RECONSIDERING THE GROUNDS OF REVIEW

Jeffrey Jowell[1]

1. British constitutional arrangements, especially the primary principle of the sovereignty of Parliament, and the absence of a bill of fundamental human rights, inclines the courts to defer to the wisdom of officials in the exercise of their power. Governments of both the left and right have been careful to discourage judicial challenge to the implementation of their social programmes. Nevertheless, judicial review of administrative action has, particularly over the last thirty years, been the most impressive and fastest developing area of the common law.

2. Courts are in Britain today just one of a number of different bodies that check the exercise of official power. These bodies apply differing standards. Numerous tribunals and inquiries hear appeals on the facts of administrative decisions and are free to form their own view of the merits of the case before them. The ombudsbodies are required to police maladministration. The new Citizens Charters require performance standards relating to efficiency (value for money) and responsiveness. The newly privatised industries (gas, water, telecommunications etc.) are controlled in some of their functions by regulatory agencies (Office of Gas, Water, Telecommunications etc.) concerned mainly to promote competition in those industries. There are also a number of self-regulatory bodies, many non-statutory, that oversee for example company take-overs and mergers and other financial services. These bodies apply rules of their own making. The courts have jurisdiction to review the decisions of most of these appeal or regulatory bodies (even the non-statutory bodies), but the judicial role diffffers from all the others by virtue of the fact that its functions are largely confined to review and not to appeal. Judicial review is based on three principal grounds: procedural propriety, illegality, and irrationality (or unreasonableness).

3. The reason for the courts being confined to review and not appeal is founded in a theory of the proper role of the courts in a democracy. On the one hand Parliament must be able to confer discretionary powers on

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officials to act creatively in the public interest. Yet courts are the final arbiters of the limits of state power and of the rights of the individual against the state. Courts are however themselves constrained in a democracy. While obliged to apply principles to guide and control official power, they may not usurp the policy-making powers of government, and may thus not themselves engage in utilitarian calculations about social or economic goals.

4. Despite this limit to judicial review, it is wrong to suggest that the courts are restricted to considerations of procedure alone, or to consideration of the way decisions are made rather than the substance of the decisions themselves. The grounds of judicial review are both procedural and substantive. Procedural grounds focus on the process of decision making and the participation of the affected parties (e.g.,was there a fair hearing/natural justice?). Substantive review involves challenge on the ground that the decision is outside the letter or purpose of the conferred power (the ground of illegality) or on the ground that the decision is unreasonable.

5. Unreasonableness, or irrationality, is a ground that is employed cautiously because the courts seek to avoid interfering (on review, compared with appeal) in the merits of an official decision. The case of Wednesbury[2] introduced the well known formula designed to inhibit such interference by restricting it to instances where the decision is unreasonable in the sense that "no reasonable authority" could so decide.

Compare the definition by Lord Diplock in the Civil Service Unions case[3] of irrationality as applying to "a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

6. Wednesbury unreasonableness is however too vague to be of use as a practical guide, is tautologous, and gives a false impression that courts may only upset official decisions when the authority has acted in a "perverse" manner. Of course courts must beware second-guessing administrators to whom they must allow a "margin of appreciation" on the facts or merits of a case. The

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[2] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223

[3] Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374

legitimacy of the law is not however enhanced by a pretence that Wednesbury unreasonableness never permits the facts or merits to be challenged through judicial review (in the absence of official insanity). The Diplock formulation (above) is more candid in its acknowledgment that courts can apply "logic or accepted moral standards" to official decisions or action. However it is no more helpful in elucidating the catagories of legally unacceptable substantive decisions that general unreasonableness obscures.[4] These categories are the following:

A. Decisions based upon improper motives or considerations. A fine line divides decisions based upon considerations that are irrelevant in the sense of being outside the purpose for which they were conferred (decisions considered under the ground of illegality above), and those that are unreasonable because infected by motives such as malice, fraud, bad faith, or by other considerations that unfairly bias the decision maker against a party or argument.

B. Decisions based upon relevant considerations but which give unreasonable weight to one relevant factor. e.g. a minor crime justifying deportation or the refusal of parole.

C. Decisions that are unreasonably oppressive. In these cases the decision or action is rendered unlawful by virtue of the fact that it will result in the complainant being subjected to an unfair burden (such as the award of grossly unfair compensation, or a condition attached to a license that in effect amounts to an expropriation of the applicant's land).

What is unreasonably onerous or burdensome in these cases will depend upon the nature of the decision, the power conferred, and the interests or rights that are adversely affected. The courts will be particularly concerned to prevent undue interference with fundamental human rights (as elusive as the source of these rights in English law may be).

The focus of attention under this head will be principally the impact of the decision upon the affected person. The question may be whether there

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[4] Compare the formulation in Kruse v. Johnson [1889] 2 Q.B. 91, where Lord Russell of Killowen C.J. expressed the view that local authority by-laws should be benevolently interpreted by the courts, but could be struck down for unreasonableness: "If, for instance, they were found to be partial and unequal in ther operation between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them . . ."

has been excessive use of a lawful power (the European concept of proportionality). The burden or adverse effects of the decision will be balanced against the necessity of the decision in its appropriate context (e.g. whether the decision to ban access to the media by certain terrorist groups is "necessary in a democratic society").[5] [See further Appendix B on proportionality].

D. Decisions that are irrational in the strict sense of that term, meaning lacking ostensible logic or comprehensible reason. These include decisions made in an arbitrary fashion, perhaps "by spinning a coin or consulting an astrologer".[6] They also include instances where there is an absence of evidence in support of the decision, where there is an absence of logical connection between the evidence and the ostensible reasons for the decision, or where the reasons themselves are simply unintelligible.

E. Decisions that violate accepted standards of administrative propriety. The courts here are concerned with the process of administration itself, applying standards that uphold norms of good administration and avoid unfairness to affected persons. Examples of such standards are those that require consistency, equality and certainty. The developing law of the European Community, and the European Court of Human Rights adopt as "general principles of law" the principle of legal certainty and the principle of equality.[7] Yet in English law too these principles can be discerned under the general cover of unreasonableness.
The general principle that a person's "legitimate expectations" should be fulfilled is mostly given legal effect by requiring a fair hearing where those

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[5] In R.v.Secretary of State for Home Affairs, ex parte Brind [1991] 1 A.C. 696, the House of Lords held that the Home Secretary's decision to ban the broadcasting of the direct spoken words of members of such groups was not on its facts a disproportionate use of the conferred power. Lords Ackner and Lowry, however, felt that proportionality should not be a ground of English administrative law. For a comprehensive account of proportionality as a general principle of European law see J.Schwartze, European Administrative Law (1992).

[6] R. v. Deputy Industrial Injuries Commissioner, ex parte Moore [1965] 1 Q.B. 456 at p. 488, per Diplock L.J.

[7] In addition to the principle of proportionality, above. See generally, Schwartze, op. cit.

expectations are thwarted.[8] However, the courts will sometimes acknowledge the underlying principle of consistency which requires officials, in the absence of competing public policy considerations, to follow their rules in like cases and not to breach their own contracts or representations.[9]

The principle of legal certainty found implicit judicial acceptance in cases involving various attempts to impose sanctions on contact with South Africa in Britain in the 1980s. For example, in Wheeler v. Leicester City Council[10] the council withdrew the licence of a local rugby club to play on the council's ground because the club had allegedly refused to press four of its members to withdraw from the Lion's South African tour. Lord Templeman held that the council had misused its powers by "punishing the club when it had done no [legal] wrong".[11]

The principle of equality of treatment without unfair discrimination echoes the example of unreasonableness endorsed even in the Wednesbury case of a teacher discriminated against on the ground of her red hair. In more recent cases however the principle has been implicitly upheld. For example, the preferential allocation of council housing to a councillor in order to put her in a better position to fight a local election was held to be an abuse of power because it was unfair to others on the housing list.[12]

7. Finally, should the grounds of review be codified? The arguments for and against codification in this area are similar to those in other areas of the law. The principal advantage of codification is its public statement of standards. Courts, officials and the public affected by their decisions will thus know of the rules of the game; of the standards that are expected and, if not met, can be legally challenged.

These advantages are offset by the disadvantage that codification can so easily lead to ossification. Even

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[8] As in Council of Civil Service Unions v. Minister for the Civil Service, supra, note 2.

[9] See e.g. H.T.V. Ltd. v. Price Commission [1976] I.C.R. 170 (C.A.); Re Preston [1985] A.C. 835 (H.L.); R. v. Secretary of State for Home Department, ex parte Asif Khan [1984] 1 W.L.R. 1337 (C.A.); R. v. Secretary of State for Health, ex parte US Tobacco International Inc. [1992] 1 All ER 212 (Q.B.D.).

[10] [1985] A.C. 1054

[11] See also Congreve v. Home office [1976] 1 Q.B. (C.A.).

[12] R. v. Port Talbot borough Council and others, ex parte Jones [1988] 2 All ER 207 (Q.B.D.).

where, as in the attached Australian **Adminstrative Decisions (Judicial Review) Act** (1977), there are provisions that allow "other" grounds than those specified to be applied, it would need a bold court to apply grounds that do not necessarily fit the existing code, or to apply growing international norms such as the principle of proportionality, of legal certainty or of equality. Flexibility will also encourage principles of legality to be enriched over time by principles of maladminstration (e.g. the decision wrongly delayed) or those contained in bills or charters of rights.

In a new constitutional order it may be desirable clearly to delineate the minimum standards of administrative justice and legality. However, it would seem equally important to allow room for the courts to feel free to reach beyond those standards in order to respond to changing expectations of justice and recompense. Where necessary the courts may wish to incorporate standards that are increasingly shared by an expanding community of democratic nations, all seeking a balance between the interests of creative administration and the need to control the potential abuse of power.

ENCLOSURES: Appendix A: Australian Federal Administrative Decisions (Judicial Review) Act (1977) (excerpt)

Appendix B: Jowell and Lester, "Proportionality: Neither Novel nor Dangerous", in Jowell and Oliver New Directions in Judicial Review (1988)

APPENDIX A

AUSTRALIA

SECTION 5 APPLICATIONS FOR REVIEW OF DECISIONS

5(1) [Person aggrieved may apply for order of review in respect of decisions] A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Court for an order of review in respect of the decision on any one or more of the following grounds:—

(a) that a breach of the rules of natural justice occurred in connexion with the making of the decision;

(b) that procedures that were required by law to be observed in connexion with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(j) that the decision was otherwise contrary to law.

5(2) [Reference to improper exercise of power] The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to—

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.

5(3) [Where result of exercise of power uncertain] The ground specified in paragraph (1)(h) shall not be taken to be made out unless—

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