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LONDON

NEW DIRECTIONS IN JUDICIAL REVIEW

URRENT
GAL
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STEVENS

NEW DIRECTIONS IN JUDICIAL REVIEW

CURRENT LEGAL PROBLEMS

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London
Stevens & Sons
1988

Published in 1988
by Stevens & Sons Limited now of
South Quay Plaza, 183 Marsh Wall, London.
Laserset by P.B. Computer Typesetting, Pickering, N. Yorks.
Printed in Great Britain

Reprinted 1990

British Library Cataloguing in Publication Data

Jowell, J.
New directions in judicial review
administration. — (Current legal problems).
1. Great Britain. Public administration.
Decision making. Judicial review
I. Title II. Oliver, D. III. Series
344.102'66

ISBN 0–420–47800–0

NEW DIRECTIONS IN JUDICIAL REVIEW

AUSTRALIA
The Law Book Company Ltd.
Sydney: Melbourne: Brisbane: Perth

CANADA
The Carswell Company Ltd.
Toronto: Calgary: Vancouver: Ottawa

INDIA
N. M. Tripathi Private Ltd.
Bombay
and
Eastern Law House Private Ltd.
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M.P.P. House
Bangalore

ISRAEL
Steimatzky's Agency Ltd.
Jerusalem: Tel Aviv: Haifa

PAKISTAN
Pakistan Law House
Karachi

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Introduction

JEFFREY JOWELL AND DAWN OLIVER

The recent growth of administrative law without doubt constitutes the most significant development in English common law over the past decade. Rapid development of that kind however does not easily permit considered reflection about the extent of the expanded scope of the principles of judicial review and the definition of its limits. This collection of essays selects five issues which pose urgent challenges to administrative law and which are in need of critical evaluation. These issues are: the public/private law distinction; the extension of the range of authorities that are subject to judicial review; the evolving doctrine about the protection of legitimate expectations; the principle of proportionality as a ground for review; and the increasing judicial supervision of the policy-making process.

Since the House of Lords' decision in *O'Reilly* v. *Mackman*[1] the courts have had to establish boundaries between public and private law. Michael Beloff Q.C., in his article on "The boundaries of judicial review" considers some of the "no man's land" where it is not clear whether judicial review is available. This territory includes the activities of domestic bodies or tribunals and self-regulatory bodies, and the "private" lives of "public" bodies, including employment and contract compliance. The ambit of *O'Reilly* v. *Mackman* is discussed, together with the variety of exceptions to that doctrine that have already been established as a result of the House of Lords' decision in *Wandsworth* v. *Winder*[2] and other cases. The present state of the law is, Michael Beloff suggests, unclear and unsatisfactory and possible solutions to the problems posed by the *O'Reilly* decision are considered. These include the overruling of *O'Reilly* v. *Mackman*, the possibility of assimilating the procedures in public and private law by extending the requirement for leave to all actions against 'public bodies', and a radical statutory reform of public law remedies.

The decision of the Court of Appeal in *R.* v. *Panel on Takeovers and Mergers, Ex p. Datafin*[3] expands the class of bodies that may

be subjected to judicial review under Order 53 of the Rules of the Supreme Court. In his paper on "What is a public authority for the purposes of judicial review?" David Pannick examines the case law on this important and somewhat uncertain topic. It seems that judicial review will lie against the university Visitor and the Civil Service Appeal Board, but it is by no means clear whether organisations such as the BBC, or regulatory bodies in the field of sport are subject to a supervisory jurisdiction, whether in public or private law. David Pannick also considers the grounds on which the court may refuse, as it did in the *Datafin* case, to exercise its supervisory jurisdiction over a body that is a "public authority." These bodies may engage in "private" activity which is not subject to judicial review, in employment and contracting for example. They may also be immune from review in making commercial or managerial decisions, or "non-justiciable" decisions on matters such as defence and foreign affairs.

Patrick Elias in his paper on "Legitimate expectation and judicial review" analyses a number of recent cases in which the courts have given protection to the "legitimate expectations" of applicants for judicial review. The concept was first introduced by Lord Denning in *Schmidt* v. *Secretary of State for Home Affairs*[4] in 1969, and has been developed in a number of cases since then, most notably by Lord Diplock in the *G.C.H.Q.*[5] case. Lord Diplock's analysis is, Patrick Elias suggests, open to criticism for failing to distinguish between legitimate expectations, which attract protection because of the conduct of the decision-maker, and rights and interests, which are protected independently, and regardless of the conduct of the decision-maker. Lord Diplock's speech seems to imply that mere interests are not entitled to the protection of judicial review unless they were created by the conduct of the decision-maker, and this is not consistent with other cases on the protection of interests such as *R.* v. *Secretary of State for Transport, Ex p. Greater London Council*.[6]

Legitimate expectations may be procedural, as in *Attorney General of Hong Kong* v. *Ng Yuen Shiu*[7] and the *Liverpool Taxi*[8] decision; or substantive, as in *St. Germain*[9] and *Asif Khan*.[10] The protection given to legitimate expectations will normally be procedural, consisting of a duty to consult or listen to representations. But, as was seen in the *G.C.H.Q.* affair, the right to protection of legitimate or reasonable expectations may yield to the requirements of national security. Where a legitimate expectation is entitled to protection the courts have gone further than mere procedural protection and actually extended substantive protection to the expectation.

In the *G.C.H.Q.* case Lord Diplock attempted to categorise the grounds for judicial review. In addition to the heads of illegality, irrationality and procedural impropriety, he hinted at the possibility of the development of an additional ground, "proportionality." In their paper on "Proportionality: neither novel nor dangerous" Jeffrey Jowell and Anthony Lester Q.C. trace the pedigree of this concept in German, French and European Community law and in the jurisprudence of the European Convention on Human Rights. They show that proportionality is also a general principle of English law, as has been demonstrated in public law cases like *R.* v. *Barnsley M.D.C, Ex p. Hook*[11] and, more recently, the *Wheeler*[12] and *Assegai*[13] cases. Proportionality also has a long pedigree in criminal law, planning law and other areas, in private as well as public law, although often passing under other names. The authors argue that English administrative law would now be strengthened if the principle of proportionality were explicitly recognised.

The policy-making process has attracted considerable attention from students of politics and public administration, and relatively little from lawyers, who have concentrated on decision-making and administrative action. The House of Lords decisions in *Bushell* v. *Secretary of State for the Environment*[14]; on cross-examination designed to challenge policy-making methodology, and in *re Findlay*,[15] on the Home Secretary's change of policy on awarding parole to prisoners, appeared to indicate a reluctance on the part of the courts to lay down any requirements of consultation or fact-gathering in the policy-making process. Dawn Oliver, in her paper on "The courts and the policy-making process" suggests however that it is generally only where policy is overwhelmingly a matter of value judgment, or where an appropriate procedure is not possible, that the courts are reluctant to lay down a policy-making process. In the *Brent*[16] and *British Oxygen*[17] cases and others the courts have indicated that where legitimate expectations, rights or interests are affected by a change of policy a prudent process and consultation with representatives of affected groups should take place. The courts therefore appear to be ready to concern themselves with the policy-making process, which is a significant new direction in administrative law.

Each essay in this collection, while primarily addressing one of the specific issues described above, also speaks to the general scope, the limits and the current mood of judicial review. We trust that the collection as a whole, through its mix of

description and critical evaluation, will assist the difficult task facing courts reviewing administrative authorities in the years to come.

University College London
January 1988

Jeffrey Jowell
Dawn Oliver

Notes

[1] [1983] 2 A.C. 237.
[2] [1985] A.C. 461.
[3] [1987] Q.B. 815.
[4] [1969] 2 Ch. 149.
[5] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374.
[6] [1986] Q.B. 556.
[7] [1983] 2 A.C. 629.
[8] [1972] 2 Q.B. 299.
[9] [1979] Q.B. 425.
[10] [1984] 1 W.L.R. 1337.
[11] [1976] 1 W.L.R. 1052.
[12] *Wheeler* v. *Leicester City Council* [1985] A.C. 1054.
[13] *The Times*, June 18, 1987.
[14] [1981] A.C. 75.
[15] [1985] A.C. 318.
[16] *R. v. Secretary of State for the Environment, Ex p. London Borough of Brent* [1982] Q.B. 593.
[17] *British Oxygen Corporation* v. *Minister of Technology* [1971] A.C. 610.