

JUDICIAL DEFERENCE & THE ADMINISTRATION:

Are UK/US parallels feasible?

Anne Oakes*

Birmingham City University, United Kingdom

I. “CONSTRUCTIVE AMBIGUITY OVER CONCEPTUAL CLARITY?”:

A very british constitutional fudge.

In *Chevron v. Natural Resources Defense Council* (1984), the United States Supreme Court articulated an administrative law principle that requires federal courts to defer to a federal agency’s interpretation of an ambiguous or unclear statute that Congress delegated to the agency to administer.¹ As practised in the U.S. the principle reflects two assumptions a) that the administrative state has value in contemporary society and b) for that reason it is appropriate to concede to administrative officials a measure of legitimate authority to interpret the law that they administer, with the consequence that judges should not interfere with an administrative decision merely because they disagree with its substance. Although current critics of the former assumption include President Trump who has secured the appointment to the Supreme Court of two justices known to disfavour the growth of the modern administrative state, the doctrine is widely regarded as one of the fundamental underpinnings of the modern administrative state and is unlikely to be reversed in the immediate future although its scope may conceivably be limited. However, it is important to remember that the formal justification for judicial deference

* Dr Anne Richardson Oakes is an Associate Professor of American Legal Studies in Birmingham City University's School of Law. She is Director of the Centre for American Legal Studies and currently teaches US Constitutional Law and Research Methods. She is also a member of the Society of Legal Scholars.

¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

to administrative interpretations is found in the power of Congress to delegate interpretive authority to the executive, either expressly or by implication.² In other words, *Chevron* deference reflects a constitutional structure of separation and diffusion of power which gives rise to complex power-sharing arrangements whereby both legislative and executive powers can be shared between Congress and the President³ and the judicial obligation is to “serve as a “check” on the political branches”.⁴

In this paper I want to explain why *Chevron* deference has no equivalent in the U.K. and to do so by addressing the issue of the theoretical basis for judicial review in U.K. constitutional arrangements. The paper will make the following assertions:

There is a doctrinal tension between the two British primary constitutional doctrines, the Sovereignty of Parliament and the Rule of Law, the effect of which is to lock them into “a zero-sum contest for supremacy within the constitutional order.”⁵ The doctrines are Dicey’s “twin constitutional pillars” the doctrine of Parliamentary Sovereignty which accords unlimited and undivided competence to acts of the legislature, and the doctrine of the Rule of Law which provides the justification for the judicial practice of administrative, (but not legislative) review. The tension arises because doctrinally the judiciary derives its powers from the will of Parliament but uses common law principles of interpretation in a way that can limit and even subvert that will, thereby posing the challenge of an additional source of authority that constitutional orthodoxy cannot explain.

Particularly notable in this connection is the House of Lords decision in *Anisminic v. Foreign Compensation Commission*⁶ that an express ouster clause did not preclude judicial

² PETER CANE, CONTROLLING ADMINISTRATIVE POWER: AN HISTORICAL COMPARISON, 214 (2016). See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

³ As Cane points out: just as the power of veto gives the President a share of legislative power, Congress’s general power – to ‘make all Laws which shall be necessary and proper for carrying into Execution’ its specific legislative powers ‘and all other Powers vested by the Constitution in the Government of the United States, or in any Department of officer thereof’ gives it a share in implementation of the law. Cane, *supra* note 2, at 78.

⁴ See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in judgment): [The *Seminole Rock* line of precedents] raises two related constitutional concerns. It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a “check” on the political branches.

⁵ MATTHEW LEWANS, ADMINISTRATIVE LAW AND JUDICIAL DEFERENCE, 14 (2018).

⁶ *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147 (HL). *Anisminic* has been extensively considered by the U.K. Supreme Court in *R. (Privacy International) v. Investigatory Powers Tribunal* [2019] UKSC 22. For comment see M. Gordon, *Privacy international, parliamentary sovereignty and the synthetic Constitution*, U.K. CONST. L. BLOG (Jun. 26, 2019).

review despite the clear wording of the statute to the contrary. The case eroded the distinction between errors that administrative authorities have power to make and those which they do not, thereby representing a major judicial “power grab” and a significant challenge to the orthodox view that the only basis for judicial interference with administrative action was the doctrine of *ultra vires*, i.e. the idea that the authority was acting outside the scope of the powers conferred by Parliament.

Since then, the theoretical basis for the exercise of judicial review in the U.K. has been the subject of an extensive debate which has taken place at both academic and judicial levels. The debate has polarised around “weak” and “strong” challenges to the constitutional orthodoxy.⁷ The “weak” challenge reconciles the twin doctrines via the fiction of implied legislative intent, i.e. Parliament is presumed to legislate on the basis that the authority that it confers will be subject to “policing” by the judiciary in accordance with principles that are indeed judicially created. On this view, to the extent that they have not been legislatively reversed, these common law principles must be regarded as having the implied sanction of parliamentary authority. It is fair to say that this is the view that generally has judicial support. However it is also true to say that it represents, in the words of Professor Mark Elliot, the “constructive ambiguity over conceptual clarity” that characterises so much of our British constitutionalism.⁸

The “strong” challenge comes from proponents of “common-law constitutionalism” i.e. the view that the bedrock of British constitutionalism is to be found in a matrix of common law principles which operate to both define and constrain the outer limits of Parliamentary Sovereignty. References in recent Supreme Court decisions⁹ to “common law rights” which are not dependent upon the European Convention of Human Rights fit into this constitutional model and provide support for an activist judicial role but the underlying challenge to constitutional orthodoxy remains deeply contentious.

The second assertion concerns the ambit of judicial discretion. The common law principles of review reflect an assumption that the judicial role is that of “policing the

⁷ See Lori Ringhand, *Fig leaves, fairy tales and constitutional foundations: Debating judicial review in Britain*, 43 COLUM. J. TRANSNAT’L L. 865, 879 (2005).

⁸ Mark C. Elliott, *Sovereignty, primacy and the common law constitution: What has EU membership taught us?*, in *THE UK CONSTITUTION AFTER MILLER: BREXIT AND BEYOND* (Mark Elliott et al., eds. 2018).

⁹ See, e.g. *Kennedy v. Charity Cmm’n.* (2014) UKSC 20.

boundaries” of parliamentary authority. This translates into a requirement that public authorities stay “within the four corners” of the authority conferred by parliament¹⁰ and the extent that they do so is a matter for the judiciary to determine. This means that, although considerations of justiciability, separation of powers and respect for administrative expertise do clearly influence judicial decision-making, and dictate “deference in practice” in appropriate cases, there is no general recognition in our constitutional arrangements of agency or administrative interpretive competence that could sustain an equivalent of *Chevron* deference. The result in many, if not most, cases is quite the reverse. The ambit of discretion given to our judiciary by these common law principles of review is so very wide that however much our judiciary warn themselves against usurping the authority that Parliament has given not to them but to the minister or agency whose decision is in question, they are inevitably vulnerable to the accusation that their decision-making is little more than a rationalisation of their perceptions of the merits of the issue in front of them. In other words, the charge is that the stated judicial task of interpreting the will of parliament is nothing more than a “fig-leaf” for disguising the otherwise naked exercise of judicial power.¹¹

In conclusion, this paper considers another assertion, namely that the fact that public law scholarship has broadly focussed on the limits and boundaries of administrative power reflects an outdated view of the value of the administrative state in the lives of its citizens. If this is indeed the case, this paper now asks what if anything can be learnt from U.S./Canadian concepts of “deference” and considers the suggestion that administrative officials could be entrusted with legitimate interpretive authority such as to justify a doctrine of judicial deference if “they have been legally empowered by a democratically responsible branch of government to decide a question of law on behalf of the community, and their decision conveys concern and respect for persons affected by their decision in both a procedural and substantive sense”.¹²

¹⁰As explained by Lord Greene in *Associated Provincial Picture Houses v. Wednesbury Corporation* (1948) 1 KB 223.

¹¹ See Sir John Laws, *Law and democracy*, PUBLIC LAW 72, 78-9 (1995): In the elaboration of [principles of judicial review] the courts have imposed and enforced judicially created standards of public behaviour ... [T]heir existence cannot be derived from the simple requirement that public bodies must be kept to the limits of their authority given by Parliament. Neither deductive logic nor the canons of ordinary language ... can attribute them to that ideal, since ... in principle their roots have grown from another seed altogether ... They are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig-leaf to cover their true origins. We do not need that fig-leaf anymore...

¹² *Id.* at 221.

REFERENCE LIST

J. Laws, *Law and democracy*, PUBLIC LAW 72-93 (1995).

L. Ringhand, *Fig leaves, fairy tales and constitutional foundations: Debating judicial review in Britain*, 43 COLUM. J. TRANSNAT'L L. 865-904 (2005).

M. Gordon, *Privacy international, parliamentary sovereignty and the synthetic Constitution*, U.K. CONST. L. BLOG (Jun. 26, 2019), <https://bit.ly/2ytfFzt/>.

M. C. Elliott, *Sovereignty, primacy and the common law constitution: What has EU membership taught us?*, in *THE UK CONSTITUTION AFTER MILLER: BREXIT AND BEYOND* (Mark Elliott et al., eds. 2018).

M. LEWANS, *ADMINISTRATIVE LAW AND JUDICIAL DEFERENCE* (2018).

P. CANE, *CONTROLLING ADMINISTRATIVE POWER: AN HISTORICAL COMPARISON* (2016).

CASES

Court of Appeal Of England And Wales, *Associated Provincial Picture Houses v. Wednesbury Corporation* (1948) 1 KB 223.

House of Lords, *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147 (HL).

U.K. Supreme Court, *Kennedy v. Charity Cmm'n.* (2014) UKSC 20.

U.K. Supreme Court, *R. (Privacy International) v. Investigatory Powers Tribunal* [2019] UKSC 22.

U.S. Supreme Court, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

U.S. Supreme Court, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015).

U.S. Supreme Court, *United States v. Mead Corp.*, 533 U.S. 218 (2001).

Submetido em: 17/07/2019

Aceito em: 05/08/2019