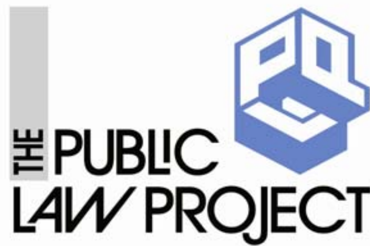

Judicial Review - Trends and Forecasts - Wales 2009

Cardiff Law School – 21st January 2009

Closing Address

Winston Roddick CB QC

Thank you for inviting me to be one of your speakers at this conference and for your kind introduction. I was immensely impressed by the content of the programme and I am sure that you have derived benefit and enjoyment from each of the speakers.

I was not able to be here for the whole of the day because it was my unfortunate duty as leader of the circuit to attend the funeral earlier today of one of our retired judges, namely HH Judge Norman Francis, a former judge of the Pontypridd County Court and later of the Cardiff County Court, which was the predecessor to the Cardiff Civil Justice Centre. HH Judge Francis was himself an excellent civil lawyer. Administrative law was nowhere as well developed during his time on the bench, certainly not during his time at the bar, as it has become by today, but many of our High Court Judges and senior circuit judges developed their civil law skills in his courts and they are his legacy to the administration of justice in Wales. He was one of those few barristers in Cardiff who, although excellent prosecutors and cross-examiners, made the civil law their field of regular practise. If he were at the bar in Cardiff today he would have dominated in the field of public law. HH Judge Francis would have been enormously excited by the developments in public law in Wales and especially about the imminent arrival here of the Administrative Court. I shall return to this later when I come to that part of my title which is about making a forecast.

There are advantages and disadvantages to being the last speaker at a conference of which the two most obvious are that everything that could be said on the subject will have been said already and the audience feels it has had enough. The advantages are that the audience looks forward, not to what you have to say, but to

your finishing what you have to say and it is always grateful to the speaker who cuts it short.

In a way, my topic is the most difficult. Most if not all sessions at law conferences are reflections, reflections on the law and procedures as they are. My subject this evening is to look to the future and to make predictions based on present trends - an exercise in speculation.

Before I go into the future, I have therefore to go into the past so that I might ascertain the trend in administrative law and judicial review in particular. I should like to begin in 1964. There were no significant, if any, trends in judicial review at that date but there was a forecast and it was made in an address by Lord Scarman to the law students of University College, London. I recall that his advice to us was that we should involve ourselves in public law for that is where the largest development was likely to occur. He foresaw a significant increase in challenges to administrative decisions. How right he was.

Thirty years later, in January 1994, Lord Woolf, the former Lord Chief Justice, said that "administrative law which is the law applied on applications for judicial review, has grown like Topsy"[1]. If Lord Woolf had been 'literary - correct' he would have said "growed" which was the word used by Topsy in her conversation with Ophelia in Uncle Tom's Cabin. Ophelia asked the child

> "Have you ever heard anything about God, Topsy?" The child looked bewildered, but grinned as usual. "Do you know who made you?" "Nobody, as I knows on," said the child, with a short laugh. The idea appeared to amuse her considerably; for her eyes twinkled, and she added, "I spect I grow'd. Don't think nobody never made me." [Chapter XX]

At the date of publication, it outsold all other books published in the USA save the Bible. Such was its popularity that Topsy's declaration that she had just "growed" soon was adopted and adapted in popular speech as "it growed like Topsy" which is a popular figure of speech to describe something that grew or increased by itself, without apparent design or intention, and by 1885 Rudyard Kipling was explaining to a correspondent that "I have really embarked ... on my novel.. Like Topsy 'it growed'

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[1] Forward to the first edition of Fordham's Judicial Review Handbook and repeated in the forward to the fifth edition.

while I wrote." Today "growed like Topsy" is most often heard in criticism of bureaucratic institutions or government budgets, for whose bloated sprawl and inefficiency no one is eager to take credit.[2] Lord Woolf was not using it in that latter sense but, I believe, in the sense that administrative law has grown by itself without apparent design or intention.

In September 2001, Lord Woolf said that the pace of development had accelerated since 1994 and the Human Rights Act has acted as a catalyst.[3] In 2004 he remarked that "one of its strengths is that it is entirely created through the decisions of the courts over the years. As it has evolved so have the principles around which it is structured" and he predicted a continuing growth. In that forecast, he too was correct and the position today is that the case law is "overwhelming in its volume and flow"[4].

That short potted history of the development of administrative law reveals an unebbing trend. There are no signs that its expansive phase is about to come to an end and it continues to be popular with the public as an instrument with which to obtain fairness and justice from public authorities.

As to a forecast as to how the trend might develop, let me refer to some of the obiter remarks of the Appellate Committee of the House of Lords in the case of *Jackson v Attorney General* in 2006. What some members said was that they might revisit the doctrine of legislative supremacy; if Parliament were to pass an Act that was contrary to principles of constitutionalism or the rule of law the courts might not give effect to the measure.[5] In the context of those last remarks, it is relevant to note that as a result of the growing threat of terrorist attacks, we now have "legislation in which opposing constitutional fundamentals confront each other".[6]

Their lordships' remarks in *Jacksons'* case are an indication of how the trend might widen to include challenges to legislative supremacy. There is a trend in the USA which I am sure will not be adopted here and that is the trend to review issues of substance. The USA's over-enthusiasm for judicial review of issues of substance rather than procedure has ossified the rule-making process in America and it is a

[2] "The Word Detective" (April 27, 2007)
[3] Forward to third edition of the Handbook.
[4] The Handbook, page ix
[5] [2006] 1AC 603 and see Jowell and Oliver "The changing Constitution" 6th ed pages 32-34
[6] Laws LJ forward to Judicial Remedies in Public Law 3rd ed by Clive Lewis QC

sound reason to continue with the present reluctance of the judges of England and Wales to get into the merits of administrative decisions.

What of the effect of these continuing developments on our constitutional principles? One very significant effect of these developments in the field of administrative law is that parliamentary sovereignty has been supplanted by the rule of law as our prime constitutional principle. Professors Jowel and Oliver in the sixth edition of their book "The Changing Constitution" say this:

> "The very concept of democracy and the commonly held assumption that majoritarian representative democracy is the appropriate form for the UK is being questioned as pressure builds up for more deliberative, participatory opportunities in the political process. Senior judges have referred to a 'new constitutional hypothesis' under which the rule of law and other democratic fundamentals may override parliament's will".[7]

We have, therefore, experienced a seismic movement between fundamental constitutional principles. In the words of Christopher Forsyth in the forward to the 9th edition of Administrative Law by himself and Sir William Wade, the constitutional centre of gravity has shifted towards the judges.[8] It is highly unlikely that the former relationship between these principles will be restored. That fact tells us that judicial review will continue the expansive trend it has followed hitherto but, as unconquered territories become fewer and fewer, the scope for expansion will reduce and the pace of development will slacken.

That then is the position as I see it generally. With regard to Wales more specifically, there is obviously no scope for expanding the function of judicial review beyond the boundaries in which it operates in England and Wales as a whole but I can foresee it playing a significant part in the development of Wales as an emerging jurisdiction.

To make a reliable prediction as to the future one needs to have a good understanding of the present. Let me then begin by describing the constitutional landscape as it is today in Wales and by summarising where I believe we have reached in the development of the administration of justice in Wales including the practice of the law. I believe that this look at the constitutional landscape will show a

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[7] At page vi
[8] Preface

developing trend and one which is very likely not only to continue but also to quicken in its pace.

In May 1998, the constitution of the United Kingdom was changed in very fundamental respects by the process of devolution. The instrument of change in Wales was the Government of Wales Act 1998. There was a second devolution settlement in 2006. As a result of this process Wales' constitutional status changed and despite the Assembly's limited legislative competence its laws are becoming increasingly different from those of the remainder of the United Kingdom.

The reasons and arguments which drove the devolution settlements of 1998 and 2006 continue to exert pressure for yet another devolution settlement for Wales. In what direction are these forces pulling us today? Reinforced as they now are by the perceived shortcomings of the 1998 and 2006 devolution settlements, I believe the direction to be that of yet a third devolution settlement – one which will devolve to the Assembly full legislative competence – what Ron Davies calls 'real devolution'. That then is the prediction. My forecasts of the changes to the constitutional landscape are these; first, that a third devolution settlement is almost inevitable. I qualify the inevitability of it in that way simply to acknowledge that the world might come to an end in the meantime. The second is that the third devolution settlement will devolve full legislative responsibility. What else might be the purpose of a third settlement if it is not to take Wales to full devolution?

The 2006 settlement is bound to increase the rate at which our laws become different from those of England. Imagine therefore the rate of change in our laws if the Assembly were to have primary legislative competence on the scale enjoyed by the Parliament of Scotland and the Assembly of Northern Ireland. The devolution of primary legislative powers to Wales on that scale would have a major impact not only as to the content of our laws and their differences from the laws of other parts of the United Kingdom but also for the machinery of justice in Wales – it would have an enormous effect on all aspects of Legal Wales

I then look at the subject of this conference against that changing landscape. The very purpose of devolution is to change the place at which decisions are made and to change the ministers which make them - from Whitehall to Cardiff and from Whitehall ministers to Welsh Assembly Government ministers. It follows as night follows day that if there are more local decisions, more local decisions will be

challenged. If that assumption is correct, it is very likely, given the change of attitude post devolution to the hearing of public law cases locally, that more and more of these challenges will be taken and determined in the local courts. That, in my opinion, is a reliable forecast based on a discernable trend.

However, I was present at an address in this theatre when a member of the Wales Public Law Association expressed the view that there were no challenges or very few challenges to the decisions of the Assembly and that the reason for this was not that the Assembly was getting it right but because the Welsh were kindly disposed towards its new Assembly notwithstanding its errors and that the Welsh are disinclined to challenge the decisions of public authorities.

I was the Counsel General when I heard that view expressed. It did not accord with my own experience and I thought the view to be a seriously mistaken view. It was not backed up by any research, any analysis of researched material or any conclusions based on the research and analysis. I was so surprised by the seemingly confident statement to the effect I have just described that I commissioned research into the matter. The results demonstrated that the claim was without foundation and was completely wrong. The research showed that in the four years immediately following devolution, the number of challenges to decisions of the NAW far exceeded the challenges to decisions of the Welsh Office in the four years immediately preceding devolution. So, if anything, devolution had acted as a stimulus. It was as if the people were more inclined to challenge a decision taken locally on a matter than they were a decision taken remotely on the same or similar matter.

I looked also at the number of challenges to the decisions of Welsh County Councils during the same two periods. The results showed a very substantial increase in the number of challenges in the four years following devolution over the number of challenges during the preceding four years. I have that research material with me this evening.

I am therefore able to say based on empirical experience and on the basis of research that there is a growing trend in Wales to challenge public law decisions and I forecast that this trend will continue hereafter.

Finally, I should like to say something about the involvement of the local solicitors and barristers in this growth industry. The Assembly is coming to accept that a metro centric approach to public law cases is not consistent with devolution nor is it consistent with Wales' broader public, economic and cultural interests. It accepts, I believe, that it cannot be heard to say "you can trust us to be as effective if not better than Whitehall was in governing Wales but we are not prepared to go along with the suggestion that we should do our own thing in relation to the conduct of public law cases and the conduct of public inquiries. The wisdom and experience is reposed outside Wales".

With regard to Local Authorities, I believe the position is different. Many of them are as metro centric as ever; devolution has not changed their attitudes or perceptions. The opportunity to have the challenges to decisions of local authorities in Wales heard and determined locally and the public interest in having the challenges heard and determined locally are just as great as in relation to the Assembly and its Government. However, many local authorities are still attached to the habits of the past so far as public law challenges are concerned. They are as they were pre devolution. The reason for that is quite simply this - The National Assembly has come to accept that it is unacceptable for Wales' National Government to continue the pre devolution trend of all public law case being heard and determined in London by judges and counsel without the slightest connection with Wales.

Some local authorities on the other hand have not shed their metro centric attitudes to High Court litigation. That fact, coupled with their devolution blindness, means that they will be late in coming to the realisation that Wales' development as an emerging jurisdiction depends on their deciding to adopt a post - devolution paradigm.

The strength of the legal professions in Wales is very considerable in terms of breadth and depth of experience. There are a number of firms of solicitors which could cope with representing public bodies including the National Assembly and which are experienced in the conduct of large public inquiries. The strength of the Bar in Wales and Chester is also considerable. Specialization is strong at the local bar. It has been so since the early seventies but is now in an expansive phase. It is developing, hand in hand, with the specialist courts which have been established in Wales in recent years and with the National Assembly's expanding responsibilities. Since we have had devolution, there have been established three specialist associations – the Wales Public Law and Human Rights Association, the Wales

Commercial Law Association and the Wales Personal Injuries Law Association and a fourth is about to be formed namely the Wales Parliamentary Bar Association of which Graham Walters is to be Chairman, Keith Bush the Treasurer and Emyr Jones the Secretary. It was born out of the fact that those three members of the circuit have recently been involved in the presentation of a matter before the Assembly's equivalent of a Parliamentary Committee. A new need creating a new opportunity. The increasing number of barristers on circuit is a sign of the circuit's confidence in itself.

To bring this back to the question I have been asked to address namely how might the changes which have occurred and those which I anticipate are about to occur impact upon the process of judicial review in Wales? My answer is that I am quite confident that there will be considerable growth in the development of public law in Wales in terms of work if not in terms of jurisprudence. It is imperative that the legal constituencies which make up Legal Wales should work together to harness these opportunities for the benefit of those who work and practice in Wales. As to whether the bar and the solicitors will be given the opportunity to harness it, the answer does not appear in my crystal bowl.

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