Administrative Law in the Anglo-American Tradition

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HISTORICAL FOUNDATIONS

It is a common belief that 'Administrative Law' is a recent development in the Anglo-American tradition. This is mistaken. The Anglo-American tradition is not premised on the existence of a separate set of courts to adjudicate on public law matters, as is common within civilian jurisdictions. To reason from this premise, to the conclusion that there was, until recently, no Administrative Law is a *non-sequitur*. English law has exercised procedural and substantive controls over the administration for well over three hundred and fifty years. Three features of this control were of central importance.

Firstly, the history of judicial review was inextricably bound up with the development of remedies as opposed to the creation of new heads of review, (Craig, 2000; Henderson, 1963; Jaffe and Henderson, 1956). The elaboration of grounds for review took place within, and was framed by, the evolution of adjectival law. Mandamus was transformed into a general tool for the remedying of administrative error. Lord Mansfield (*R. v. Barker* (1762) 3 Burr. 1265) gave the seminal rationalisation of mandamus. It was, he said, introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used 'upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one'. The evolution of certiorari into a generalised remedy capable of catching a variety of governmental errors occurred later.

Secondly, it was through the common law itself that these developments in judicial review occurred. The common law was seen as the embodiment of reason, which could be modified so as to meet the challenges of a new age. Coke and other lawyers 'disapproved of Parliament changing the common law, because they believed that the wisdom of a single Parliament was unlikely to surpass the wisdom embodied in laws shaped by the accumulated experience of many generations' (Goldsworthy, 1999: 119). The same relationship between statute and common law can be seen in the eighteenth century, as exemplified by the work of Blackstone and Mansfield. Blackstone's *Commentaries* were the pre-eminent statement of the law during this period. They also constituted the main teaching manual for law students in the eighteenth and nineteenth centuries (Lieberman, 1989: 64-5) Blackstone lamented the 'mischiefs' which had arisen from alterations in the law, and laid the blame for this squarely with Parliament, for its passage of imperfect and inadequate legislation. While he acknowledged the importance of certain legislation, such as that concerned with habeas corpus, his general stance was to venerate the perfection of the common law, and regret the manner in which its symmetry had been distorted by ill-conceived legislation. This vision of the common law was inherently conservative and idealistic, as forcefully pointed out by Bentham. The preference for the common law over statute was equally evident in the creative jurisprudence of Lord Mansfield.

Thirdly, the courts did not reason on the basis of any rigid dichotomy between public and private law. This did not mean that there was no administrative law until the mid-twentieth century. There was a wealth of case law dealing with all aspects of review, both procedural and substantive, from at least the seventeenth century onwards. It did mean that the constraints were fashioned on the basis of what were felt to be sound normative principles for the exercise of power. Whether the power was

public, private or a hybrid of the two could be a factor in this determination, but there was no assumption that the conceptual rationale for such constraints, or the constraints themselves, had to be different depending on how the body was classified.

THE DICEYAN LEGACY AND BEYOND

It was Dicey's dislike of Administrative Law that cast a shadow over the subject in the early years of this century, at least in the UK, but also to some extent in the USA. The modern growth of Administrative Law was directly connected with the extension of governmental functions relating to the poor, the unemployed, trade regulation and the like. It became impossible to separate an evaluation of the agencies applying these laws from a value judgment of the social policies in the laws themselves. Those who disliked such social intervention, including Dicey, tended to view the agencies applying such laws with suspicion (Dicey, 1959). The predominance he accorded to the 'ordinary law', applied by the 'ordinary courts', was a means of controlling these agencies, and of maintaining judicial supervision over the substantive policies which they applied. The paramount function of the courts was essentially negative, to ensure that the agency did not make mistakes by exceeding the power granted to it.

These ideas of mistake avoidance and distrust came to be challenged as a direct consequence of changing attitudes towards the social policies which the agencies were applying. People perceived the positive contributions made by such policies. Academics such as Robson (1928: XV) approached the study of administrative justice without 'any ready-made assumption that every tribunal which does not at the moment form part of the recognised system of judicature must

necessarily and inevitably be arbitrary, incompetent, unsatisfactory, injurious to the freedom of the citizen and to the welfare of society'.

The consequences of this change in attitude were important. Administrative agencies were not now viewed as perfect. Defects in their operation were readily apparent. However it was no longer taken for granted that the justice dispensed by the ordinary courts and the ordinary law was necessarily better than that of agencies. Nor was it felt that the sole object of administrative law was to ensure that the agency avoided making mistakes by overstepping its boundaries. A more positive desire that the agency should successfully fulfil the policy assigned to it became the focus of discussion, and the courts were perceived as but one factor in fulfilling this objective, (Aman, 1993: Chap. 1; Harlow and Rawlings, 1997: Chaps. 1-3). Scholars differed in their approach.

Some advanced an explicitly pluralist vision of democracy, in place of the unitary view espoused by Dicey. They contested the idea that all public power was wielded by the state. Religious, economic and social associations exercised authority. 'Legislative' decisions would often be reached by the executive, after negotiation with such groups, and would then be forced through the actual legislature. Group power was applauded rather than condemned. The all-powerful unitary state was dangerous. Liberty was best preserved by the presence of groups within the state to which the individual could owe allegiance, (Laski, 1917, 1919). This vision of political pluralism was complemented by a concern with the social and economic conditions within the state. There was a strong belief that political liberty was closely linked with social and economic equality. The scope of administrative law should not therefore be concerned only with those bodies to whom statutory or prerogative power had been given, but also with other institutions that exercised public power.

Others advanced a more market based conception of pluralist democracy, which was manifest in governmental policy within the late 1970s and 80s, both in the UK and the USA, (Craig, 1990: Chaps 3-4; Stewart, 1975). The market was viewed as the best 'arbitrator' of economic issues, and direct governmental regulation thereof was perceived as necessary only when there was market failure, the existence of which was narrowly defined. The sphere of legitimate governmental action was therefore closely circumscribed. The very fulfilment of the free market vision required, however, a strong central government. Different conclusions were drawn as to the bodies that should be run by the state. Deregulation and privatisation were the consequences of this approach. Even where some continuing regulation of a privatised industry was required, the aim of the regulation was coloured by the market-oriented vision. The purpose was often to prevent an industry with monopolistic power from abusing its dominant position.

Yet others viewed Administrative Law through the lens of participatory democracy, and republicanism. This was particularly so in the USA where Sunstein (1985,1988), and Michelman (1986) were prominent advocates of this underlying theory as to the purpose of Administrative Law. They rejected the view that Administrative Law was simply about the aggregation of interests. Republicanism connoted an attachment to deliberation, political equality, universalism, and citizenship. The purpose of politics was not simply to aggregate private preferences, but rather to subject those preferences to scrutiny and review. Discussion and dialogue were central to this process.

DIVERGENT STRAINS WITHIN ANGLO-AMERICAN ADMINISTRATIVE LAW

It is self-evident that there will be points of divergence within the Anglo-American tradition, in terms of doctrine. Two points are, however, of more general importance in this respect.

The first is that doctrine in the USA is developed against the background of a written Constitution and a general statute, the Administrative Procedure Act of 1946 (APA). By way of contrast there is no written Constitution in the UK, and nothing equivalent to the APA. The greater part of UK Administrative Law has traditionally been judge made common law. There have however been important statutes dealing with particular issues. The Human Rights Act 1998, which came into effect on 2 October 2000, is especially important in this respect. It brings the rights from the European Convention on Human Rights (ECHR) into UK domestic law, and allows individuals to rely on such rights in actions before national courts, (Grosz, Beatson and Duffy, 2000).

The second point is that the UK is a member of the European Union. This has had a marked impact on its Administrative Law. EU law is binding on the Member States in those areas covered by the Treaties. Principles of judicial review developed by the European Court of Justice (ECJ) will therefore have to be applied by national courts in areas that fall within the remit of the EU. These principles will be fashioned by the ECJ drawing on concepts from Member State law. The great majority of states that are members of the EU have civilian legal systems. The consequence is that EU law, developed from these sources, will be binding on the UK. There is therefore a greater interplay between common law and civil law concepts in the UK than hitherto. It should moreover be noted that principles of EU law can have a ‘spillover impact’. They may be applied by UK courts in areas not covered by EU law in a strict sense,

and thus influence the development of the general principles of judicial review, (Andenas, 1998; Andenas and Jacobs, 1998; Ellis, 1999; Schonberg, 2000).

DOCTRINE: PROCEDURAL CONSTRAINTS IN ADJUDICATION

Foundations

Academic commentators and courts alike have, as in the USA, recognised two rationales for the application of procedural rights in adjudication. They perform an instrumental role in the sense of helping to attain an accurate decision on the substance of the case. They can also serve non-instrumental goals such as protecting human dignity by ensuring that people are told why they are being treated unfavourably, and by enabling them to take part in that decision, (Galligan, 1996: 75-82; Hart, 1961: 156, 202; Mashaw, 1985: Chaps. 4-7; Michelman, 1977; Rawls, 1973: 235; Resnick, 1977). These twin rationales for the existence of procedural rights have been recognised by the judiciary in the UK and the USA, (*R. v. Secretary of State for the Home Department, ex p. Doody* [1994] A.C. 531, 551; *Goldberg v. Kelly* 397 U.S. 254 (1970)).

The derivation of process rights varies from country to country. In the USA these rights will normally be grounded in the Constitution or the Administrative Procedure Act of 1946 (APA). There is, as seen above, no written constitution or Administrative Procedure Act in the UK. The common law courts have therefore largely developed procedural rights, although statute has had an impact in this area to some degree. The applicability and the extent of procedural rights have also been

affected by the European Community law, and by the European Convention of Human Rights.

If an individual is aggrieved by the actions of government, a public body, or certain domestic tribunals or associations, he or she may claim that there has been a breach of natural justice. The phrase natural justice encapsulates two ideas: that the individual be given adequate notice of the charge and an adequate hearing (*audi alteram partem*), and that the adjudicator be unbiased (*nemo judex in causa sua*).

In the eighteenth and nineteenth centuries the *audi alteram partem* principle was applied to a wide variety of bodies. Deprivation of office (*Bagg's Case* (1615) 11 Co. Rep. 93b), and disciplinary measures imposed on the clergy (*Capel v. Child* (1832) 2 Cr. & J. 588) were two common types of case to come before the courts. The principle was also applied to a private bodies such as clubs, associations and trade unions (*Abbott* v. *Sullivan* [1952] 1 K.B. 189). The generality of application of the principle was emphasised in *Cooper v. Wandsworth Board of Works* ((1863) 14 C.B.(N.S.) 180) where the court held that the omission of positive words in the statute requiring a hearing was not a bar since the justice of the common law would supply the omission of the legislature. This was further reinforced by Lord Loreburn L.C., who stated that the maxim applied to 'everyone who decides anything' (*Board of Education* v. *Rice* [1911] A.C. 179, 182).

The breadth of the *audi alteram partem* principle was however limited in the first half of this century. The courts held that a hearing would only be required if the body was acting judicially rather than administratively, (*Errington v. Minister of Health* [1935] 1 K.B. 249); there was misunderstanding over remedies, particularly the scope of certiorari, which affected the applicability of natural justice; and some

courts held that natural justice would only apply to protect rights and not privileges, (*Nakkuda Ali* [1951] A.C. 66, 77-78; *Bailey v. Richardson* 182 F 2d 46 (1950)).

The principle of natural justice was revived in the UK by the House of Lords in *Ridge v. Baldwin* ([1964] A.C. 40), and in the USA by *Goldberg v. Kelly* (397 U.S. 254 (1970)). In *Ridge* the House of Lords swept away many of the limitations on the application of the principle which had been imposed by the case law of the early twentieth century. The applicability of natural justice was to be dependent on the nature of the power exercised and its effect upon the individual concerned. In *Goldberg* the Supreme Court was willing to apply Constitutional Due Process to a welfare claimant, and characterized the claimant's interest as being property for the purposes of the 5th Amendment.

The Applicability of Procedural Protection

The 'trigger' for the applicability of procedural protection varies in common law regimes, depending upon the more precise foundation for the process rights.

Thus, in the USA claimants can seek to base procedural protection on three different sources. If the claim is framed in constitutional terms, it will have to be shown that the claimant has a life, liberty or property interest that has been affected by the agency action complained of. The interpretation of these terms is for the courts, and ultimately for the Supreme Court, *Board of Regents v. Roth* 408 U.S. 1972. A claimant can invoke the APA of 1946. Section 554 will apply to agency adjudication required by statute to be determined on the record after opportunity for an agency hearing. This statutory language has been interpreted in rather different ways by the courts, (compare *Seacoast Anti-Pollution League v. Costle* 572 F. 2d. 872 (1978), and

Chemical Waste Management Inc. v. US Environmental Protection Agency 873 F. 2d 1477 (1989)). Where neither the Constitution nor the APA is applicable then an individual may be able to gain limited process rights through the reasoning in *Citizens to Preserve Overton Park v. Volpe* 401 U.S. 402 (1971). This provides a basis for the derivation of limited process rights in relation to informal agency action. The process rights must however be linked to enforcing substantive limits on the agency's power.

The position in the UK is somewhat different, precisely because there is no written Constitution and nothing equivalent to the APA of 1946. The courts have determined the applicability of procedural protection through the common law. The years since *Ridge v. Baldwin* have seen the development of the duty to act fairly. Some courts regard natural justice as but a manifestation of fairness. Others apply natural justice to judicial decisions, and reserve a duty to act fairly for administrative or executive determinations. As discredited limitations have been discarded, and natural justice has expanded to new fields, fairness is seen as a more appropriate label, (*McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520). The courts determine what adjudicative procedures are required in particular areas. In some it may approximate to the full panoply of procedural safeguards including: notice, oral hearing, representation, discovery, cross-examination, and reasoned decisions. In others it may connote considerably less. There will be a broad spectrum in between. The courts have therefore exercised control over procedural rights not by rigid prior classification, but rather by admitting that natural justice or fairness applies and varying the content of those rules according to the facts of the case.

The claimant will nonetheless have to show that he or she has an interest which is sufficient to trigger the applicability of procedural rights. There is therefore an analogy between the UK jurisprudence and that of the US courts when deciding on

the applicability of constitutional due process (*Board of Regents of State Colleges v. Roth* 408 U.S. 564 (1972)). In the UK the claimant will have to show some, right, interest or legitimate expectation in order to be entitled to procedural protection. The term *right* covers a recognised proprietary or personal right of the individual. The term *interest* is looser than that of right. It has been used as the basis for a hearing even where the individual would not be regarded in law as having any actual substantive entitlement or right in the particular case. This is exemplified by the application of natural justice in the context of licensing, social welfare, clubs, unions and trade associations. The concept of *legitimate expectations* can provide the foundation for process rights in circumstances where the individual does not possess the requisite right or interest in the preceding sense. Thus the courts have used the concept to protect future interests, such as licensing renewals, (*McInnes v. Onslow-Fane*). It has also been used when a representation has been made by a public body, where in the absence of the representation, it is unlikely that the substantive interest would entitle the applicant to natural justice or fairness, (*A.G. of Hong Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629). The existence of a representation, and the consequential legitimate expectation which flows from it, may serve to augment the procedural rights granted to the applicant, (*R. v. Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299).

The Content of Process Rights: The Balancing Process

In deciding upon the content of process rights the court will balance between the nature of the individual's interest, the likely benefit to be gained from an increase in procedural rights and the costs to the administration of having to comply with such

process rights. This is the *Mathews v. Eldridge* calculus, (*Mathews v. Eldridge* 424 U.S. 319 (1976)). The UK courts have reasoned in a similar manner, as exemplified by *Re Pergamon Press Ltd.* [1971] Ch. 388.

It is clear that balancing necessitates not only an identification of the individual's interest, but also some judgment about how much we value it, or the weight which we accord to it. For example, to take some position, as Megarry V.C. did in *McInnes* [1978] 1 W.L.R. 1520 as to whether the renewal of a licence is a 'higher' interest than an initial application, is not to engage in rigid conceptualism, but is rather a necessary step in reaching any decision.

It is clear also that valuing the other elements in the balancing process, the social benefits and costs of the procedural safeguards, may be problematic. This is not simply a 'mathematical' calculus. Deciding what are the relevant costs and benefits is itself a hard task, (Mashaw, 1976: 47-9). Moreover, the existence of judicial balancing should not lead us to conclude that all such balancing is necessarily premised on the same assumptions. The premises which underpin a law and economics approach to process rights, may be far removed from those which underlie a more rights-based approach to process, (compare, Posner, 1973, and Mashaw, 1985).

The Content of Process Rights: Particular Process Rights

This section will consider, albeit briefly, the most important process rights which applicants commonly claim.

The courts will protect the right to *notice* since as Lord Denning said, if the right to be heard is to be a real right which is worth anything, it must carry with it a

right in the accused man to know the case which is made against him, (*Kanda v. Government of Malaya* [1962] A.C. 322, 337).

In terms of the *hearing* itself, the strict rules of evidence will not normally have to be followed, (*Ex p. Moore,* [1965] 1 Q.B. 456, *Richardson v. Perales* 402 U.S. 389 (1971)). The tribunal is not restricted to evidence acceptable in a court of law; provided that it has some probative value, is relevant and comes from a reliable source the court will consider it. Where there is an oral hearing, written evidence submitted by the applicant must be considered, but the agency may take account of any evidence of probative value from another source provided that the applicant is informed and allowed to comment on it. An applicant must also be allowed to address argument on the whole of the case. These general principles are, however, subject to the following reservation. The overriding obligation is to provide the applicant with a fair hearing and a fair opportunity to controvert the charge, (*R. v. Board of Visitors of Hull Prison, ex p. St. Germain (No. 2)* [1979] 1 W.L.R. 1401, 1408-1412.). This may in certain cases require not only that the applicant be informed of the evidence, but that the individual should be given a sufficient opportunity to deal with it. This may involve the cross-examination of the witnesses whose evidence is before the hearing authority in the form of hearsay.

The provision of *reasons* is of particular importance. Reasons can assist the courts in performing their supervisory function; they can help to ensure that the decision has been thought through by the agency; and they can increase public confidence in the administrative process and enhance its legitimacy. A duty to provide reasons can, therefore, help to attain both the instrumental and non-instrumental objectives which underlie process rights more generally, (*R. v. Secretary of State for the Home Department, ex p. Doody* [1994] 1 A.C. 531). Reasons may also be required

because of Community law. In EC law there is a duty to give reasons based on Article 253 EC (formerly 190). The extent of this duty will depend upon the nature of the relevant act and the context within which it was made. The duty is principally imposed upon the Community organs themselves, but it can apply to national authorities where they are acting as agents of the Community for the application of EC law.

The Impact of the European Convention on Human Rights

In the UK, process rights are also influenced by Article 6 of the ECHR. Under the Human Rights Act 1998 (HRA), the courts have an obligation to interpret legislation to be in accord with these rights, and acts of public authorities which are incompatible with the rights are unlawful. Section 2 of the HRA provides that the national courts must take into account the jurisprudence of the Strasbourg institutions, although they are not bound by it. Article 6 provides, so far as relevant here, that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

The phrase civil rights and obligations has been interpreted broadly so as to include: disputes concerning land use; monetary claims against public authorities; applications for, and revocations of, licences; claims for certain types of social security benefit; and disciplinary proceedings leading to suspension or expulsion from a profession. The European Court of Human Rights (ECtHR) has stressed a number of elements as integral to the requirement of a fair hearing pursuant to Article 6. There must be access to a court. There must be procedural equality or what is often termed

‘equality of arms’. This implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage in relation to his opponent. There must be some proper form of judicial process, which will often take the form of an adversarial trial where the parties have the opportunity to have knowledge of, and comment on, the observations and evidence adduced by the other side. While there is no express requirement to give reasons the ECtHR regards this as implicit in the obligation to provide a fair hearing. Reasons do not have to be given every single point, but they must be sufficient to enable a party to understand the essence of the decision in order to be able to exercise any appeal rights. The requirements of a fair hearing do not have to be satisfied at every stage in the decision-making process. Where an administrative body does not comply with the duty imposed by Article 6 it will have to be subject to the control of a judicial body which does so comply.

DOCTRINE: PROCEDURAL RIGHTS IN RULEMAKING

There are considerable advantages to allowing some form of consultation or participation before rules are made. It enables views to be taken into account before an administrative policy has hardened into a draft rule. It can assist the legislature with technical scrutiny. It is hoped that there will be better rules as a result of input from interested parties, particularly where they have some knowledge of the area being regulated. A duty to consult allows those outside government to play some role in the shaping of policy. In this sense it enhances participation. It is moreover not immediately self-evident why a hearing should be thought natural when there is some form of individualised adjudication, but not where rules are being made. The

unspoken presumption is that a ‘hearing’ will be given to a rule indirectly through the operation of our principles of representative democracy. Reality falls short of this ideal both in the UK and in the USA.

It would be mistaken to think that according such participatory rights is unproblematic. It has been argued that the APA provisions on rule-making can lead to ‘paralysis by analysis’, with interest groups opposed to the proposed rule using all available legal machinery to delay its implementation. Participatory rights can also lead to delay and extra cost. However, if all decisions were made by an autocrat they would doubtless be made more speedily. A cost of democracy is precisely the cost of involving more people. Moreover, the argument for increased participatory rights is based, in part at least, upon the idea that the people who are consulted may have something to offer the administrator. The rule that emerges will, it is hoped, be better. Whether this is always so may be debatable, but there is little reason to suggest that the argument does not hold in certain instances. Where it does have validity, then it is far less clear that the granting of such rights will entail an overall increase in cost. If a less good rule emerges where there is no consultation then the total costs may be greater because, for example, the rule fails to achieve its objective.

In the UK the rules of natural justice are not generally applicable to rulemaking, and in the USA Constitutional Due Process is not applicable in such instances. This is, however, where the legal analogy stops, (Ziamou, 2001). In the UK a right to participate in rule-making will exist only where Parliament has chosen to grant it under a particular statute. In the USA the Administrative Procedure Act 1946 accords a general right to participate in rule-making by the agencies covered by the legislation.

Notice of any proposed rule-making is to be published in the Federal Register, including a statement of the time and place of the rule-making proceedings and the terms or substance of the proposed rule. After notice the agency is to afford interested persons an opportunity to participate in the rule-making. There are, in essence, three differing modes of participation, which have varying degrees of formality. Most administrative rules are subject to notice and comment: the proposed rules are published and interested parties can proffer written comments. Other rules are subject to formal rule-making, a full trial type hearing, which can include the provision of oral testimony and cross-examination. Yet other rules are governed by a hybrid process, which entails more formality than notice and comment, but less than the trial type hearing.

DOCTRINE: SUBSTANTIVE CONSTRAINTS

General Approach

It is clearly not possible, within the limits of available space, to set out all the doctrines of substantive review commonly found within the Anglo-American tradition. Certain foundational principles can nonetheless be enunciated.

The courts will maintain substantive control over agency determinations. The nature of this control will vary depending upon the nature of the issue that arises before the courts. Thus courts in the Anglo-American tradition will tend to maintain greater control over the conditions that set the jurisdictional limits for the agency, than they will over agency discretionary choices. The nature of these controls will be examined below. In relation to discretionary determinations it is generally accepted

that it is not for the courts to substitute their view as to how the discretion should have been exercised for that of the agency. The political branch of government has assigned this discretion to the agency, and it is not for the courts to intervene simply because they would, as a matter of first impression, have exercised the discretion differently from the agency. While courts in the Anglo-American tradition accept this dictate, there is considerably more discussion as to how intensive review of discretion should be. The fact that it is accepted that there should not be substitution of judgment, does not mean that there is consensus about the intensity of review falling short of this. It would, for example, be possible for the courts to intervene only where there has been some manifestly unreasonable or arbitrary decision. They could, by way of contrast, exercise greater control over discretionary determinations, albeit falling short of substitution of judgment, through a hard look form of review, through a more exacting test of reasonableness, or through control framed in terms of proportionality. Courts in the UK, USA and elsewhere have grappled with these issues, and have reached differing conclusions as to the proper bounds of control over discretion. The intensity of review has ebbed and flowed over time. The principal factors that have affected the judicial choices have been the courts' perception of their relationship with agencies, their willingness to become involved in technically complex material, and the structural limits imposed by the nature of the review process itself.

It should not moreover be thought that courts in the Anglo-American tradition will always be of the same view as to the appropriate limits of judicial intervention. This can be exemplified by considering the contrasting approaches of the courts in the UK and the USA in relation to control over issues of law.

Control over Law: A Contrast

All agencies established through legislation will be given a statutory remit that defines the scope of their authority. A simple paradigm is of agency established on the following terms: if an employee is injured at work the agency may grant compensation. Courts will have to decide on the appropriate test for review when it is claimed that the agency adopted an incorrect meaning of the term employee, injury or work. The test adopted will reflect judicial choice as to the correct balance between agency autonomy and judicial control. Courts in the USA and in the UK have not always been of like mind on this issue.

The leading in the UK is *Page* v. *Hull University Visitor* ([1993] 1 All E.R. 97). It was held that Parliament had only conferred the decision making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision *ultra vires*. In general therefore, any error of law made by an administrative tribunal or inferior court in reaching its decision would be quashed for error of law.

The seminal modern case on this topic in the USA is *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.* (467 US 837 (1984)). The case concerned the legality of regulations made pursuant to the clean air legislation. The Clean Air Act Amendments of 1977 imposed certain requirements on states that had not met the national air quality standards established by the Environmental Protection Agency (EPA). The requirements included an obligation on such states to establish regulatory regimes under which permits would be issued relating to 'new or modified major stationary sources' of air pollution. A permit could not be issued unless stringent conditions had been met. The EPA promulgated regulations designed to implement

the permit requirement and these regulations allowed a state to adopt a plant-wide definition of stationary source. The effect of this was that an existing plant which had a number of pollution emitting devices could install or modify one piece of equipment without meeting the permit conditions, provided that the alteration did not increase the total emissions from the plant. The state was, therefore, allowed to treat all the pollution emitting devices within the same industrial grouping as though they were encased in a ‘bubble’. It was this construction of the enabling legislation which was challenged by the National Resources Defense Council, the argument being that this interpretation was too generous to industrial users.

Justice Stevens gave the judgment of the Supreme Court. He adopted a two stage approach. First, if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. Secondly, if however the court determined that Congress had not directly addressed the precise question at issue, the court did not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute was silent or ambiguous with respect to the specific issue, the question for the court was whether the agency's answer was based on a permissible construction of the statute. If Congress had explicitly left a gap for the agency to fill, there was an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations were given controlling weight unless they were arbitrary, capricious or manifestly contrary to the statute. Sometimes the legislative delegation to the agency was implicit rather than explicit. In such a case, a court should not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. The court should defer to the agency's

construction whenever a decision as the meaning or reach of a statute involved the reconciliation of conflicting policies, in circumstances where the agency had particular expertise in the matters subjected to its regulatory remit.

Applying these principles the court then upheld the contested agency interpretation. It found that Congress did not have any specific intention with regard to the applicability of the bubble concept to the permit programme. Given that this was so the question was not whether the reviewing court believed that the bubble concept was a good thing within the general context of a scheme designed to improve air quality. It was rather whether the agency's view that the bubble concept was appropriate within this scheme was a reasonable one. Looked at in the light of the objectives of the legislation in this area the court found that it was a reasonable interpretation which sought to balance the needs of the environment and those of business. The NRDC was, said Justice Stevens, seeking to wage a battle over policy in the courts on an issue which Congress had not specifically addressed, having lost that battle in the agency itself: these policy arguments should more properly be addressed to the legislators or administrators rather than the judges. There has been significant academic commentary on the case, (Aman, 1988; Farina, 1989; Pierce, 1988; Scalia, 1989; Sunstein, 1988).

The case law since the *Chevron* decision is itself of considerable interest as later cases have sought to test the metes and bounds of the principles set out above. There have been cases that give latitude to agency interpretations. There have been many cases where the court comes closer to substitution of judgment, drawing upon that part of the argument in *Chevron* that asserts the primacy of Congressional intent where that can be identified. It is clear moreover that judges possess considerable discretion as to how to characterise a particular case, in the sense of whether it comes

within part one or part two of the *Chevron* formula. This is inevitable. What is less readily apparent is that there has been real disagreement among the judiciary as to the meaning which should be ascribed to the two parts of test, especially part one. This is particularly important as can be appreciated by considering two contrasting views on this issue.

In *Immigration and Naturalization Service* v. *Cardozo-Fonseca* (480 U.S. 421 (1986)), the Supreme Court decided that the meaning of a particular statutory term was clear within the first limb of the *Chevron* test because the Court could divine this through the normal tools of statutory construction. This provoked a powerful separate opinion from Justice Scalia. He felt that the approach of the majority would radically undermine the purpose of the *Chevron* formula, given that a Court could always then hold that the meaning of a statutory term was clear through the use of 'normal tools of statutory construction'. The approach in the *Cardozo-Fonseca* case can be contrasted with that in *Rust* v. *Sullivan* (111 S. Ct. 1759 (1991)), where Chief Justice Rehnquist gave the leading judgment of the Court. His interpretation of the first limb of *Chevron* was markedly different. On his view a case would only fall under the first limb of the test if the Congressional meaning of the term really was evident on the face of the statute. If this was not so then the matter would fall to be determined under the rationality part of the formula. This in turn provoked a sharp dissent from Justice Stevens who argued that the majority was construing part one of the test too narrowly.

The contrast between the UK and USA jurisprudence throws into sharp relief the judicial choices that are available in this area.

The courts can, as in the UK, substitute judgment for that of the agency on all issues of statutory interpretation. This will be so irrespective of the nature of the issue posed, and the relative expertise of agency and court to resolve it. The courts can, as

in the USA, proceed via a two-part test. Issues coming within part one of the *Chevron* test would lead to substitution of judgment by the court for that of the agency. Issues that fall within part-two of that test would be subject to control through the medium of the rational basis or reasonableness test. While there are bound to be some disagreements as to which of these tests should be applied in any particular case the nature of these should not be overstated. Substitution of judgment is suitable either where the legislature really has spoken to the issue, or where the challenged decision involves an issue on which the agency does not have any special expertise. In other instances the rationality test should be applied, particularly in relation to those matters of statutory interpretation which do fall within the agency's sphere of competence. It should not moreover be forgotten that agency determinations can be struck down even under this latter standard of review.

The choice between the two approaches outlined above has important implications for the more general relationship between agencies and courts. At base the issue is whether agencies are to have any autonomy over the meaning to be ascribed to their empowering legislation. Under the UK approach the answer is essentially 'no'. Under the US approach the answer is a qualified 'yes'. It is clear that different commentators will have differing views as to which of these options is to be preferred, but at least the US jurisprudence enables us to see that there are ways of maintaining control over agency choices short of substituting judgment on each and ever occasion.

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