

# The Development of Classical Administrative Law and Modern Threats to it

Professor Christopher Forsyth

University of Hong Kong

12<sup>th</sup> April 2018

# The awakening of English Administrative law

In 1982 in one of his last speeches in the House of Lords Lord Diplock said that the progress made towards a comprehensive system of administrative law “was the greatest achievement of the English courts in my judicial lifetime”. He was here referring to the way in which the modern law of judicial review is now an ever present safeguard against the abuse of governmental power.

# The awakening of English Administrative law

In the 1950s “an atmosphere of depression and defeatism hung over public law. The great accretion of discretionary power to the state during the [Second World] War and during Attlee’s reforming government thereafter had left many to conclude that the common law had lost the power to control the executive.”

# The development of classical administrative law

- But in a series of scintillating and bold judgments made mostly during the 1960s the English courts cast the mantle of the rule of law over the exercise of discretionary power. In two cases decided nearly fifty years ago (Anisminic, Padfield ) and one decided fifty four years ago (Ridge v Baldwin ) the foundations were laid for the modern administrative law. With the addition of the famous Wednesbury case from an earlier era the conceptual foundations were complete.

# The development of classical administrative law

The organising principle was jurisdiction: did the decision maker act within or outside the decision-making power granted by Parliament. If the decision-maker acted outside the powers granted, the decision was legally non-existent and void (so not caught by ouster clauses reasonably interpreted as applying only to valid decisions). (This may be traced to Anisminic but it is much older.)

# The development of classical administrative law

Once determined that the decision-maker had power to act, the question was whether that decision was taken in a procedurally fair manner. The duty to act fairly now applies to practically anyone who decides practically anything. If a decision was not made fairly it was once more invalid and void. (This is all traced (with some hiccups) to *Ridge v Baldwin*.) Similarly the statute under which the power arises grants that power for a purpose express or implied. When the decision-maker acts for some other purpose, he or she acts invalidly; and the decision is void. Since statutory power is always given for a purpose it follows that there is no such thing as an unfettered discretion. (This is all traced to *Padfield*.)

# The development of classical administrative law

From these simple ideas classic administrative law was constructed. Today it is the case, with very few exceptions, that any person or body exercising public power may be called to account to the law for its exercise. This was a great judicial achievement. And I would add an academic achievement for the writings of Professor Stanley de Smith and Professor Sir William Wade played a crucial role..

# The ultra vires doctrine

The ultra vires doctrine was a crucial part of this story. Where Parliament is sovereign (as it is in the United Kingdom) then the ultra vires doctrine (or something very like it) necessarily provides the justification for judicial review.

What is it that justifies an unelected official (a judge) in quashing a decision made by a Minister of the Crown?

# The ultra vires doctrine

- Professor Baxter puts it this way: ‘... the self justification of the ultra vires doctrine is that its application consists of nothing other than an application of the law itself, and the law of Parliament to boot.’ If an official acts beyond his legal power then his act is legally non-existent or void. And there is nothing exceptional (although it is very important) that a court should uphold the law and declare that act void. This is nothing more than the rule of law at work.

# The ultra vires doctrine

. Of course statutes are often silent or uncertain; and it is implausible to suppose that Parliament intends every nuance or point of detail that may arise in the application of the statute. But as Lord Steyn said in *R v Home Secretary, ex parte Pierson*: “Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.” This is the “so called” modified ultra vires doctrine in which it is presumed that Parliament, unless it makes the contrary intent clear, intends that powers should be exercised in accordance with the principles of good administration. When decision-makers do not exercise their powers in accordance with those principles, they act ultra vires and their decision may be quashed.

# The ultra vires doctrine

- The ultra vires doctrine, even in this modified form is not found convincing by all. Others – some very eminent – locate the justification for judicial review in the common law.
- But the point I would defend is that where Parliament is sovereign, something very like the modified ultra vires doctrine must be the justification for judicial review.

# The ultra vires doctrine

Suppose a decision-maker complies with every requirement, express and implied, laid down by Parliament for the validity of their decision..There can be no additional requirement for validity– eg that fuller reasons for the decision be given- for validity (added by the common law) nor can a requirement be removed (eg that the hearing need not be oral) without challenging the power of Parliament to lay down the requirements of validity. Somehow the creativity of the judiciary in developing administrative law has to be reconciled with the supremacy of Parliament.

# The benison of the rule of law

Why then is reconciliation between the different schools of thought so difficult? Behind the technical arguments is a fundamental question about the constitutional position of the judiciary. Are the judges (like everyone else) ultimately subject to the law or are they masters of the common law. Surely the position is that the law is the judges' only master. After all, all judges (in England) swear an oath on

# The benison of the rule of law

- taking office to ‘do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will’.
- There is a similar oath in Hong Kong in which the judge swears to “serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit.”
- The law, of course , needs to be developed to take account of changing needs. Fidelity to the law—founded in the oath—means that any changes that judges introduce are interstitial and incremental and in accordance with recognised doctrine.

# The benison of the rule of law

- . The craft and the challenge of the judicial office is to adapt the law to the challenges of today while staying within the overlapping constraints of the law and the constitution. Sometimes, of course, the judge finds it frustrating to proceed incrementally when it is clear that justice requires an immediate and broad reform. But the creation of the classical administrative law, extending the benison of the rule of law far into practically all exercise of public power, is an eloquent demonstration of what can be achieved by the incremental approach.

# Threats to the classical administrative law

- This part of my presentation derives from a perception that judges have been asserting their power in ways that take them beyond their proper constitutional role.
- Two examples may be considered.
- First, *Evans v The AG* [2015] in which the Supreme Court while paying lip-service to the sovereignty of Parliament in fact disregarded it. This is the case about Prince Charles's "black spider" letters to Ministers.
- Secondly, *Cart* [2011] in which the organising principle of jurisdiction is abandoned.

# Evans v Attorney-General [2015] UKSC 21

- Here where Parliament had clearly provided for an executive override over certain decisions taken by the Upper Tribunal in the administration of the FOIA 2000.
- But the SC “rewrote” the Act to give section 53 a meaning Parliament did not intend it to have.

# Evans v Attorney-General [2015]

## UKSC 21

- *Section 53(2)*
- *A decision notice or enforcement notice to which this section applies shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person [A Minister of the Crown] ... gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within [section 53] subsection (1)(b).[This relates to a failure to communicate information as required by the Act (section 1(1)(b).]*

# Evans v Attorney-General [2015]

## UKSC 21

- The fundamental point is contained in para 170 of Lord Wilson's dissent. He said:
- It is helpful to notice the circumstances in which section 53 came to be included in FOIA. The version of the Bill printed on 10 February 2000 included nothing analogous to it. But under that version the applicant had no *right* to disclosure of such information as was subject to qualified exemptions. Clause 13(4) of it merely conferred a *discretion* on the public authority to disclose such information and clause 13(5) required that, in exercising the discretion, it should have regard to the desirability of disclosing it wherever the public interest in doing so outweighed the public interest in not doing so. In the event that disclosure was refused, clause 48 empowered the Commissioner only to *recommend* that it be given. He could not overrule the authority by *ordering* disclosure. At the Commons Report stage, however, the text of the Bill came, instead, to impose enforceable obligations on public authorities to disclose such information as was subject to qualified exemptions unless (reversing the weighting originally canvassed) the public interest in maintaining the exemption outweighed the public interest in disclosing the information. But, if the discretion of public authorities in this respect was to be eliminated, there needed, so Parliament decided, to be a closely circumscribed power of public authorities at the highest level to override the evaluation of public interests by the Commissioner or by tribunals or courts in ensuing appeals. This was clause 52 of the text of the Bill printed on 6 April 2000 and it became section 53 of FOIA. It is a central feature of the Act.

# Evans v Attorney-General [2015]

## UKSC 21

- It is also important to note that issue on which the Upper Tribunal and the Attorney-General took different views was not a point of law on which the Upper Tribunal might be thought to have particular expertise but was on the assessment of where the balance of public interest lies. The actual provision in contention is section 2(2)(b) of the 2000 Act which is in these terms: “[whether] in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

# Evans v Attorney-General [2015]

## UKSC 21

- Lord Wilson is once more spot on (para 171).
- A power of executive override of determinations of the Commissioner, or of tribunals or courts in ensuing appeals, on issues of *law* would have been an unlawful encroachment upon the principle of separation of powers..... But issues relating to the *evaluation of public interests* are entirely different. In the words of Lord Hoffmann in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [\[2001\] UKHL 23](#), [\[2003\] 2 AC 295](#), at para 69, the principle is that “in a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them”. This was the principle reflected in the first version of the Bill. In the later version Parliament sanctioned departure from it but, in enacting section 53, it no doubt continued to have in mind that the evaluation of public interests was not an exercise in relation to which the Commissioner, the tribunals and the courts, could claim any monopoly of expertise. With respect to Lord Neuberger, I cannot agree with his observation at para 96 above that in this context it is hard to differentiate between the findings of fact and conclusions of law traditionally reached by tribunals and courts, on the one hand, and their occasional excursions into evaluating the potency of rival public interests on the other.
-

# Evans v Attorney-General [2015]

## UKSC 21

- Compare this with Lord Neuberger: “... where, as here, a court has conducted a full open hearing into the question of whether, in the light of certain facts and competing arguments, the public interest favours disclosure of certain information and has concluded for reasons given in a judgment that it does, *section 53 cannot be invoked effectively to overrule that judgment merely because a member of the executive, considering the same facts and arguments, takes a different view*” ( para 59). But is that not exactly what section 53(2) provides for?

# Evans v Attorney-General [2015]

## UKSC 21

- Is Lord Neuberger not rewriting the statute to say what he would have liked Parliament to say rather what Parliament did in fact say.
- There were plans in government to enact legislation to overturn Evans but all that has been swept away by the complexities of Brexit.

# Cart v Upper Tribunal [2011] UKSC

## 28

- There was a dispute over an increase in child maintenance that the Child Support Agency had ordered Mr Cart to pay Mrs Cart. Mr Cart appealed to the First Tier Tribunal who dismissed his appeal; so he appealed to the Upper Tribunal on four grounds the detail of which need not concern us. The Upper Tribunal granted permission to appeal on three of the grounds but refused leave on the fourth.
- Although there is a right of appeal with permission from the Upper Tribunal to the Court of Appeal on a “point of law”, this did not include a refusal of permission. Thus Mr Cart’s only possible remedy was to apply for judicial review.

# Cart v Upper Tribunal [2011] UKSC

## 28

- But was the Upper Tribunal subject to judicial review? The Upper Tribunal had been established as a “superior court of record” and there was some authority to the effect that this placed it on the same footing as the High Court (which as a court with unlimited jurisdiction was not subject to judicial review). Every court that heard *Cart* rejected this approach and held that the Upper Tribunal was subject to judicial review.

# Cart v Upper Tribunal [2011] UKSC

## 28

- The SC accepted that the Upper Tribunal was subject to judicial review and that there would be no return to the pre- *Anisminic* law which, it said, would ‘lead us back to the distinction between jurisdictional and other errors which was effectively abandoned [in that case]’.

# Cart v Upper Tribunal [2011] UKSC

## 28

- Instead the court restricts the availability of judicial review on pragmatic but not principled grounds. The court (in Baroness Hale's judgment) makes a profoundly pragmatic case that permission to apply for judicial review of the Upper Tribunal should only be granted when the stringent 'second tier appeal criteria'
- The Supreme Court thus, while establishing in principle the general availability of judicial review of the Upper Tribunal (because all errors of law are jurisdictional), has carved away so much of that principle that only rarely will judicial review lie against decisions of the Upper Tribunal.

# Cart v The Upper Tribunal

## [2011] UKSC 28

There is a distinct tendency in the Supreme Court not to lay down clear rules that can be followed in the future by lower courts and individuals seeking a guide to their conduct. Instead the outcome of legal disputes is made dependent upon the exercise of judicial discretion to the detriment of legal certainty.

If the approach of Cart is applied generally the question of whether a decision-maker has power to make a particular decision, i.e. whether that decision is within jurisdiction becomes a matter of judicial discretion. In effect law is replaced with judicial discretion and classic administrative law disappears.

# Concluding Remarks

- What of the future? I am (I hope) wise enough to make no predictions. But here are some possibilities. It may be that the UK government is so concerned with Brexit for decades to come that its plans to reform human rights law and the application for judicial review come to naught. The current uneasy tension between the judiciary and the other branches of government continues indefinitely.
- Or it may be that judiciary, emboldened by the government being distracted by Brexit,

# Concluding Remarks

- asserts itself more forcibly as the guardian of the constitution and effectively gains unchallenged control over the merits of major decisions.
- Or it may be that the government's response to the growth in judicial power is to make the appointment of the higher judiciary subject to Parliamentary approval. The judiciary becomes much more political (as in the US) and they trim their judgments to the political tide.
- These are possible developments and possible developments that I generally deprecate. But if the judiciary are to make important political decisions they must anticipate that the political process will seek to hold them accountable.