Worth Matravers described JUSTICE's interventions as at the forefront of protecting the public interest.

The cases chosen by the regular interveners sometimes seem to have more to do with the causes of one part of the political spectrum than their organisations' lofty original objects. For example, Liberty, which was founded to protect individual liberty, and which campaigned on behalf of conscientious objectors in World War II, intervened against a woman who had a conscientious objection to same sex marriage. Similarly, JUSTICE has intervened to maximise the weight given to Article 8 in extradition cases, and in relation to protests around abortion clinics, although these topics seem unconnected with its traditional mission to improve the administration of justice.

No change to the law on "standing" was proposed by the Independent Review of Administrative Law chaired by Lord Faulks QC, and none has been enacted in the Judicial Review and Courts Act 2022. But the Faulks Review has made a recommendation in respect of interventions, namely publication of the criteria for allowing them. This paper argues that that opens a golden opportunity for the Government to address a long-standing problem.

Granted that standing is not being altered, such justification as has ever existed for pressure groups being allowed to intervene has been weakened. If their voice needs to be heard to achieve public law justice, the court will now allow them to litigate as a claimant.

The practice of allowing pressure groups to participate in litigation as interveners is undesirable for the following reasons:-

1. It adds to the time and cost of proceedings.
2. Giving such a hearing to groups with wide-ranging politico-legal aims fosters the illusion that a court is the appropriate forum for decisions for which only a legislature is equipped.
3. It makes for an uneven playing field. The pressure groups do not provide neutral information, but actively advocate an outcome, almost always in support of a claimant, and in the direction of seeking to expand the scope of human rights law.
4. The welcome extended by the courts to the regular interveners, and the readiness of judges to describe them as representing the public interest, has created the appearance (even if this is not the reality) that the judges have driven the last two decades' expansion of human rights and public law hand in glove with a coterie of campaigners whose attitudes they share.

The actual mechanism suggested by the Faulks Review for the publication of criteria for interventions is "...perhaps in the Guidance for the Administrative Court." This is unsatisfactory, as no such document exists; as "guidance" to judges on how to exercise their discretions should come from the senior courts, not the Government; and since the judges, who have been sympathetic to interventions, are unlikely always to have an appetite for constraining them. But the more important point is that the Review has recommended that something should be done.

The Government's response to the recommendation has to date been muted. It has mentioned the possibility of rules of court, but this is also unsatisfactory as the Civil Procedure Rules are not written by the Government. The clean and potentially effective mechanism is a simple provision in legislation.

A useful template for appropriate criteria may be found in a recent Direction of the Supreme Court of Canada. Its contents reflect extensive Canadian case-law on interventions, and is founded in principles of common law jurisprudence, as applicable here as in Canada.

Amongst the criteria should be that of fair balance. There has been at least one recent Supreme Court case in which permission to intervene was granted to JUSTICE but refused to a conservative group. Legislation should require the court, if granting permission for one pressure group to intervene, to look sympathetically at allowing an opposing viewpoint from a different pressure group: if a court then decides to hear no intervener rather than two, there should be no loss to the courts' proper purpose. To ensure that this works in practice the Court Service should publish

information on applications and permissions to intervene. Other criteria for intervention should normally be that the intervener will recognise that the litigation remains a suit between the parties, will refrain from arguing for a decision in favour of either party to litigation, and will not merely repeat material already being presented by the parties.

A draft legislative provision is suggested below.

The Government ought to be trying to depoliticise the courts. It should not miss a rare opportunity to take a small step in that direction.

Introduction

Twenty years ago Professor Carol Harlow KC (Hon)[1] drew attention to a development in the English courts which had started to give her a feeling of unease[2]. She described it as a "partial colonisation of the legal by the political process". There had been, she argued, a "tiny procedural revolution" which had fundamentally changed access to the courts, by opening them up to campaigning groups. She saw this revolution as having been effected by two procedural changes. One was the expansion of "standing" to apply for judicial review; the other was the hearing of pressure groups as interveners. Whereas other reforms of civil procedure, such as those instigated by Lord Woolf, had been the subject of wide public debate, this "rapid, even dramatic evolution", Harlow complained, had attracted little attention. It had been, she said,

> "engineered by judges with the active encouragement of campaigning groups".

In language which foreshadowed Lord Sumption's complaint in our own day that litigation has become "the pursuit of politics by another means"[3], Harlow wrote:-

> "In the present political climate, litigation is often a political tactic. It is a step in a wider political campaign ..."[4]

Over the following two decades, as the politicisation of our courts has become more and more apparent, nothing has been done to restrict, still less reverse, the two procedural changes. But her academic distinction coupled with a chance of fate 20 years after her prophetic article gave Professor Harlow an opportunity to bring her concerns to official attention. That was by her appointment as a member of the Independent Review of Administrative Law chaired by Lord Faulks QC. Whilst outsiders have no knowledge of which members of the Panel contributed what to its outcome, their report, although recommending no rule change[5] in respect of "standing" , did recommend a reform in respect of interveners. That topic of interveners is the subject of this paper.

Although the actual mechanism of reform suggested by the Panel is argued below to be flawed, the Panel's position on the primary question of the need for reform is greatly to be welcomed. It would be unfortunate if a government, which in principle should sympathise with concern at the current situation, allowed the present opportunity to slip through its fingers.

1. Professor Harlow KC (Hon) is Emeritus Professor of Law at the LSE, a Fellow of the British Academy and a Bencher of Middle Temple.
2. "Public Law and Popular Justice" Carol Harlow, Modern Law Review vol 65, p.1
3. Lecture at the London School of Economics 14 May 2012 entitled "Foreign Affairs in the English Courts since 9/11" https://www.supremecourt.uk/docs/speech_120514.pdf
4. op cit p.17
5. However, the section of the Report on "standing" has more than one reference to "some of the Panel" suggesting that there were some differences of approach amongst its membership

History of permission for interveners

Prior to the mid-1990s it was almost unknown for pressure groups to be allowed to make submissions in judicial proceedings to which they were not a party. A notable illustration of the prevailing policy occurred in 1985 in a case brought by Mrs Gillick to challenge the provision of contraceptive advice to young girls[6]: a group which described itself as advocating for young people, the Children's Legal Centre, was refused permission to intervene.

The practice of interventions by pressure groups started with written submissions being accepted. The first such instance seems to have been the intervention of Liberty in *R v Khan*[7], a case about evidence obtained in breach of ECHR article 8. In the same year JUSTICE and the Public Law Project published a report of a committee chaired by Laws J. recommending a rule change to facilitate the hearing of third parties. This recommendation may have influenced the drafting of rule CPR 54.17, whose terms are:-

> "(1) Any person may apply for permission –
> (a) to file evidence; or
> (b) make representations at the hearing of the judicial review.
> (2) An application under paragraph (1) should be made promptly."

The rule could be perceived as a modest thing. It does no more that facilitate the court in permitting an arrangement it chooses. It creates no new jurisdiction or power, since the courts have always been able to allow an intervention in any case: courts have, for example, done so when it was considered to be in the interest of justice to hear a non-party who would be directly affected by a determination[8]. There is nothing in the CPR directly to indicate a policy favouring the intervention of pressure groups. But none of those factors detracted from the new rule being seen as a green light.

The following year JUSTICE was allowed to submit a written submission in the Thompson and Venables case[9]. In a parliamentary debate on 24th November 1997 Lord Irvine spoke in favour of written *amicus* briefs, but his remarks seem to indicate that he was against oral submissions from interveners[10]. It may be noted in passing that Lord Irvine's remarks are typical of many of the espousals of pressure group interventions in

6. *Gillick v W Norfolk & Wisbech Area Health Authority* [1985] 1 All ER 533
7. [1997] AC 558
8. e.g. *Callery v Gray* [2001] 1 WLR 2142
9. *R v Home Secretary ex p T and V* [1997] 3 WLR 23
10. Hansard HL debate 24th November 1997 col 832

clouding their nature by ambiguous language: the true role of an "*amicus curiae*" is, as Lord Hobhouse once explained, "impartially to assist the court"[11], whereas the whole purpose of the interveners whom Lord Irvine seemed to have in mind has been to advance their policies.

In 1998 oral submissions were allowed from Amnesty in the first House of Lords *Pinochet* case: Lord Slynn said that this was being permitted "exceptionally" because of "the very short time available before the hearing"[12]. The next hearing before the House of Lords in the *Pinochet* case was the application to set aside the first decision on the ground of Lord Hoffmann's bias: on that occasion Amnesty were again allowed to make oral submissions, for the purpose of supporting the Government of Spain in trying to reject the bias challenge[13]. By the time a fresh panel of 7 law lords was undertaking the rehearing Amnesty and other interveners were again allowed to present oral submissions, on this occasion represented by no fewer than six barristers: the speed with which the case came on cannot by then have been the explanation for oral submissions, and no alternative explanation was offered. The whole case may be regarded as an illustration of the dangers of interventions, since if Amnesty had not been allowed to come in as a party, there would never have been the apparent bias on the part of Lord Hoffmann, which brought shame on our highest court.

An academic study of interventions in the House of Lords in the period 1994 to 2009[14] revealed a sharp rise from 2000, when the Human Rights Act came into force. In the pre-HRA period there were interventions in 7% of cases: as already mentioned, prior to *Khan* in 1996, none of these were by pressure groups. By contrast in the post-HRA period there were interventions in 23% of House of Lords cases. The authors wrote that the bulk of this rise could be ascribed to human rights cases. The most frequent non-governmental interveners were JUSTICE and Liberty, both of which intervened 19 times; in third place came Amnesty with 8 appearances in those years.

In 2009 the House of Lords was superseded by the UK Supreme Court. A study[15] by JUSTICE contained an analysis of interventions between 2009 and 2016. This reveals the Supreme Court continuing the practice of ready access to campaigning groups. For instance, in 2011, in which year there were a total of 61 cases, there were 22 interventions by non-governmental organisations; and in 2015, in which there were a total of 79 cases, there were 27 such NGO interventions.

Liberty formerly listed interventions which it has made on its website: in the period of seven years 2000 to 2006 it made 17 interventions, whilst in the following seven years 2007 to 2013 it intervened no fewer than 43 times. Most, though by no means all, of their interventions were in judicial review cases.

The cases in which pressure group interveners appear are usually those raising major issues, often involving human rights. The direction of their advocacy is usually towards expansion of the scope of the law. And the judges usually behave as if they are pleased to see the intervener. The

11. *re Northern Ireland Human Rights Commission* [2002] UKHL 25 at [72]
12. *R v Bow Street Magistrate ex p Pinochet* [1998] 3 WLR 1456 at p.1462D.
13. *R v Bow Street Magistrate ex p Pinochet (No 2)* [2000] 1 AC 119, especially at p.124E
14. "Rights, Interveners and the Law Lords" Sangeeta Shah, Thomas Poole and Michael Blackwell, Oxford Journal of Legal Studies (2014) vol 34, p.295.
15. "To Assist the Court: Third Party Interventions in the Public Interest" JUSTICE 2016.

most frequent interveners sometimes have joined together to make a joint intervention[16]. Whilst there seems recently to have been some decline in the frequency of interventions, they continue to be permitted, notably in the most high-profile cases.

There have rarely been interventions by pressure groups arguing in a different direction from the frequent interveners[17]. It seems probable that conservatively inclined groups in general do not seek to intervene. Two factors may explain this reticence. One is that without the announcement of a public policy favouring "counter-interventions" those with an approach at variance from the regular interveners may anticipate a cool reception. The second is that they have no advance warning of cases in which one of the groups seeking to expand the impact of the Human Rights Act or Convention have been granted permission to intervene.

There has, however, been at least one troubling, recent occasion when the Supreme Court granted permission to JUSTICE to intervene but without any explanation refused permission to a conservative group. This was the 2022 reference by the Attorney-General of Northern Ireland in respect of a Northern Ireland Assembly Bill[18] which enacted measures for buffer zones around abortion clinics. Within these zones the Bill created a criminal offence of acting in such a way as to influence those attending the clinics: this was principally directed at pro-life groups holding prayer vigils or demonstrations outside clinics. The Attorney-General invited the court to consider whether this provision is incompatible with the European Convention on Human Rights by infringing rights of free expression or manifestation of religious beliefs. The Bill creates no defence for those who act with reasonable excuse. JUSTICE was given permission to intervene to argue that the Bill, as it stood, was compatible with Convention rights. ADF UK, which is a faith-based charity promoting fundamental freedoms, applied to argue the other way; but was refused permission. This was notwithstanding that the ADF's advocate would have been John Larkin QC, who had recently completed 10 years's service as Attorney-General of Northern Ireland, and so might have been thought to have been unusually well placed to give assistance to the court; and notwithstanding also that ADF International, to which the British group is linked, had been involved in the leading cases at Strasbourg relating to protests and prayer vigils outside abortion clinics[19].

16. By way of examples, JUSTICE and Liberty combined in *Al Jedda* [2007] UKHL 58; JUSTICE and Amnesty combined in *Jones v Saudi Arabia* [2006] UKHL 26, and again in *Belhaj v Jack Straw* [2017] UKSC 3; JUSTICE combined with Human Rights Watch in the Abu Qatada case (2012) 55 EHRR 1; Liberty, JUSTICE, INQUEST and Mind combined in *Rabbone v Pennine Care NHS Trust* [2012] UKSC 2.

17. In *Miller II* Sir John Major was given permission to intervene. The Society for the Protection of Unborn Children ("SPUC") has brought judicial review against the Secretary of State for Health, and intervened in R v DPP ex p Pretty [2001] UKHL 61; and a consortium of SPUC and some other pro-life groups, together with Archbishop Murphy-O'Connor intervened in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147. The Federation of Small Businesses, was given permission to bring a judicial review in *R v Inland Revenue Commissioners* [1981] 2 WLR 722. But there seems to be no example of an intervention from an organisation representing a conservative approach to jurisprudence.

18. *Reference by the A-G of N Ireland - Abortion Services (Safe Access Zones) (N Ireland) Bill* UKSC no 2022/0077, judgment is awaited at the time of writing

19. *Annen v Germany* application 3690/10, and *Eweida v United Kingdom* applications 48420/10, 59842/10

Interventions by Liberty

Liberty was founded as National Council for Civil Liberties (NCCL) in 1934. It is reputed that its foundation was announced by a letter published in The *Times* and The Guardian citing "the general and alarming tendency to encroachment on the liberty of the citizen" as the reason for its establishment[20]. Its first campaign was against the criminalisation of pacifist or anti-war literature. Throughout the Second World War it undertook much work on behalf of conscientious objectors[21]. By contrast, in the present century one of its interventions was in *Ladele v Islington LBC*[22], the case concerning a devout Christian who had been a registrar of marriages for a number of years, and who on conscientious grounds refused to conduct same sex marriages when they were introduced: in that case Liberty intervened against the conscientious objector, and to support the employer authority. It is one of several campaigning groups whose choice of cases for interventions suggest a broadening of focus from their original missions.

An insight into Liberty's approach to interventions has been provided by John Wadham, a former Director of Liberty[23], and by Baroness Chakrabarti[24], who succeeded him, in frank interviews[25] with Professor Richard Maiman[26]. They readily acknowledged that their purpose was not that of a true *amicus curiae*, seeking to assist the court by a neutral exposition of relevant law, but, rather, the pursuit of a campaign. Maiman summarised their motivation:

> "Liberty, like most rights NGOs, has no interest in performing the traditional British *amicus curiae* function of providing the court with neutral information relevant to the case. In litigation under the Human Rights Act, Liberty's interventions would virtually always support interpretations of the law which would benefit individual appellants against the government."[27]

This would not, however, always mean that Liberty would set out in full its own preferred legal position. It might argue tactically for a narrower position, which it judged to be a more attainable staging post on the way to its ultimate objective:-

> "For example, in R v Khan, the first House of Lords intervention in 1996, Liberty's strong interest in having Article 8 of the European Convention recognised in British law, led it to present a relatively narrow argument that not only did not support the appellant's case but may actually have weakened

20. An archive on the organisation is held at Hull University, with information and documents available at https://archiveshub.jisc.ac.uk/search/archives/4d4f490e-1dd7-3329-8141-69b1788e4397
21. Documents in filing case no 1 held in the Hull University archive.
22. [2009] EWCA Civ 1357
23. Wadham gave the interview on 23 April 2003, at which date he was Director of Liberty.
24. Baroness Chakrabarti CBE, PC gave the interviews on 13 March 2003 and 22 May 2003, at which dates she was in-house counsel at Liberty. In July 2003 she was appointed Director, a post which she held until 2016.
25. Chapter entitled " 'We've Had to Raise our Game': Liberty's Litigation Strategy under the Human Rights Act 1998" by Richard J Maiman in the book "Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context" edited by Simon Halliday and Patrick Schmidt (Hart 2004) at pages 85.
26. Professor in the Department of Political Science, University of Southern Maine, USA, and a Visiting Fellow at the Human Rights Centre of the University of Essex
27. This and the next quotation are from Maiman at p.107

> it. However, when the case was subsequently taken to the European Court of Human Rights, Liberty fully supported the appellant's position."

The extent to which an intervention would be part of a Liberty campaign was illustrated by the episode of the Labour Government's attempt by the Nationality, Immigration and Asylum Act 2002 to restrict subsistence to asylum seekers who did not claim asylum at the first opportunity. Chakrabarti said:-

> "[The amendments] came into force on the 8th of January, and we geared up for that even before the 8th of January, because we campaigned against the policy when it was first introduced as an amendment to the Act. We campaigned against it, we did media work, we said this is appalling. … And that built up a head of steam when the Act was passed. And we coordinated meetings with all the major refugee and asylum organisations so that essentially people were out looking for just case victims from the second that policy came into force."[28]

As it happened a group which was not part of Liberty's campaign issued a claim form before the test cases which Liberty wanted to run. Wadham explained:-

> "we got to court in the evening and somebody else got to court in the morning, and they got the case. So we then intervened with all those other organisations."[29]

The result was that the court heard two sets of similar submissions from leading silks, both of whom later became High Court judges -- Nicholas Blake QC instructed on behalf of the group who had got to court "in the morning", and Rabinder Singh QC instructed by Liberty and seven other organisations as interveners[30].

It might be wondered why campaigners have considered it worthwhile to double bank submissions in this way. Chakrabarti's explanation is that the intervener can appear, uncontaminated by awkward acts, in her words as a "fairy godmother":-

> "Sometimes, even though we're on the same team, we are just going to lend something to the intervention because there's something quite pure and convenient about not having to be trammeled by facts, facts that may be unattractive, clients that may be unattractive, to be able to come in as fairy godmother and say, 'These are points of principle, and this is what we say about them.' "[31]

Whatever view be taken of the role of campaigner as interveners, there is little doubt about the readiness of the senior courts to hear them. Chakrabarti said:-

28. Maiman p.107-8
29. Maiman p.108
30. *R (Q and others) v Home Secretary* [2004] QB 36
31. Quotation from Chakrabarti interview at Maiman p.106

> "The claimant always wants us in, and normally the public authority concerned — which in Liberty's case is usually, but not always, the Home Office — is too gentlemanly to actually say, 'No, they shouldn't.' Usually they say, 'We've got "nothing to say about this," or they say nothing at all. And that seems to be good enough."

Wadham summarised it: "the courts have virtually never said no to us"[32].

32. Quotations of Chakrabarti and Wadham on the readiness of courts to hear Liberty at Maiman p.105

Interventions by JUSTICE

In its early years JUSTICE, which was founded in 1957, earned a high reputation under the leadership of Tom Sargant for its work on cases of miscarriage of justice. It has broadened its works from wrongful criminal convictions, but its mission is still described as concerned with the administration of justice:-

> "We strive for a fair, accessible, and equal justice system. Our work aims to propose practical, realistic, and timely changes, addressing some of the most urgent issues facing the United Kingdom's legal framework. We use our voice to influence and improve policies and practice, while not being afraid to scrutinise and challenge developments in the justice system that threaten the nation's adherence to human rights and the rule of law."[33]

It publicises its current work programme as reform of the courts, user-centred justice, effective routes of redress, challenges to the courts and constitution, and non-judicial decision-making – all topics concerned with the administration of justice. With such a manifesto it is, perhaps, unsurprising if judges anticipate that an intervention from JUSTICE would be based on principles valued by the courts.

The website of JUSTICE makes available the written text of some 20 interventions made by it since 2011[34]. The majority are in the UK Supreme Court, with some in the European Court of Human Rights and a handful in lower courts. They are uniformly of an impressive standard. Some display profound learning in international law; a few contain extensive international comparisons. Almost all were signed by a QC and at least one junior. Counsel instructed have included Keir Starmer QC and Lord Pannick QC. Solicitors involved have included Herbert Smith.

None are drafted in the form of an *amicus curiae* submission, seeking in a neutral manner to present relevant law. All unambiguously present an argument for a particular conclusion. In some cases this is merely a conclusion on one issue amongst those raised by the litigation in question. But the majority argue for success for a particular party in the litigation – invariably for the party suing the government or a public authority.

Some are concerned with issues touching JUSTICE's administration of justice mission. Examples of such interventions are those in the UK Supreme Court and the European Court of Human Rights in the case of *Neal & Hallam*[35], which concerned the standard of proof of a miscarriage of justice required for entitlement to compensation for a wrongful conviction.

33. JUSTICE Annual Report 2021
34. https://justice.org.uk/our-work/third-party-interventions/ (accessed 10th August 2022)
35. *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2

Another such example was JUSTICE's intervention in *R (Monica) v DPP*[36] arguing for an easier right of appeal to the Supreme Court in criminal judicial reviews. A third such case was *Nunn v Chief Constable of Suffolk*[37], where JUSTICE argued for a right of access to DNA held by the police for a defendant who hoped to prove that his conviction had been wrongful.

Other cases chosen by JUSTICE for interventions, on the other hand, have no such obvious connection with the administration of justice. The theme of many of the interventions has been expanding the scope of European Convention on Human Rights. They include some of the most controversial human rights cases of the last two decades. One was *Smith v Ministry of Defence*[38], the case which more than any other has been responsible for a flood of civil claims arising out of conduct of soldiers on operations. That followed JUSTICE's interventions in *Al Jedda*[39] where the issue was whether detention in Basra involved a breach of article 5; and earlier in *Chahal*[40], which many regard as the original case in the line of 20 years Strasbourg expansion of the meaning of the Convention.

Chahal was just one of several JUSTICE interventions in support of defendants seeking to avoid extradition. Others include the case of Abu Qatada[41], whose extradition to Jordan was delayed by court proceedings for so many years. Another was *R (HH) v Westminster City Magistrates Court*[42] concerning the circumstances in which article 8 rights to a home should prevent an extradition to Italy. Bearing in mind that nobody argued that the proceedings against HH were unfair in England or would unfair be in Italy, and that the public interest in extradition is acknowledged in one of its own submissions to lean in favour of extradition, the enthusiasm of JUSTICE to maximise article 8 rights can make it look as if it is another organisation whose aims have moved a long way beyond its traditional mission.

JUSTICE's intervention in 2022 in the Supreme Court in the *Reference by the A-G of N Ireland - Abortion Services (Safe Access Zones) (N Ireland) Bill* is another instance of it intervening to expand the impact of the Human Rights Act, as opposed to protecting good working of the court system: that is the case mentioned above in which an application to intervene by a conservative pressure group to present a different perspective was refused. JUSTICE argued that the presence or absence of an explicit defence of reasonable excuse in the Bill made no difference, since criminal courts must always treat a disproportionate interference with Convention rights under articles, 9, 10 and 11 as a defence. Neither abortion nor the rights of demonstrators feature in JUSTICE's mission statement.

An explanation may be that JUSTICE's real interests have expanded. A press release announcing its intervention in the Northern Ireland case stated:-

> "JUSTICE unequivocally supports reproductive rights and the ability to access abortion healthcare services privately, safely and with dignity. This is in accordance with Article 8 ECHR, and is especially important at a time where such rights are

36. [2019] QB 1019
37. [2014] UKSC 37
38. *[2013] UKSC 41*
39. *R (Al Jedda) v Secretary of State for Defence* [2007] UKHL 58
40. *Chahal v UK* (1997) 23 EHRR 413
41. *Othman v UK* (2012) 55 EHRR 1
42. *[2012] UKSC 25*

> subject to threat – not least in the United States of America, following the overturning of the case of Roe v Wade (1973). We support the establishment of safe zones as an important tool to protect those rights."[43]

Quite apart from the significance of JUSTICE holding a policy on the sensitive and controversial issues surrounding abortion, the announcement is also notable for advancing what might charitably be called a pioneering theory as to the impact of article 8: in *A, B & C v Ireland*[44] the Grand Chamber of the European Court of Human Rights held that article 8 does not confer a right to an abortion and that Ireland's former constitutional right for the life of the unborn did not contravene the Convention.

There are, thus, grounds for thinking that JUSTICE may be another organisation which has traded on its reputation to secure access to courts for arguments which are actually motivated by partisan positions unrelated to its supposed mission.

43. An identical statement was made in the newsletter sent to all JUSTICE members in July 2022.
44. (2011) 53 EHRR 13

Interventions by Amnesty

The third regular intervener is Amnesty. Its attitude to interventions was revealed in an interesting way by its intervention in the House of Lords in *re Northern Ireland Human Rights Commission*[45]. The issue was whether the vires of the Commission, a statutory body which had recently been established in fulfilment of the Good Friday Agreement, permitted it to intervene in a coroner's inquest in Belfast. The courts at both levels in Northern Ireland had held that this would be outside its statutory powers. Amnesty supported the Commission's appeal. Its reasoning was interesting. A starting point was the established norm, so Amnesty contended, of bodies such as Amnesty itself, being given leave to intervene: therefore, its argument ran, it would be anomalous if Parliament had not intended the Commission to do so as well. The terms in which as early as 2002 Amnesty already felt the confidence to speak of permissions to itself to intervene are striking[46]:-

> "Our position, as illustrated by the intervention of Amnesty International in the Pinochet case and indeed our intervention in this appeal, is that we may intervene, in writing or orally, with the leave of the court."

Like the pressure groups already discussed, Amnesty International has broadened its aims over the years. Its initial mission when founded in 1961 by an English barrister, Peter Benenson, was to campaign on behalf of prisoners of conscience. The focus was first extended to concern about torture and detention without trial; then to include opposition to the death penalty; in 2000 to embrace "economic, social and cultural rights"; in 2007 to include support for abortion. Today it now describes itself as "upholding the whole spectrum of human rights" and speaking out "for anyone and everyone whose freedom and dignity are under threat".

As has already been observed in regard to Liberty and JUSTICE, Amnesty's choice of cases in which to intervene does not always seem related to its supposed objects. As already mentioned, one of its interventions was to argue that Lord Hoffmann ought not to have recused himself. Bearing in mind that Amnesty's stated mission is to campaign for human rights, it was in some ways surprising for it to be heard arguing against the application of so fundamental a natural justice principle as *nemo iudex in sua causa*: they justified their stance with the sweeping assertion that a judge's involvement in a human rights charity should never be investigated.

Some of the problems inherent in pressure group interventions were illustrated by the most recent Amnesty intervention in our top court. R (O)

45. [2002] UKHL 25

46. Amnesty's written submission as intervener paragraph 30-31: https://www.rightsandsecurity.org/assets/downloads/Re_Northern_Ireland_Human_Rights_Commission_Submission.pdf

(a child) v Secretary of State[47] concerned the legality of a statutory instrument prescribing a fee of £1,012 as payable on an application to register a child as a British national. Since legislation introduced by the Labour Government in 2004, statute has expressly authorised the minister to set a fee which exceeds the administrative costs of processing such applications, and which also reflects the benefits to an individual of British nationality. Amnesty wished to argue that to set a fee at a level which some would-be applicants could not afford was in conflict with the 1961 United Nations Convention on the Reduction of Statelessness, and that either primary legislation must be read compatibly with that UN Charter or the SI declared unlawful. At first instance, Amnesty was refused permission to intervene on the ground that the claimants could present this argument. The claimants did include that contention in its submissions; but having lost in the Administrative Court, decided to confine its appeal to more promising ground of conventional statutory interpretation (i.e. of the extent of the minister's power) in the Court of Appeal and the Supreme Court.

Amnesty was granted permission to come back into the case in the Supreme Court. But the only contention which it there advanced was its argument about the 1961 UN Convention. Lord Hodge was scathing about this intervention: the UN Convention argument had ceased to be relevant to the case when the claimants chose not to pursue it in the Court of Appeal. He added that in any event the argument would face the difficulty that the UK adopts a dualism approach to international law which would exclude a challenge to the validity of primary legislation on the ground of inconsistency with an obligation of the UK in international law[48].

This episode well illustrates the tension caused by the difference of objective between a pressure group, which may be interested in attacking a government policy on its merits, and the court which is concerned only with the legality of government action. As Lord Hodge said in his judgment[49]:-

> "The appropriateness of imposing the fee on children who apply for British citizenship under section 1(4) of the 1981 Act is a question of policy which is for political determination. It is not a matter for judges for whom the question is the much narrower one of whether Parliament has authorised the Secretary of State to set the impugned fee at the level which it has been set."

47. [2022] UKSC 3
48. see [54] to [56]
49. at [51]

Do campaigning groups have a proper place in the court room?

Approaching the matter from first principles, it is hard to understand why a pressure group should have a relevant place in a court proceeding. It is axiomatic to the English law's approach that courts exist to determine individual cases, not points of general principle. It has also been axiomatic until recently that the party bringing a case will do so to protect some right or interest to which it claims entitlement. A judicial review case is essentially like any other in that two parties come before a court – the one being an applicant with proper standing to seek the remedy, the other a public authority defending its decision. In her seminal article Professor Harlow wrote:-

> "I have said that the primary objective of the civil lawsuit is the protection of legal interests and the classic English rules about standing to sue reflect this. As powerfully expressed by Sir William Wade, 'the primary purpose of administrative law is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse'." [50]

This traditional "adversarial", or "bipolar", model of legal proceedings may be undergoing some modification today to the extent that the claimant may not need to assert its own interest. A subtly different theory of the purpose of public law proceedings, which has been postulated from the UK Supreme Court, now regards the primary role of the courts in the field of public law to be to arrest unlawful conduct by the government, whether or not any individual person's rights are thereby violated. This focus on upholding the rule of law received notable expression by Lord Reed in *Axa v Lord Advocate*, a Scottish case in 2011 in which the Supreme Court held that the Scottish courts should move to the more relaxed approach to standing which had already developed in England:-

> "The essential function of the courts is however the preservation of the rule of law, which extends beyond the protection of individuals' legal rights..... A public authority can violate the rule of law without infringing the rights of any individual .... A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law."[51]

50. op cit p.3
51. [2012] 1 AC 868 at [169]

Lord Reed concluded that a rights-based approach should therefore give way to an approach based on interests. But that change makes no difference to the point which for present purposes is critical – that litigation is an affair between two parties.

As a matter of statute law, at least, "sufficient interest" has been the criterion for standing in England and Wales for the last 40 years: Supreme Court Act 1981 s.31. There is no proposal from either Lord Faulks' Review Panel or the Government to change the law on *locus standi* for judicial review. It is unquestionable that in recent years the existing statutory test has been interpreted more liberally. But, although it has its critics, this liberal approach to standing may now be regarded as a new normal[52]. In *R v Secretary of State for Trade and Industry ex p Greenpeace* [53] Laws J described it an "accepted and greatly valued dimension of the judicial review jurisdiction". A notable example was the grant of permission to bring judicial review to the World Development Movement in respect of the Pergau dam in Malaysia[54].

Assuming for present purposes, then, that the new status quo is one in which permission to apply for judicial review will in an appropriate case be granted to a pressure group, the case for pressure groups to be allowed into the courtroom as interveners is inevitably weakened. If their voice needs to be heard to achieve public law justice, the court will now allow them to litigate as a claimant.

It may, of course, be that a pressure group has built up expertise on the law affecting administrative action in the subject area of its interest. That expertise may be of assistance to an applicant, especially in a test case. But there is nothing to prevent a pressure group assisting a claimant, as often happens. Nor is there anything to prevent the in-house lawyer of a pressure group acting professionally for the claimant, and that happens, too. And, indeed, there is nothing to prevent a pressure group which has a complaint about something which affects a number of individuals putting up one of those individuals as a nominal claimant. All those are legitimate processes, and ones which might be thought to provide sufficient scope for pressure groups to ventilate their viewpoints in court.

52. The recent refusal of the High Court to recognise the Good Law Project as having standing to challenge appointments to critical positions in the response to Covid 19 may indicate a judicial reluctance to allow the expansion of standing to advanced any further: *R (Good Law Project Ltd) v The Prime Minister* [2022] EWHC 298. Similarly, the expansion of standing by default through the failure of defendant authorities to raise challenges may be less likely in future in the light of dicta in *R (All the Citizens) v Secretary of State* [2022] EWHC 960 at [152].

53. *[1998] Env LR 415*

54. *R v Secretary of State for Foreign Affairs ex p World Development Movement* [1995] 1 WLR 386

Do interventions by pressure groups do any harm?

If it be granted that there is no need in the interests of public law litigation for campaigning groups to be accorded a voice as interveners, it may, nonetheless, be asked: does it do any harm? For four reasons, it does do harm.

Firstly, though least importantly, this contributes to the length and cost of proceedings, and to the number of pages of the court's papers. The stated aim of both the Woolf and Jackson reforms was to reduce the cost and length of hearings (even if in the view of some practitioners the Woolf reforms ended up having the opposite consequence). So it is curious to find the senior judiciary enthusiastic about the addition of unnecessary parties.

Secondly, allowing the input of pressure groups, whose aims are always likely to be some general policy direction, rather than a specific outcome for just one litigant, fosters the dangerous illusion that the court can evaluate and balance competing factors in a way which only a legislative assembly properly can. An academic article by Sarah Hannett KC expresses this consideration[55]:-

> "Although in a post-Human Rights Act world, the courts are increasingly making decisions with wide-ranging policy implications, the limitations of the courtroom for undertaking this kind of decision making have been well rehearsed. That the court may feel the need for more information and assistance to ameliorate these deficiencies may well be understandable. Yet intervention cannot replace or mimic the processes of consultation that Parliament undertakes. Intervention cannot realistically provide a voice for all of those affected by the decision at hand. A court is simply not suited to canvassing relevant interests, or assessing the credibility or representative nature of those before it. Even to the extent that the judicial process can carry out such tasks, the case has certainly not been made that it should. In short, the current judicial drift towards an expanded regime of public interest intervention should be scrutinised and contained."

Thirdly, intervention involves unevening the playing field. Pressure groups do not go to the trouble and expense of intervening merely to provide neutral and non-partisan observations. As frankly recognised by Liberty

55. "Third Party Intervention: In the Public Interest" Sarah Hannett [2003] PL 128

(see discussion above), they do so in order to advance their own agendas, normally by assisting a claimant.

One of the justifications which Baroness Hale has advanced for allowing interventions is that it allows the court to hear a range of different views:-

> "18. There may also be a relevant distinction to be drawn between the three different types of intervention. The first is in a case which raises wider policy issues on which the court needs the full range of points of view if it is to form a proper appreciation of those issues....
>
> The second is in a case in which a third party has a direct interest in the outcome ....
>
> 19. In the third category is a case such as this in which a third party undoubtedly has an indirect interest in the outcome of a decision on a point of law because that decision may be determinative of their own case."[56]

The second and third categories there mentioned are not, of course, relevant to interventions by pressure groups. And as to the first, hearing a range of different views is precisely what has not happened in practice over the last 20 years. The most frequent interveners, that is JUSTICE, Liberty and Amnesty, are pursuing parallel campaigns: indeed, they sometimes combine to submit a joint submission.

Viewed from an Olympian height, it might be contended that a second party adds nothing to the weight of the first if their submissions go in the same direction. But such a view would ignore forensic reality. Any barrister welcomes a second party in court making similar submissions. Weight in numbers tends to add to the plausibility of arguments, and the presence of the second party contributes moral support. There are practical benefits as well. A major part of court hearing in our tradition is the testing of submissions by questions, sometimes very probing, from the bench. The first advocate, faced with a question which has not been entirely anticipated, may not on the spot give the best answer; a second advocate has time to think out a better response. Furthermore, even the best lawyers do not always spot every potential argument, and their researches may miss a useful authority: to have a second legal team researching the same legal points is always a benefit. For all those reasons it is potentially of positive assistance to an applicant for judicial review for the court to allow a sympathetic pressure group to participate in the proceedings.

In one sense, it should not be a complaint if the presence of an intervener enables the court to hear the best possible presentation of a case: in broad terms the interests of justice are advanced by high quality advocacy. But justice is not advanced by inequality of arms. Public authority defendants do not necessarily have the deep pockets: the finances of local authorities, in particular, are often severely stretched by the cost of legal proceedings.

56. per Hale LJ in *Matthews v Ministry of Defence* [2002] EWCA Civ 533

Even central Government, facing its vast case-load of judicial review claims, can devote only limited resources to fighting any particular case, and, like any litigant, sometimes has policy reasons for not challenging contentions which may be incorrect..

More important, perhaps, has been central Government's unwillingness to be seen to challenge the growth of some of the fundamental underlying principles of judicial review. In *R (Privacy International) v Investigatory Powers Tribunal*[57] Lord Carnwath discussed how the stance taken in cases by Junior Treasury Counsel for the Government had contributed to the emergence of a consensus on the principles of administrative law; and Lord Sumption in a speech with which Lord Reed agreed said that, whilst it was now too late to revert, this consensus has, in fact, overlooked the subtle distinctions which were to be found in *Anisminic*, and thus overstated the scope of judicial review. This is not to say that that consensus represents an inherently undesirable state of the law. It is merely to point out that the defendant in judicial review cases has not always advanced all the available arguments against a claim.

The mischief of the unevening of the playing field goes beyond the mere addition of a second voice arguing for a similar outcome to the claimant, because judges often regard the regular interveners as representing the public interest. As balanced a judge as Lord Phillips of Worth Matravers, the first President of the UK Supreme Court, gushed extra-judicially:-

> "Another growth area has been the creation of both governmental and non-governmental bodies whose role is to protect the public interest in one form or another. At the forefront of the latter has been JUSTICE, celebrating its 60th birthday next year. An important activity of such bodies has been the intervention, to protect the public interest, in actions where this is involved."[58]

Whilst the activists in the regular interveners undoubtedly consider that their policies coincide with the public interest, other equally conscientious people can sincerely believe that different approaches would be in the public interest.

It is impossible to say whether the contribution of an intervener has altered the outcome of a particular case, although one can point to instances where the submissions of an intervener have been adopted by the court[59]. Certainly, common sense suggests that pressure groups would not be devoting effort and resources, unless they judged that their involvement might make a difference.

All the factors discussed above lead to a final reason why what has been happening is undesirable. The last two decades have witnessed the coincidence in time of the following developments:-

(a) The novel phenomenon of pressure groups being given permission by judges to intervene in court proceedings;

(b) The most frequent intervener groups expanding their focus

57. *[2020]AC 491 at [52]*

58. Foreword to "To Assist the Court: Third Party Interventions in the Public Interest" JUSTICE, 2016

59. For an example, see *Ladele v Islington LBC* [2009] EWCA Civ 1357 per Lord Neuberger MR at [68]. The work by Shah et al concluded that there was no statistical evidence to demonstrate that interventions had had an effect on the outcomes of cases, but considered they might have affected how reasons for an outcome were expressed.

from their traditional, specific mission to a readiness in a more generalised way to support causes associated with one part of the political spectrum – Liberty intervening against a conscientious objector who opposed same sex marriage, JUSTICE encouraging art 8 objections to extraditions, and Amnesty seeking to argue for lower fees in nationality applications.

(c) These very pressure groups being seen to receive lavish praise or support from the senior judiciary – Lord Phillips lauding JUSTICE, Lord Hoffmann supporting Amnesty.

(d) An unprecedented expansion in the scope of public law and human rights jurisprudence.

It may be that there has, in truth, been no causal connection between these developments. But there have been few stronger principles of the British tradition than that in the matter of doing justice appearances matter as much as the reality. The unfortunate consequence has been to allow the impression to an outside observer that the expansion of public and human rights law has been driven by a judiciary working hand in glove with a coterie of campaigners, whose attitudes they share.

The 2015 Act

In a consultation in 2013 the Government tentatively raised the question of a modification of the rules for interveners[60]. Unsurprisingly, pressure groups who regularly intervened protested against any change. Amongst the arguments they raised was that the courts sometimes found interveners' contributions helpful. Liberty cited a number of cases in which judges had said this of their material[61].

In the legislation which followed the consultation the Government confined itself to a provision which became s.87 of the Criminal Justice and Courts Act 2015. This provides for interveners to be ordered to pay another party's costs in various circumstances, none of which are frequent. It also provides that the principal parties are not to be ordered to pay the costs of an intervener save in exceptional circumstances; but that had never been a likely risk. These modest provisions do not seem to have made much change to the frequency with which pressure groups have sought, or been granted, permission to intervene.

60. "Judicial Review Proposals for Further Reform" MoJ September 2013, para 90

61. *R (Marper) Chief Constable of S Yorkshire* [2002] EWCA Civ 1275 per Sedley LJ at [72];

The recommendation of the Faulks' Review

The Independent Review of Administrative Law chaired by Lord Faulks QC noted that there had been a great increase in the number of interveners allowed to make submissions in judicial review cases, and expressed concern that this was the result of unfettered judicial discretion. The Report[62] stated:-

> " Since 2000, however, there has been a significant increase in the use of intervention, most obviously in the House of Lords, where groups such as Liberty and JUSTICE have effectively acquired repeat-player status. In A (No2) there were 16 requests to intervene, though only two interveners were represented by counsel in the oral proceedings. There were five interveners in Miller (No 1) and in the Northern Ireland abortion case mentioned earlier, there were 10 interveners. It is questionable whether this number of interveners was justifiable, or even helpful.
>
> 4.108. The Panel is concerned that this development is the product of unfettered judicial discretion. Promptness aside, CPR 54 is silent about the relevant criteria and judicial failure to explain when, why, by whom and in what form intervention will be permitted is a major point of criticism. The courts have effectively adopted a policy of drift. Intervention as a lobbying tactic also raises concerns for the integrity of the adjudicative process and separate identity of courts....."

The recommendation which followed that passage, however, looks a little weak in relation to the problem which the Panel had identified. The recommendation was simply:-

> "..... The Panel therefore recommends that the criteria permitting intervention should be developed and published, perhaps in the Guidance for the Administrative Court."

In some other situations where a need has been identified for the courts to have in mind certain criteria or principles when exercising their powers Parliament has enacted such in primary legislation.

Nonetheless, the fact that the Panel have acknowledged the existence of a problem, and have recommended that some action be taken, ought to be seen as creating a golden opportunity. It would be unfortunate if the Government fails to recognise this.

62. March 2021, CP 407 at paragraph 4.107., published at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf

The Government's response

In its Consultation Document[63] following the publication of the Review's Report the Government backed away from any legislative action in relation to interveners:-

> "102. The Review recommend that criteria for permitting interventions should be developed and published, perhaps in guidance. The Government believes that this proposal has merit, but does not believe it appropriate to be taking it forward in primary legislation or rules of court. It will therefore be considered separately."

There followed a strange passage in which the Government seemed to be considering a move which would actually encouraged more appearances of interveners:-

> "103. A call for evidence respondent suggested imposing a duty on parties to identify to the court not just the named challenger, but any organisation or wider group that that individual represents or is affiliated with, who might assist. This would assist in identifying potential interveners proactively. We consider this an appropriate measure to invite consultees' thoughts on. Giving the court and Defendant's notice of the potential for interveners could also be useful in estimating cost and length of litigation.
>
> Question 13: Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?"

In its Response[64] to the consultation the Government said only that as the procedural reforms did not require legislation, responses to procedural matters would be analysed and responded to at a later date. It is good that the Government have not closed the file on the topic, but a pity that the opportunity for legislation seems to be slipping by.

63. "Judicial Review Reform The Government Response to the Independent Review of Administrative Law" March 2001 Ministry of Justice CP108

64. "Judicial Review Reform Consultation: The Government Response" MoJ, July 2021, CP 477

Could this policy be implemented by Rules or Guidance?

The Faulks' Panel suggested that a new policy on criteria for allowing interveners be published "perhaps in Guidance for the Administrative Court". But there is currently no known publication bearing the title. Nor is there any document in the public domain bearing any other title which purports to provide guidance to judges sitting in the Administrative Court on how they should exercise their discretion. If there were such a document one would expect it to be issued by the senior judiciary, not the Government, since it is fundamental to our political system that the courts are independent of Government. There is a publication entitled "The Administrative Court: Judicial Review Guide", but this is a guide for court users on the procedure of the Court, not a directive to judges on the criteria they should adopt.

The Government's Consultation Document mentioned Rules of Court as a possibility. But that does not look an attractive route. The Civil Procedure Rules are made by a Civil Procedure Rule Committee, half of whose members are judges appointed by the Lord Chief Justice. The Lord Chancellor has power to disallow Rules made by that Committee, but if he exercises that power he must provide written reasons for doing so (Civil Procedure Act 1997 s.2(8); and even if exercised, this power is merely a veto on something which the Committee wants. The closest thing to a power in the Government to make court rules, is a power inserted in 2005 in the Lord Chancellor to give notice to the Rule Committee that he considers it expedient for the Rules to "achieve a purpose" specified in his notice. But the adoption of that route in the face of a reluctant Rule Committee looks a recipe for a messy squabble, with ample scope for it to be broadcast by the soft left groups as some kind of threat to justice.

A simple clause in legislation now would be so much cleaner and more effective. The Faulks' Panel recommended the publication of criteria: legislation could do just that. A splendid opportunity has been presented to achieve a change which would have real benefit. It is much to be hoped that the Government will not let it slip by.

Possible legislative action

The fundamental problem for any policy aimed at constraining permissions for pressure group interventions is that many senior judges so much like them. The phenomenon exists at all only because the senior judiciary has invited it. As just one indicator of the likely judicial reluctance to curb the current practice one can cite Lord Phillips of Worth Matravers' observation on the trivial change to costs enacted by the 2015 Act: he said it could have a "chilling effect on interventions"[65]. In fact, it has not applied any noticeable brake at all.

In theory, Parliament might trump the judicial fondness by enacting a complete ban on interventions by pressure groups. But, even if such a restriction on how courts handle their cases were thought acceptable, this might involve some difficulty in defining the scope of the prohibition, if it were not to be a blunt instrument, risking the exclusion of parties who reasonably ought to be heard. And in any event, it would not have the advantage of representing an implementation of the Faulks' Panel's recommendation – which was the publication of criteria.

A useful template for a set of criteria may be found in a Direction recently issued by the Supreme Court of Canada[66]:-

> "1. The Court expects all intervener submissions to be useful to the Court and different from those of the parties.
>
> 2. The purpose of an intervention is not to support a party but to advance the intervener's own view of a legal issue before the Court. Despite the participation of interveners, the case remains a dispute between its parties. However, the fact that an intervener's submission aligns it generally with one party over another does not, without more, make the submission inappropriate.
>
> 3. Interveners should not take a position on the outcome of an appeal, whether in written or oral argument.
>
> 4. Interveners must not challenge findings of fact, introduce new issues, or try to expand the case.
>
> 5. In considering applications to intervene, the Court will be mindful of the need not to unduly imbalance the arguments before it.

65. Foreword to "To Assist the Court: Third Party Interventions in the Public Interest" JUSTICE, 2016

66. Notice to the Profession issued by the Supreme Court of Canada, November 2021 at https://www.scc-csc.ca/ar-lr/notices-avis/21-11-eng.aspx

> 6. The Court always retains a discretion to take any steps it sees fit to prevent an unfairness to the parties arising from an intervener's participation in an appeal."

The Canadian Supreme Court's first policy – that mere repetition of the submissions already being heard from the parties is of no assistance to a court – is one which has been expressed in our own courts. In 2009 Lord Hoffmann said[67],

> "An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything."

On the other hand, several of the other policies in the Direction have not been expressly recognised by our domestic courts. In Canada they have been developed through an evolution of case-law over recent years. Three principles, in particular, are noteworthy:-

(a) An intervener's submissions must respect that the role of a court is confined to the law :-

> "In interpreting legislation, we regard legislative purpose as "the authentic aim of the legislation passed by the legislators, not what international authorities, judges, parties and interveners think is 'best for Canadians' or what they consider to be 'just', 'right' or 'fair'".[68]

(b) The litigation exists between the parties. Interveners must take the parties' issues as hey find them:-

> "If interveners want to do more, if they want to advance their own issues, they must bring their own cases as parties with all that that entails, including legal expense and potential costs liability."[69]

(c) Allowing interveners supporting just one side of a case risks the reality or appearance of unfairness. A Federal Court of Appeal judgment this year suggested that a consideration was:-

> "Will the addition of multiple interveners create the reality or an appearance of an 'inequality of arms' or imbalance on one side?"

The court explained:-

> " ... fairness and impartiality are damaged, sometimes severely, when the Court admits too many interveners on only one side of the debate, all pushing for the same

67. *E (a child) v Chief Constable of Ulster* [2009] UKHL 536
68. *Right to Life Association v Canada* 2022 FCA 67 at [12]. The quoted passage is from *Canada (Attorney-General) v Kattenburg* 2020 FCA 164.
69. *Right to Life Association v Canada* at [14]

> outcome. If the Court ultimately adopts that outcome, fair-minded lay observers might well believe that the imbalance of voices on one side of the courtroom and their amplification through frequent repetition—all set up by the Court's decisions on intervention—may have carried the day.
>
> Thus, in considering applications to intervene, we are careful to avoid the appearance of a court-sanctioned stacking in favour of one side or a court-sanctioned gang-up against the other side."[70]

Those three principles all have a sound basis in common law jurisprudence, and should be as applicable domestically as in Canada. If pressed, judges at home might find it hard to quarrel with the reasonableness of the first two. But the third – the need for a balance in the interventions permitted – runs counter to what has been happening in England and Wales over the last 20 years. Manifestly, our judiciary are unlikely to adopt it without a gentle steer from Parliament.

A suggestion for doing so has been made Professor Richard Ekins, who has proposed a new clause in these terms[71]:-

> "(1) In deciding whether to permit an intervener to participate, whether in writing only or orally, in judicial review proceedings, the court or tribunal must take into account:
>
> (a) whether the intervention is likely to add materially to the submissions made by the parties; and
>
> (b) the importance of maintaining a fair balance of representation between the parties.
>
> (2) If the court or tribunal permits an intervention, the court or tribunal must provide reasons."

The great merit of this proposal is to codify the principle of "fair balance". That is important for the cases in which an interest groups with an agenda different from the "repeat players" has sought to intervene. But of equal importance is addressing the factors suggested above as explaining the apparent rarity of applications from such groups – namely, the fear of a cool reception, and lack of information on grants of permission to left of centre groups. So an effective policy favouring balance, if there are to be any interventions at all, must address those two factors.

As to the first of those factors, it may be hoped that the very fact of Parliament enacting a criterion of encouraging a balance of views, if any are to be heard other than those of the parties themselves, will dissipate an expectation by, for instance, conservative-leaning groups that they

70. The quotations are from *Right to Life Association v Canada* at [10], and [15] to [16].

71. *How to Improve the Judicial Review and Courts Bill* (Policy Exchange, 26 October 2021), p37.

would be unwelcome. The second factor, however, will require positive action: a change of practice will be needed to ensure public awareness of interventions which are in prospect. A minimum measure to achieve this could be the setting up by the Court Service of a dedicated page on its website on which information is posted about permissions to intervene which have been granted.

The impact of the policy discussed above may be illustrated by a practical example. In the high-profile recent case of Shamima Begum permission was granted in the Supreme Court for both Justice and Liberty to intervene. If the grant of that permission had been publicised on a web page which members of the public could regularly check, an organisation with a different, relevant viewpoint, such as Migration Watch, would have had the opportunity to consider whether it, too, might wish to be heard. An exhortation to the courts to take into account the value of hearing a balance of views would not compel the court to grant permission to intervene to Migration Watch, but in practice the judges involved would then probably incline to doing so.

Ideally courts may wish to consider all applications to intervene at the same time. The Supreme Court's present policy is to list all applications to intervene at one and the same time. Its Practice Direction 6.9.3 states:

> "6.9.3 Applications for permission to intervene should be filed at least 10 weeks before the date of hearing of the appeal. Failure to meet this deadline may increase the burden on the parties in preparing their cases and the core volumes, and may delay the hearing of the appeal. The Court will wish to consider all the applications to intervene at one time and the Registrar will group applications together and refer them to members of the Court as a group."

If a court were to have before it at the same time an application from a pressure group seeking, in simple terms, to maximise the impact of the Human Rights Act and another application from a pressure group seeking, in equally simple terms, to minimise its impact, then one might hope that, in the absence of other factors, the court would either grant both applications or would grant neither. Therefore, a policy of publicity might be extended to applications to intervene, as well to actual grants of permission. But publicity for applications alone would not be sufficient. Pressure groups may not be motivated to apply to intervene unless and until they know that a pressure group with different objectives has actually been given permission to intervene in forthcoming proceedings. Therefore, after permission has been given to one intervener the duty on the courts to give weight to achieving a balance of positions from interventions must continue and apply to any further applications. A policy of hearing, if possible, all applications at the same time ought not to be allowed completely to exclude later applications.

Whilst it may be taken for granted that any policy aimed at constraining pressure group interventions will be bitterly opposed by the voices of

liberal orthodoxy, it is a little hard to see scope for valid objection to the hearing of a balance of submissions. It could be pointed out that a submission from a group with a different perspective or philosophy at the same time as a court hears from a "repeat player" would do no more than advance what Hale LJ recognised in her dictum quoted above about the value of interveners being to allow the hearing of the "full range of points of view".

A statutory duty to give weight to the desirability of balance ought to achieve one of two alternative results, both of which would be beneficial – either there would be two interveners presenting opposing viewpoints, or else there would be no intervener at all. As to that first possibility, the publications in recent years of the Judicial Power Project, to name just one body, are testament to the existence of an intellectually coherent viewpoint very different from that espoused by regular interveners.. A pity of recent years is that such arguments against the expansion of the scope of administrative law have sometimes been heard only after a major court decision, when it is too late for them to have any impact on the actual judgments.

In reality, the more likely consequence might be the second possibility: that is that the pressure to grant permission for an intervention from a conservative-leaning body to balance an intervention from those with "repeat player status" would lead the court hearing the first application for permission to intervene to decide that there should be no interventions at all – which would be the most desirable outcome of all.

A draft statutory provision

Drawing together the above threads a statutory provision might be in terms such as these:-

"(1) This section applies when a person in any court proceedings[72] applies to intervene by,

(a) submitting written representations; or

(b) making oral submissions[73].

(2) Any such notice of application shall be made by notice, and the notice shall state in summary the contention which the applicant wishes to present to the court.

(3) In considering whether to grant permission so to intervene the court shall take into account, subject to sub-section (5) below,

(a) whether the proposed intervention will contribute submissions of value to the court beyond those being presented to the court by the parties;

(b) if so, whether the proposed intervention will assist the court to resolve the issues between the parties;

(c) how far the proposed intervention, taken together with any other intervention being permitted, will be compatible with the desirability of maintaining a balance between the contentions being presented to the court;

(d) whether the proposed interveners will recognise that the litigation is the suit between the parties, will confine their submissions to the issues raised by the parties, and will refrain from advancing a position on what the outcome of the case should be; and

(e) whether the proposed intervention will add significantly to the length or cost of the proceedings.

72. Professor Ekins' suggested provision, like CPR 54.17, was limited to judicial review proceedings. Although many of the interventions by pressure groups are in judicial review, some are in other litigation. So this wording would cover all proceedings.

73. This wording contains two of the three limbs in CPR 54.17, namely written representations and oral submissions: deliberately I am not including the third, namely filing evidence. Whilst a court having control of its proceedings can permit almost anything consistent with fairness, it is inherently undesirable that a pressure group should seek to add to the evidence presented by the parties. The Canadian court in Right to Life Association made a particular point at [13] of deploring a practice of interveners trying "to slip fresh evidence into the record by crafty, unprofessional means such as smuggling into their books of authorities materials that contain facts and social science opinions not in evidence".

(4) Her Majesty's Courts and Tribunals Service shall maintain, and constantly update, a page on its website on which it shall publish information in respect of any proceedings at High Court level or any level above on,

(a) all applications by a non-governmental organisation for permission to intervene;

(b) all grants to a non-governmental organisation of permission to intervene

Such information shall include the names of the parties, the file number of the case, the name of the intervener, and the summary of the contention which the applicant to intervene wishes to present.

(5) In the event that in any proceedings, in which permission to intervene has already been granted to at least one person, an application is made by another person also to intervene, the court shall give weight in considering whether or not to grant such application to the criterion of maintaining a fair balance of approaches to the issues in the case."

Conclusion

The grant to a pressure group of permission to intervene in litigation is a procedural matter. As such it may seem a dry technicality compared with high principles of public law. But there may here be an illustration of a famous jurist's dictum that substantive law is secreted in "the interstices of procedure"[74]. There is a justified concern that the prevalence of interventions by the pressure groups such as the "repeat players" has encouraged a judicial tendency over the last two decades to equate those groups' policies with the public interest. And as those groups priorities have shifted from their specific and widely admired original objects towards a more generalised support for causes currently favoured by one section of the political spectrum, such as the maximisation of the impact of article 8, so the courts may have drifted into aligning Convention rights with those positions.

None of this is a complaint against the pressure groups, who are fully entitled to utilise opportunities offered to them to advance their campaigns. The responsibility lies fairly and squarely upon the judges who have allowed and fostered the undesirable growth of pressure group interventions.

The Government ought to be trying to depoliticise the courts. It ought not to miss a rare opportunity to take a small step in that direction.

74. *F W Maitland*, who is regarded as the father of English legal history, drew attention to this remark of the Victorian jurist Sir Henry Maine: *The Forms of Action at Common Law 1909, Lectures I and VII.*

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