

Substantive grounds of judicial review

Introduction

JR to **maintain rule of law**/ **protect sovereignty** Parliament
Substantive grounds re content; procedural re process
Exist mostly at **common law**; court can add/amend

1. Illegality

core meaning and sub-meanings

1.1 Excess of power/'four corners'

Power does not exist: 'houses not hospitals'; 'teachers not nurses'.

Entick v Carrington no statute; no common law

Northumbria Police Court may find 'lost/forgotten' prerogative powers

Importance of rules of statutory interpretation

Different techniques (or even same technique) >>> different result

Literalism

Roberts v Hopwood (HoL) >>> contrast >>> (CoA)

Laski (1925) Harvard LR >>> echoed >>> **Fennell (1986) JoLS**

Liversidge v Anderson (HoL) >>> contrast >>> **Atkin** dissent

Anisimic (HoL) >>> contrast >>> **Salmon** dissent

Wade (1969) LQR >>> contrast >>> **Griffiths (1977) Politics of judiciary**

Literalism - incidental powers

AG v Fulham Corp municipal bath house; subsidized laundry

Akumah v LB Hackney car parking regulation within housing management

Golden rule

Padfield v MAFF (HoL) >>> contrast >>> *Morris dissent*

1.2 Improper purpose

Congreve v Home Office tv licence increase

1.3 Non-delegation

Ellis v Dubowski movie licensing
Allingham v Min of Ag *delagatus non potest delgare (!)*
Barnra v NDLB administrative convenience cannot justify

Carltona different considerations for Minister; **alter ego** principle

1.4 No fettering >>> estoppel

British Oxygen v DoT *Hulkin v Min of Ag* not if ultra vires
Lever Finance ok if intra vires
Western Fish maybe if intra vires

1.5 Directly effective EC law statutory source for JR > unusual

Autonomous effect EC law or ECA 1972 s.2-3; Treaty articles/secondary legislation

Only situation where JR invoked 'against Parliament' >>>> *Factortame 2*

1.6 Convention rights statutory source for JR > unusual

Breach convention right triggers

- a) 'Re-interpretation' per s.3 if statutory power; or
- b) Declaration of incompatibility per s.4 if statutory power; or
- c) Develop common law per s.6 if common law issue

2. Irrationality

Wednesbury (Lord Greene) so absurd non-one could dream
GCHQ (Lord Diplock) so outrageous in defiance of logic/ morality

2.1 Sub-head

Relevant/irrelevant considerations

Roberts v Hopwood (HoL) eccentric principles socialism/feminism

Does this bring courts too close to merits ? Separation of powers problem?

3. Proportionality

3.1 As indigenous principle

Jowell and Lester (1988) in New directions in jr irrationality too loose a standard ?
more intensive review enhance rule of law

Is proportionality too like appeal ? *Brind v Home Secretary* } Court must not use jr
Smith v Defence Secretary } to decide merits

Is it already here – but disguised ? *Barnsley, ex parte Hook* peeing in streets
Wheeler v Leicester CC rugby to South Africa

3.2 As EC law

requires proportionality **meaning intense**
Bela-Muhle v Grows Farm skimmed milk cost
Watson and Belman ID cards for workers

3.3 As HRA 1998

requires proportionality **meaning variable**
Daly >>> contrast ... *Alconbury*

Conclusion/links

increasingly red light common law >> link >>
more intensive review; cf Mustill in *FBU*
loosen standing test
additional statutory grounds