# De Smith's Judicial Review

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# De Smith's Judicial Review

Sixth Edition

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# PREFACE

This book was begun by Stanley de Smith in the 1950s as a doctoral thesis and then published in 1959. de Smith set out its aims in his original Preface as follows:

> "It is to be hoped that [this book] will be helpful to practitioners, to public administrators and their legal advisers, and to students and their teachers in England and elsewhere. And those students of government who are not lawyers may also find in it material that has a bearing on the larger issues inherent in the relationship between the Administration and the individual."

de Smith's book was the first in the United Kingdom to describe and analyse this field of law with coherence. It quickly established a groundbreaking reputation here and in the Commonwealth. Professor de Smith produced two further editions in 1968 and 1973. After his untimely death, Professor John M. Evans (now Mr Justice Evans of the Federal Court of Canada) edited the 4th edition in 1980.

When two of the present authors (Woolf and Jowell) were asked to prepare a 5th edition of the work in the early 1990s, it soon became clear that the initial intention, which was merely to update the existing edition, was insufficient. Prompted by reforms to the procedures and remedies, and also by a changing intellectual climate, the 1980s and early 1990s saw dramatic changes in judicial review: the number of applications increased from a few hundred a year to several thousand; the judicial reasoning which creates the grounds for challenging the validity of governmental action grew in its sophistication; and there was by then a burgeoning academic literature about this area of law. The 5th edition of the work (ISBN 0 420 46620 7) was published in 1995 (with the assistance of Andrew Le Sueur) and consisted of a substantial restructuring and supplementation of the 1980 edition. A supplement, updating the 1995 text, was published in 1998 (ISBN 0 421 607904)). An abridged version of the work, intended more as a student text, was published in 1999 under the title *Principles of Judicial Review* (ISBN 0421 62020 X).

When work began on the present edition (with Le Sueur now a joint author), we recognised that new work would be required on the impact upon judicial review of the Human Rights Act 1998. We also agreed that the separate short surveys of the operation of judicial review in different contexts at the end of the 5th edition, excellent though they were, would be better integrated into the main body of the work. In other respects, however, we again initially assumed that a mere updating of the previous edition would suffice.

It soon became clear, however, that judicial review had altered in the past 12 years to an extent even more significant than between the previous

editions and that a substantial re-arrangement, and major additions and reformulations were again required. These changes were driven, in particular, by the explicit recognition that individuals in a democracy possess rights against the state—as enunciated both by the common law as well as the Human Rights Act 1998 and in European Community law. In addition, the relationships between the courts and other branches of government have been clarified in important ways. The principle of the sovereignty of Parliament has been, if not been fatally undermined, at least substantially weakened as a shield against either unlawful administrative action or legislation which offends the rule of law. Constitutional principles such as the rule of law and separation of powers have been explicitly articulated as such, and their status has been enhanced. Above all, it has become clear that judicial review is not merely about the way decisions are reached but also about the substance of those decisions themselves. The fine line between appeal on the merits of a case and review still exists but we have moved, as we emphasise in various sections of this book, towards a "culture of justification".

In this edition, as in the last, we have, inevitably, deviated from some of de Smith's standpoints and approaches but not, we believe, in ways of which he would have disapproved, in the changed circumstances of these times. In three respects at least, we have attempted wherever possible to be faithful to de Smith's distinctive approach. First, by setting out the principles underlying each area of judicial review: de Smith's hallmark was, above all, the elucidation of principle. Never content merely to describe a line of cases, he would invariably sum up their underlying rationale through a series of "propositions". We have sought to do the same. Secondly, we have retained much of de Smith's unmatched historical researches (updating them were necessary), which are so important to a proper understanding of the context of judicial review today. As he wrote in his first Preface, "many of the peculiarities of judicial review in English administrative law are unintelligible unless viewed in the light of their historical origins". Thirdly, we have attempted to refer to the experience of other jurisdictions yet, again as in the previous editions, without any pretence at creating a work of comparative law. We have been struck by the increased readiness of our courts to consider (if not slavishly to follow) the decisions of courts in other countries. The requirement in some of the provisions of the European Convention on Human Rights that our decision-makers adhere to the necessary qualities of a "democratic society" is just one of the factors that have encouraged reference to the experience of democracies elsewhere. We have in this edition summarised at the end of a number of chapters the corresponding law and practice in some relevant Commonwealth countries.

Another of de Smith's hallmarks was his meticulous coverage of the case-law. He took pride in the fact that he had cited 1800 cases in the first edition. In the age before electronic databases this was a considerable achievement. Professor Evans was equally meticulous in his comprehensive

coverage of developments in judicial review between 1973 and 1979. In those times it may have been possible to refer to virtually every case relevant to the subject (although some critics of the 4th edition queried the need for the routine citation of all relevant cases). To cite the mass of case law that exists today is, we believe, even if possible, unnecessary in a work of this nature. We hope not to have neglected the need to be comprehensive where desirable. We have, however, consciously been prepared to sacrifice coverage where it might impede de Smith's prime goal of clarity of exposition of principle.

Previous editions of the work were entitled *Judicial Review of Administrative Action*. We have in this edition dropped the reference to administrative action, which would today be partial and misleading, as some of judicial review (that under European Community law and in the interpretation of the rights under the European Convention on Human Rights as incorporated by the Human Rights Act 1998) involves review not only of administrative action (or the exercise of public functions, as we now prefer to say), but also of primary legislation.

## SCHEME OF THE WORK

In Chapter 1 we set out the context of judicial review and its scope, considering at the outset a number of issues that guide our approach in so many of the later chapters. We therefore engage, more specifically than in the last edition, the constitutional foundations of judicial review. A raging debate on that subject erupted shortly after the 5th edition went to press. Our position is that courts in judicial review enunciate not merely the will of the legislature but the fundamental principles of a democratic (albeit unwritten) constitution. We also sketch at the outset another fundamental issue, namely, the respective roles of courts and other branches of government—the question of whether there are some matters that are simply beyond judicial review because they are not "justiciable". In addition, we consider the context in which judicial review is but one of a number of possible avenues of redress for aggrieved citizens, which include internal complaints procedures, mediation and other forms of ADR, ombudsmen and (reinvigorated by the Tribunals, Courts and Enforcement Act 2007) tribunals. In an era of "proportionate dispute resolution" there is a renewed appreciation that administrative justice may be achieved beyond the Administrative Court. As we argue, however, while other redress mechanisms may often provide cheaper, speedier and more convenient remedies, judicial review is usually best placed to ensure the rule of law.

Chapter 2 considers those who may initiate a claim for judicial review (claimants); those who have a right to be a party to the proceedings (interested parties), and those, often pressure groups, who may seek permission from the court to make submissions as interveners. Whatever may have been the case in the past, the operation of the rule on the

standing of a person to bring a claim —which since 1976 has been based upon the need for "a sufficient interest in the matter" to which the claim relates—now excludes few people with well-presented grounds of challenge from commencing a review. Where a claimant seeks to rely on a Convention right as a ground of review, s.7 of the Human Rights Act 1998 modifies the standing test to include a requirement that the claimant be "a victim" (a development that has been subject to academic criticism and some judicial vacillation in its practical application).

In Chapter 3, we consider the often complex and controversial questions of which defendants and decisions are subject to judicial review. The court's choice as to whether to embark on review depends on its jurisdiction to do so; whether the decision is justiciable (on which, see Chapter 1) and whether there are any factors that indicate that the court should exercise its discretion to decline to review the matter. We see that the source of the public authorities' power in statute or a prerogative power continues to provide a clear basis for the court's jurisdiction in most cases, but the complementary "public function" test has not led to a widespread expansion of the ambit of judicial review. The court's approach to reviewing contracts—generally requiring there to be an "additional public element"—is less than satisfactory. The Human Rights Act has brought with it a new range of amenability problems as the courts and Parliament have struggled with the concept of "functions of a public nature" under s.6. Towards of end of Chapter 3 we note that a controversy of former years—whether a litigant must use the judicial review procedure rather than some other form of legal proceedings to raise a public law issue—has now subsided in the wake of the flexibility introduced by the Civil Procedure Rules.

Chapter 4 deals with concepts of jurisdiction and unlawful administration, including statutory provisions which seek to oust the courts' jurisdiction. The approach to ouster clauses is significantly affected by the Human Rights Act and the recently-endorsed common law right of access to justice. These developments have also affected the possibility of "collateral" challenge to official decisions (that is, in procedures other than judicial review).

Part II of the book (Chapters 5-14) deals with the grounds of review. As in the previous edition, we largely retain the categories which Lord Diplock set out, namely illegality (Chapter 5), lack of procedural fairness (Chapters 6-10) and irrationality or unreasonableness (Chapter 11—albeit, as discussed below, now renamed). Again, we recognise that these grounds are by no means self-contained, and that other grounds may well emerge in the future (the term "abuse of power" is often employed these days, either as a distinct ground of review or as a general term for unlawful action).

In the 5th edition the notion of "illegality" as a ground of review was regarded as relatively free of conceptual difficulties. In this edition we devote attention to the process of interpretation of statutory purpose, or relevancy, in respect of a number of issues, including problems raised by

*Pepper v Hart*, and the interaction between matters which engage Convention rights, European Community law and international law. New distinctions have been drawn recently between powers and duties (some of which are regarded as mere "target duties") and changing judicial approaches to what in the past may have been regarded as unenforceable "policies". Similarly, there have been significant developments in the notion of "relevancy", particularly the extent to which cost, or financial considerations may be lawfully relevant. Delegation of a power is also dealt with in this chapter.

Chapters 6-10 deal with the ground of procedural fairness. We retain the basic format of the 5th edition, dealing first with the history of the requirement that both sides be heard (Chapter 6), then proceeding to the situations giving rise to the fair decision-making process and the content of that entitlement (Chapter 7), then exceptions (Chapter 8). One of the situations which nowadays gives rise to a requirement of fair procedure is where there is a "legitimate expectation" of a hearing or benefit. In the 5th edition we dealt with the legitimate expectation in two parts of the book: in the section on procedural fairness and then again in respect of its relationship to the "unreasonable" decision, where it was then just emerging as a ground of substantive review. We felt in this edition that the legitimate expectation is best treated by considering both of its aspects together, and this is now done in Chapter 12.

Although there have perhaps been relatively few conceptual developments in the notion of fettering of discretion (Chapter 9), we were surprised at the extent of intense judicial examination given to the notion of bias and conflict of interest (as we now entitle Chapter 10). This issue has also been significantly affected by Convention law, especially Article 6 (I), which requires many tribunals to fulfil the qualities of "independence" and "impartiality".

In the 5th edition the chapter which contained for us the most surprises was the one we entitled "The Unreasonable Exercise of Power". De Smith had previously devoted little attention to the notion of "unreasonableness" but when we assembled the cases we discovered far more than we had expected in which decisions were held invalid on the ground of their substance, rather than procedure and we sought to make some sense of the categories in which such review took place. Substantive review is now fully recognised, prompted in particular by the more intense scrutiny that has been accorded to cases where human rights (or "constitutional rights" as they are now explicitly called) are engaged, and where the concept of proportionality is applied. As a result, we have retitled Chapter 11 "Substantive Review and Justification", and seek to show the relationship between the irrational, unreasonable and disproportionate decisions, the different senses of each of those terms, and how the courts have, in different circumstances, adopted different degrees of intensity of review and imposed different standards of justification.

Chapter 12, as we have said above, considers the legitimate expectation in both its procedural and substantive contexts and also considers the

extent to which an unlawful representation may give rise to a legally enforceable expectation (as has increasingly been suggested).

This work cannot possibly cover the approach of the courts to each of the specific Convention rights, or the administrative law of the European Union. Other specialist texts admirably cover that extensive ground. However, we must at least outline the essence of those important areas of judicial review and this is done in Chapter 13 (drafted by Ivan Hare), which sets out the salient features of judicial review as it applies to Convention Rights under the Human Rights Act 1998, and in Chapter 14 (updated by Catherine Donnelly), which has the same purpose in respect of the law of the European Union.

Part III of the book is concerned with procedures and remedies. Since the 5th edition, the Civil Procedure Rules have been extended to claims for judicial review—RSC Ord.53 has been replaced by CPR Pt 54. In judicial review as in other types of litigation regard must now be had to "the overriding objectives" of the CPR. There have also been several changes in terminology: claims (rather than applications) for judicial review; the Administrative Court supersedes the Crown Office List; the ancient remedies of prohibition, mandamus and certiorari become prohibiting, mandatory and quashing orders. In Chapter 16, we have included some discussion of alternative dispute resolution, an outline of the Freedom of Information Act 2000 and the Data Protection Act 1998, funding and costs. Chapter 19 turns to monetary remedies against the background of a continuing Law Commission project on financial remedies against public authorities.

We have sought to state the law as it stood on June 1, 2007, though some later developments (to the end of October 2007) were incorporated at proof stage.

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Harry Woolf
Jeffrey Jowell
Andrew Le Sueur
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