



Judicial Review, Competence and the Rational Basis Theory

by

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(i) Introduction

In this article I shall outline the shortfalls of the three main principles that the courts have used to ensure that administrative bodies remain within their power. I will argue that the future direction of the law of jurisdiction should be based upon the competence of bodies to make decisions and should be rooted within the constitutional foundations of judicial review. I will argue that Craig's Rational Basis theory addresses both the issues of constitutional and institutional competence and provides a positive future direction for the law of jurisdiction.

(ii) The Principles

(a) Collateral Fact Doctrine

There are three main principles that have been used by the courts to ensure that administrative bodies remain within their power. The first principle I will examine is the Collateral Fact Doctrine. The classic enunciation of this theory was by Diplock LJ in *Anisminic Ltd v Foreign Compensation Commission*¹ when the case was in the Court of Appeal. The plaintiff was an English company which owned property in Egypt before 1956. Their property was sequestered by Egypt and sold to TEDO (an Egyptian company). The plaintiff put pressure on customers not to buy ore from TEDO so that they bought the mining business from them for £500,000. The UK reached a compensation agreement with the UAE but for a period not including the time when the plaintiff lost their property. The Foreign Compensation Commission said that they only had to inquire whether there was a successor in title and if they qualified. The plaintiff argued that the nationality of successor was irrelevant where the claimant was the original owner. Diplock LJ reasoned that a decision is 'correct' if made by person entitled to do so by power accorded to them by Parliament. The rationale of this theory is that power is given on certain terms and therefore matters should be considered such as whether

¹ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 QB 862

the tribunal was properly constituted. If the court believes the tribunal erred in any of these matters (fact, law or discretion) the conclusion reached by the tribunal will be a nullity.

A significant problem with this analysis is that it may only leave the tribunal able to give one right answer (i.e. the same as that given by the reviewing court). Diplock LJ thus drew following distinction: misconstruction of enabling statute describing the *kind* of case meant to be dealt with goes to *jurisdiction* whereas misconstruction of the statutory description of the *situation* that the tribunal had to determine would at best be an error *within jurisdiction*. The difficulty is that this line is impossible to draw. The former represents the sum of the parts and the latter the parts themselves. Craig has argued that the distinction between *kind* and *type* and *truth* and *detail* is illusory.

The case went on to the House of Lords² where judgment was given for the plaintiff. Lord Reid gave the leading judgment and he reasoned that there were a number of ways in which a tribunal could do something to render its decision a nullity, for example, by failing to take account of relevant considerations or by asking the wrong question. This approach significantly broadened the scope of review for jurisdictional error. Saying that the tribunal addressed the wrong question does not mean that the error was jurisdictional. Lord Reid reaffirmed the possibility of errors of law within jurisdiction; Lord Morris dissented pointing out that the Order was full of words requiring construction

(b) Limited Review

An alternative principle, advocated by Gordon, is that of Limited Review. It criticises the Collateral Fact Doctrine because tribunals are always meant to relatively decide whether issues are relevant for decision and that it is unrealistic to divide preliminary and essential issues. The Limited Review doctrine looks to the question of whether the facts relating to the subject of the

² *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

jurisdiction exist in the opinion of the tribunal. Craig gives an example³ of a situation where a tribunal is given authority to deal with 'assaults' then the key question is whether the assault exists in the opinion of the tribunal. The scope is not determined by the truth of findings rather the scope or nature. This means that jurisdiction is determined at the start rather than end of tribunal.

This approach is exemplified by *R v Bolton*⁴, where a magistrate found that the plaintiff had occupied a parish house as a pauper and a formal notice to quit had been served on him. The plaintiff wished to introduce affidavit evidence and the magistrate agreed that this could be introduced to show that jurisdiction did not exist. If the charge on its face was well laid before a magistrate bringing itself within jurisdiction, any error would be within jurisdiction. The question of jurisdiction in this case depended not on the truth of the charge but upon its nature and was determinable at the commencement not at the conclusion of the inquiry. The limit of the inquiry must be whether the magistrates had jurisdiction supposing the facts to be true. There are a number of problems with Gordon's theory. The main problem is the circularity in his argument: it presumes you can divorce (drawing on the previous example) the term 'assault' from the elements that make up an assault- it would mean an assault could exist without any of the elements that comprise it.

(c) Extensive Review

Gordon's theory is opposed by Gould who advocates an Extensive Review approach. The case of *Page*⁵ is an example of the application of this theory. Page was a lecturer at The University of Hull who was made redundant. He argued that his employment contract was not able to be terminated on the basis that it was. Lord Browne-Wilkinson gave judgment commenting that any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law. He also said that the constitutional foundation of the court's power was the *ultra vires* doctrine. The general rule

³ Paul Craig, *Administrative Law*, 4th Edition, 1999, Sweet & Maxwell, p. 480

⁴ *R v Bolton* [1841] 1 QB 66

⁵ *Page v Hull University Visitor* [1993] 1 All ER 97

(a rebuttable presumption) was that any relevant error of law could be quashed because the tribunals' decision was *ultra vires*.

The general approach of the Extensive Review doctrine is disapproving of the collateral fact doctrine. It aims to replace the theory with one that says that all errors of law are open to scrutiny. The approach states that any tribunal has to address two issues: first, whether the issue put to it was one it had the power to answer and second, the substance of the matter, which is for the tribunal itself. The *ultra vires* principle in *Page* is different from the normal principle because it means that any error of law may lead to decisions being thought *ultra vires*. There are two readings of the principle: first, that Parliament intends all errors of law to be corrected and second, that *ultra vires* is based on the law of the land (including the common law) and that it is a vehicle for courts to control administration. Craig has argued that it is against constitutional theory that it should be an irrebuttable presumption as to Parliamentary intent that legal issues are 'given' because Parliament intended them to be decided by ordinary courts. Gould argues that it would not be possible to talk of an error of law if the elements of it were not 'given' but Craig suggests that this confuses cause and effect. One could say that it is only by giving the legal meaning to a term that uniformity can be achieved, as opposed to diverse interpretation. However, Craig argues that uniformity should be achieved by providing a channel of appeal.

(iii) Application

The current case-law has evolved from these three principles used by the courts. The time between the cases of *Anisminic* and *Raca*⁶ led to uncertainty with some cases such as *Moore*⁷ being given a narrow approach to avoid each point of law being litigated and cases such as *Pearlman*⁸ being given a wide interpretation that any area of the law could be jurisdictional if the case

⁶ *Re Rascol Communication Limited* [1981] AC 374

⁷ *R v Preston Supplementary Benefits Appeal Tribunal ex p. Moore and Shine* [1975] 1 WLR 624

⁸ *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56

depended upon it. The case of *Racal* brought with it a great deal of uncertainty. There was little agreement amongst the judges in this case as to the state of the jurisdictional reviews. The *South Yorkshire Transport*⁹ case was the most significant recent case in terms of the law of jurisdiction. The Monopolies and Mergers Commission investigated a merger between two companies operating bus services where only 3.2% of the UK population lived. One of the pre-conditions for a review was that it must affect a “substantial part of the UK”. Lord Mustill gave judgment for the MMC saying that ‘substantial’ could have a range of meanings. It was up to the court to decide where on the spectrum the term should be placed. It might be that it is perfectly rational to reach different conclusions.

Therefore, currently the law will allow a review of any relevant or material error of law and will not in general distinguish between jurisdictional and non-jurisdictional error. When an error of jurisdiction has been made the court will normally substitute its view for that of the body subject to the review. The varying presumption as to legislative intent does still appear to operate depending upon the type of institution being reviewed. If the institution before the court is a tribunal then the presumption will be that Parliament did not intend that body to be the final arbiter on issues of law, whereas if it is an inferior court then there will be no such presumption. The court will not necessarily substitute its judgment for that of the agency. They will define the actual meaning that the statutory term is to have, but where that particular meaning is itself inherently imprecise the court will only intervene if the application of the term is irrational. Craig argues that it is a good thing that the doctrines of Collateral Fact and Limited Review have disappeared. However, he argues that the reason why the doctrines were entrenched for so long was because the courts thought they best captured the balance between judicial control and agency autonomy. This issue is clearly extremely pertinent when deciding upon the future direction of the law of jurisdiction.

⁹ *R v Monopolies & Mergers Commission, ex parte South Yorkshire Transport* [1993] 1 All ER 289

(iv) The Future?

(a) Basic Principles

What future direction should the law of jurisdiction take? I would argue that the answer to this question must have its roots in the substantive justifications of judicial review itself. The traditional justification for this power lies in the doctrine of *ultra vires*. This doctrine is founded in the theories of the separation of powers and the sovereignty of Parliament. The *ultra vires* justification states that Parliament has exclusive power to determine judicial review principles. Judicial power is legitimised through implied legislative intent that the tribunal should act within legal limits. Craig argues that (for those who support the *ultra vires* position) the application of principles that constitute the rule of law is dependant on this legislative intent¹⁰. This approach is contrasted with the common law model that contends that power is shared between the courts and Parliament. It acknowledges that Parliament can, although it will not do so commonly, indicate the principles of review. Moreover, Parliament can always ‘trump’ judicial doctrine with statute. However, in most instances, the courts will develop the principles of judicial review independently in accordance with the rule of law.

(b) Competence

How then do these principles affect the direction of the law of jurisdiction? Jeffrey Jowell argues that: “the proper justification for judicial review does matter, not only because it provides a reason for intervention, but also because it indicates the limits of judicial power and its legitimate scope”¹¹. Jowell highlights the fact that ‘competence’ is a key justification of judicial review and thus jurisdiction. He argues that competence takes two forms: first, constitutional competence (the task the courts seek to perform is not more appropriately conferred on another instrument of governance) and second, institutional competence (that the courts are deciding matters that are capable

¹⁰ Craig, Paul, ‘Constitutional Foundations, the Rule of Law and Supremacy’, (2003) *Public Law* 92, p.93

¹¹ Jowell, Geoffrey, ‘Vires and Vacuums: The Constitutional Context of Judicial Review’, (1999) *Public Law* 448, p.449

of resolution by means of adjudication and not requiring expertise the courts lack). To address these questions correctly does not simply require an inquiry into the expertise of the court in question, rather an examination of constitutional principles. However, before these are examined, it is first worth considering the issue of institutional competence.

(c) Rational Basis Theory

Institutional competence is central to Craig's 'Middle Way / Rational Basis' approach to the future of jurisdiction. He argues that the US approach as put forward in the cases of *Hearst* and *Chevron* is the most promising.¹² If it is thought that the legislator had a specific intention in the precise question in issue, it should be given effect to and the court will substitute judgment for that of the agency. However, if statute is ambiguous or silent on the issue then the court will allow for the agency's interpretation of the statutory term itself to fall within a spectrum of possible rational interpretations which such a term can bear. The *South Yorkshire* case allows some room for a rational basis test but not a great deal. It leaves the choice of whether the agency's interpretation of the statutory term itself falls within a spectrum of possible rational interpretations, with the court. It is only where the term, as defined by the reviewing court, is still inherently imprecise that a rational basis test will be applied to test whether the agency's interpretation can withstand scrutiny. Craig argues that the 'Rational Basis' theory overcomes the difficulties with the present law regarding the balance between agency autonomy and judicial control. For example, he comments that there is no logical reason why the decision of one body should be preferred to that of another but rather a normative judgment is made as to whose relative opinion should be adopted. Furthermore, that there is a danger with present policy that administrative autonomy will be overridden. He argues that this problem could be lessened if the courts interpreted the term 'law' in a more pragmatic way, taking into account the desirability of interfering with the agency decision.

¹² *Supra*, n.3, p.513

(d) Rational Basis Theory and Competence

I would argue that Craig's 'Rational Basis' theory is successful in cogently expressing the need for institutional competence in the area of jurisdiction. He is right to express concern that judicial review has not always, and partially continues not to, take account of the question of whose opinion should count in a given circumstance. How does a theory that takes judicial review in this direction rest with Jowell's notion of constitutional competence? To answer this question will require one to make a judgment as to which of the competing theories of the basis of judicial review one thinks is the most satisfactory. I do sympathise to a certain extent with Allan's argument¹³ that the result of such an inquiry may appear to be of little value. It seems that when the theories are broken down it does seem as though they each pay their respects to the theories of the rule of law and the sovereignty of Parliament in their own way but both with a slightly different emphasis. However, as Craig argues, what the issue comes down to is that for those that support *ultra vires* as the model for judicial review, development of it will come down to *specific intent* and for those who support the common law model it will come down to the *rule of law*. There is a plethora of material on this debate and the balance of opinion seems to be in favour of the common law model providing the best historical account of the constitutional settlement, which can best justify the context of judicial review. I would argue that the theory best encapsulates the independent role of the courts and this is exemplified by the way in which it can accommodate judicial review of non-statutory bodies¹⁴.

If the common-law model is the context in which judicial review finds itself, then it is against this backdrop that one can address Jowell's question of constitutional competence. Does Craig's Rational Basis theory allow for the constitutional competence of the body whose decision is preferred in the same way it demands institutional competence? This is a potentially more

¹³ Allan, 'Constitutional Dialogue and the Justification of Judicial Review', (2003) *Oxford Journal of Legal Studies* 563

¹⁴ *Supra*, n.11, p. 459

complex question to address and it will largely depend on how judges treat such a theory. Craig himself notes a concern that judges may manipulate the label of 'rational basis' to substitute decisions for those already reached. However, whilst noting this concern, if one is to analyse his theory in a strictly conceptual sense (rather than deliberating at present as to how it may be distorted) I would argue that the theory is compatible with the common law model and can provide constitutional competence to the body whose decision is preferred.

(e) Rational Basis Theory and the Rule of Law

In the previous paragraph I described the issue of constitutional competence as 'potentially' more complex than the issue of institutional competence. This is because as soon as one accepts the common law model as the constitutional basis of judicial review, the development of judicial review is centred on the rule of law as opposed to the intent of Parliament. The rule of law means different things to different people and therefore it would of course be possible to construe the rule of law so as to deny the constitutional competence of Craig's Rational Basis theory. Craig himself advocates a substantive rule of law theory of the kind articulated by Dworkin to run alongside his Rational Basis theory¹⁵. However, he admits that the implications of such a theory are not 'self-executing' for administrative law and that it can be compatible with both the substitution of judgments on errors of law as well as the *Chevron* test. I would also argue that as well as being compatible with a substantive Dworkinian rule of law theory it is also compatible with the general principles of the common law theory.

(v) Conclusions

The first half of the *Chevron* test allows for a court to give effect to the decision of a tribunal if there is a specific legislative intent that this should be the case. As previously alluded to, the common law theory has always

¹⁵ *Supra*, n.10, p.103

maintained that sovereignty is shared but that if Parliament indicates the principles of review then the courts will defer to this. The second half of the *Chevron* test allows for a range of interpretations from the tribunal where a statute is silent or ambiguous. This part of the test is not only (as set out in the previous paragraph) compatible with the development of judicial review in the context of the common law model (i.e. through a conception of the rule of law) but also incorporates the inseparable notion of, and commitment to, institutional competence.

Therefore, in conclusion, I would argue that Craig's Rational Basis approach provides the law of jurisdiction and judicial review with decision-making bodies of both institutional and constitutional competence. Of course there may be concerns about its practical application and whether it can meet the high ideals to which it aspires. However, examined in a theoretical sense, it addresses the critical question of whose opinion should count in terms of who is competent, in both an institutional and constitutional sense, to make decisions. I would argue that on these grounds it provides a positive development for judicial review that should be embraced.