

## JUDICIAL REVIEW: THE FUTURE

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By way of a long-range forecast, here is a top 20 of future developments:

1. **Judicial review of primary legislation.** Inspired by their new status as a Supreme Court, the senior judiciary will be persuaded that it is proper to give a constitutional 'declaration of incompatibility' where primary legislation contravenes fundamental constitutional principles. A Constitution should have no lesser status by virtue of it being unwritten.
2. **Direct effect of international law.** Customary international law will find its proper home in the common law through public law obligations owed by State authorities and supervised by judicial review. Moreover the principle of legality will come to include insisting that governmental power is exercised compatibly with the United Kingdom's international treaty obligations. *Brind* [1991] 1 AC 696 was wrong.
3. **New costs rules.** Freedom at last from inapt assumed parallels inherited from private law litigation. The rule will be that a citizen or group who properly brings judicial review will not have to pay the costs even if they lose. A defendant wishing an opportunity to argue for disapplication of the rule will need permission from the Court at the start of proceedings.
4. **Defendant candour principles.** Authoritative practical guidance will be given to public authority defendants as to the scope of their duty of candid disclosure of documents in judicial review. Principles will deal with the scope of disclosure, timing, and the duty of due diligence to locate relevant documents. Representatives of public authorities will be required to certify the discharge of the duty of candour.
5. **A monetary remedy for maladministration.** Public law Courts will be empowered to exercise a residual discretionary power to augment judicial review remedies by making a monetary order, not unlike just satisfaction under the HRA. This could be by neat amendment of SCA s.31(2), if so recommended by the Law Commission. If not, imaginative judges will discover a common law remedy, as they did with the law of restitution.
6. **Disapplication of statutory ousters.** Courts will outgrow the idea of 'leaning against' interpreting a statute as precluding judicial review, such that only 'plain words' will do: they will not. Judicial review is a

- fundamental constitutional safeguard provided in a dual-sovereignty context and a statute purporting to exclude it will be disapplied. This is *Anisminic* [1969] 2 AC 147 reinterpreted (not for the first time).
7. **No 'forbidden areas' of non-justiciability.** Taking the hint from *Abbasi* [2003] UKHRR 76, it will be recognised that there are in truth no high-policy 'immunity' zones for judicial review. Yes, sensitive areas can by their content require a high degree of latitude for Government. But no more absolute self-denying abdications of the judicial function. What matters is whether a public law issue truly arises.
  8. **An autonomous Administrative Court.** The days of being an adjunct to the Queen's Bench Division will end. The Administrative Court will be reorganised as a self-standing Division, with judges being permanently assigned to it.
  9. **Judicial review of private functions.** It will be recognised that a public authority is in principle amenable to judicial review even in respect of its 'private' functions, such as decisions as landowner or employer, wherever there is an issue about failure to act properly as a public authority.
  10. **A general duty to give reasons.** Finally, the Courts will take the measured step of recognising that public authorities are in principle (and subject to narrow exceptions) required to give adequate reasons for their decisions. *Walters* (1994) 26 HLR 170 was right.
  11. **Common law proportionality.** As a species of abuse of power, alongside unreasonableness, the disciplined template of proportionality (legitimate aim, suitability and necessity) will be deployed to test the justification of public authority action, albeit absent any fundamental right or even legitimate expectation. *ABCIFER* [2003] QB 1397 was wrong.
  12. **Equal treatment at common law.** Free from the constraints of HRA:ECHR Article 14, the Courts will develop a freestanding ground for judicial review where there is unequal treatment lacking objective justification.
  13. **Discovering constitutional human rights.** After many years of fixating on a statutory solution of viewing fundamental rights through an outdated European rights instrument, the Courts will recapture the momentum of pre-HRA constitutional rights, extending beyond the ECHR and informed by comparative law beyond Strasbourg.

14. **Freedom from SCA s.29(3).** Building on the residual jurisdiction to judicially review crown court matters even where relating to trial on indictment (*Harrow* [2000] QB 719), s.29(3) of the 1981 Act will be seen as not ousting the Court's jurisdiction, with the true principle being the discretionary rule against interference with the criminal process (*Buck* (1978) 68 Cr App Rep 114).
  15. **Abandoning the ultra vires fairytale.** Courts will bury the academic debate about the analytical source of grounds for judicial review. Whatever the power under review, the source of the standards of review is the common law and not presumed legislative intent.
  16. **Systematic facilitation of third party interventions.** The Court service will devise measures to allow orderly and early intervention. A website database and e-alerts will allow monitoring of pending cases, by reference to headnote summaries required by the parties. Appellants will be required promptly to notify UNHCR of any CA or HL case raising an issue under the Refugee Convention.
  17. **"Reasonableness".** Courts will stop using the language of "irrationality" and "perversity" to connote common law unreasonableness. Lord Cooke was right (*ITF* [1999] 2 AC 418, 452; *Daly* [2001] 2 AC 532 at [32]).
  18. **Rights as relevancies.** Judges will explain that a public authority should recognise when it is interfering with human rights, and confront directly what it is doing, to earn the applicable latitude. Reasoning matters. The CA was right in *Denbigh High School* [2007] 1 AC 100, after all.
  19. **The rule against retro-reasons.** Laying to rest the divergent post-*Ermakov* [1996] 2 All ER 302 case-law, on when a public authority can improve its reasoning when under challenge, such reasons will be excluded in principle. A reasons duty ensures a disciplined mind at the time of decision-making. Reasons 'after the event' will not do.
  20. **Legitimate expectation as fairness.** Completing the job after *Coughlan* [2001] QB 213, the dual-standard of fairness and reasonableness categories of legitimate expectation will give way to a universal fairness standard. *Findlay* [1985] AC 318 and *Hargreaves* [1997] 1 WLR 906 were wrong.
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