# Principles of Public Law

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# INTRODUCTION TO JUDICIAL REVIEW

## 11.1 Judicial review in the UK

The purposes of a legal system in a liberal democracy include setting limits on the powers of public authorities, providing a framework of rules and procedures for making collective decisions, and imposing legal responsibilities on public authorities to secure people's safety and welfare (see above, 1.7). Judicial review is one field of legal activity concerned with all of these purposes. A central objective of judicial review is to give judges power to ensure that public authorities act within the limits of the powers conferred on them directly or indirectly by the UK Parliament, and to ensure that public authorities fulfil their statutory duties. Judicial review is also used to ensure that, when ministers in the UK government exercise prerogative powers (see above, 2.4.3) they do so in accordance with the law. In recent years, judicial review has also been used as a way of making non-statutory self-regulatory bodies, such as the Press Complaints Commission, act according to recognised legal principles.

This chapter introduces two things. First, it outlines the grounds of judicial review – the practical legal arguments used by lawyers to challenge or defend the actions and omissions of public authorities (they will be examined in more detail in Chapters 12–16). The chapter then goes on to ask and to consider possible answers to an important question: what is the constitutional basis of the courts' power to engage in judicial review?

As we saw in Chapter 2, there are three separate legal systems in the UK (see above, 2.10). In England and Wales, it is the High Court which has responsibility for determining the 4,000 or so judicial review applications made each year. Some applications go on appeal to the Court of Appeal and House of Lords. In Northern Ireland, the procedures and grounds of judicial review are similar to those in England and Wales; the High Court of Northern Ireland determines applications in the province. In Scotland, the procedure for making a petition for judicial review and the grounds of judicial review are different (see Himsworth, CMG, 'Judicial review in Scotland', in Hadfield, B, *Judicial Review: a Thematic Approach*, 1995, Dublin: Gill and Macmillan). The focus of this and the following chapters is on England and Wales.

The new constitutional settlement has opened up the need for a court to adjudicate on 'devolution issues' – questions about the legislative competences of the assemblies in Wales and Northern Ireland and the Scottish Parliament, the matters reserved to the UK Parliament, and the powers and

duties of the executive bodies in Wales, Northern Ireland and Scotland. So now, in addition to judicial review in the constituent parts of the UK, a new field of judicial review has been created by the Government of Wales Act 1998, the Scotland Act 1998 and the Northern Ireland Act 1998. Devolution issues are determined by the Judicial Committee of the Privy Council (see above, 2.8.4). It is not yet clear what methods of judicial reasoning the Privy Council will use in such cases, or to what extent new principles ought or need to be developed (see Craig, P and Walters, M, 'The courts, devolution and judicial review' [1999] PL 274).

## 11.2 The grounds of review

The grounds of judicial review are the arguments which a lawyer can put forward as to why a court should hold a public authority's decision to be unlawful. They can be categorised in various ways. If you look at the contents pages of the standard textbooks on judicial review and administrative law, you will notice a startling lack of uniformity; the same material is divided up in quite different ways, with different chapter headings and subheadings. To some extent, the differences are merely terminological and organisational. In one sense, it does not matter whether the court's power to review a decision for reasonableness comes under a chapter labelled 'Abuse of discretion', or labelled 'Unreasonableness', or labelled 'Irrationality'. On the other hand, the differences of terminology should not be ignored altogether. For one thing, it is necessary to be aware that someone else (a judge, or an academic) may be using a word in a different sense from that which you expect. This is even the case with regard to quite central concepts such as 'illegality' (considered further below), where differences in meaning can cause spectacular misunderstandings.

Further, changes in vocabulary can be a sign of more substantive shifts in the nature of the ground of review in question. For example, the gradual shift of vocabulary from 'natural justice' to 'fairness' (a process still not complete) has coincided with a relaxation of many of the previous rigidities of the doctrine, and a recognition that it could apply to areas previously considered out of bounds to procedural intervention. This is so even though, today, the terms 'natural justice' and 'fairness' are frequently used entirely interchangeably. Similarly, the move away from the phrase '*Wednesbury* unreasonableness' and the adoption of the term 'irrationality' (still not universally accepted) may highlight a change in the nature of that ground of review; we examine this in more detail in Chapter 15.

For now, it is useful to set out the terminology which we have adopted in this book. We have followed the well known division of the grounds of review enunciated by Lord Diplock in the *GCHQ* case (*R v Minister for the Civil Service ex p Council of Civil Service Unions* (1985)). Lord Diplock divided the grounds of review under three heads:

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

To get an overview of what follows in the next chapters, it is worth briefly considering each of these heads of review in turn.

### 11.2.1 Illegality

In the *GCHQ* case, Lord Diplock gave a very brief definition of 'illegality':

> By illegality as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it.

Lord Diplock's meaning is best illustrated by a simple example. If a decision maker is given the power to decide between options (a), (b) and (c), then he would be acting outside his powers if he were to choose a different option (d); he would be acting outside the 'four corners' of his jurisdiction. Under the heading of illegality may also be classified the requirements that a decision maker must not 'fetter' his discretion (by committing himself as to how he will exercise it in advance of the decision), nor unlawfully delegate his discretion (by giving the power of decision to another person). We will look at all these different aspects of illegality in the next chapter.

### 11.2.2 Procedural impropriety

By 'procedural impropriety', Lord Diplock sought to include those heads of review which lay down procedural standards to which public decision makers must, in certain circumstances, adhere. These include the duty to give a fair hearing to a person affected by a decision, and the duty not to be affected by bias (all of which are considered in Chapter 13). It also includes, as we shall see, the obligation not to disappoint a legitimate expectation (dealt with in Chapter 14) – although to the extent that a legitimate expectation may be protected 'substantively', it may be seen as moving beyond 'procedural' protection.

### 11.2.3 Irrationality

In the *GCHQ* case, Lord Diplock explained this term as follows:

> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses v Wednesbury Corporation*). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

Whether or not this is an adequate, or indeed an accurate, definition of this ground of review will be considered in Chapter 15. For now, it is merely worth noting that under this head comes what may be characterised (in spite of judicial protestations to the contrary) as review of the *merits* of the decision (however limited a scrutiny of the merits that may turn out to be). An important issue here is the extent to which the decision under challenge should be judged against the yardstick of 'substantive' principles of judicial review. Advocates of such an approach argue that these substantive principles include the doctrine of proportionality, referred to by Lord Diplock in the passage above as a possible fourth ground of review, as well as other principles, such as the legal certainty and consistency.

### 11.2.4 Other heads of judicial review

We should re-emphasise that these categories are not set in stone. They are mere 'chapter headings' for the grounds of judicial review (*per* Lord Donaldson MR in *R v Secretary of State for the Home Department ex p Brind* (1990)). Furthermore, the grounds are themselves divided into subcategories, which are often more convenient to use as tools in the day to day task of establishing whether the decision of a public body is unlawful. For example, a subcategory such as the rule against the 'fettering of discretion', which we have located under 'illegality', could justifiably be placed under 'procedural impropriety' – or, conceivably, under 'irrationality'. However it is identified, the content of the rule is the same, and as a matter of day to day practicality it will be applied in the same way however it is regarded. For an alternative approach to the classification of the grounds of review, it is worth referring to the position in Australia, where the grounds have been codified by ss 3–7 of the (Australian) Administrative Decisions (Judicial Review) Act 1977 (as amended) (which are set out at Appendix 8 in JUSTICE/All Souls, *Review of Administrative Law in the United Kingdom*, 1988, Oxford: OUP). Rather than attempting to classify the different grounds of review under 'chapter headings' like illegality or irrationality, the statute sets out, in s 5(1), a long list of grounds (nine basic ones) upon which an applicant may rely.

To complete Lord Diplock's classification, three other possible heads of review should be borne in mind.

*Breach of European Community law*

An applicant for judicial review may also argue that a public authority has breached a rule of European Community law. As we have already seen, important provisions of European Community law are set out in provisions of the EC Treaty and may be relied upon directly in courts in the UK (see above, 7.9.2). Rules contained in directives and EC regulations may also be directly effective. Thus, breach of such a directly effective provision may be seen simply as a facet of the head of review of 'illegality'. In addition, however, the European Court of Justice has, in its case law, developed 'general principles', which are applicable both to Community institutions and to national bodies in making decisions affecting community rights. These general principles include proportionality; legitimate expectation and legal certainty; equality; respect for human rights; the right to be heard; and the requirement to state reasons.

*Human Rights Act 1998*

The Human Rights Act creates a broad ground of judicial review. Section 6 provides that 'It is unlawful for a public authority to act in a way which is incompatible with one or more of the Convention rights'. The scope of this new provision is considered below, 19.10.4. Arguably, breach of s 6 of the Act can be seen merely as an aspect of 'illegality'. However, the courts will have to consider the body of case law which has been developed by the European Court of Human Rights since the 1950s. It is also likely that the court will develop distinctive principles for dealing with human rights issues. Breach of s 6, therefore, needs to be recognised as a head of review in its own right.

*Devolution issues*

As we have already noted, devolution issues are dealt with by the Judicial Committee of the Privy Council and the approach that the court is likely to take is not yet known (see above, 2.8.4 and 11.1). The main task of the court will be to interpret the devolution Acts, and so the issues may be seen as just an element of 'illegality'. The Privy Council may, however, develop distinct principles for dealing with devolution issues; if this happens, a separate head of review may emerge.

## 11.3 The constitutional basis of the court's power to intervene

From where do the courts derive their power to review the decisions and actions of public authorities, such as ministers and local councils? Such a

question may, at first glance, seem unnecessary, but in public law this apparently theoretical question often arises in the most practical contexts; it is of central importance to an understanding of the present day scope and limitations of judicial review. The question also has a constitutional significance in public law, because the courts are deploying a specialised body of law to control and confine the exercise of power by or deriving from democratically elected bodies.

### 11.3.1 The traditional analysis: *ultra vires*

The traditional explanation of the court's power to intervene can be stated briefly, if crudely. The twin doctrines of the sovereignty of Parliament and the rule of law (see above, 5.2 and 5.3) require that a public authority entrusted with statutory powers can only exercise those powers which have been conferred, either expressly or impliedly, by Parliament. Statutory bodies (sometimes called 'creatures of statute'), such as local authorities, cannot create their own powers. The courts, in judicially reviewing an action of such a public body, are merely adjudicating upon the exact limits of a particular allocation of power; they are checking whether the public body has been given the power to act as it did.

Ultimately, the court's power to perform this 'checking' role is not, itself, conferred by any statute. How could it be, since how would the law which purported to confer the 'checking' role on the courts itself be checked? (The court's role has, however, been recognised in statutes, for instance in s 31 of the Supreme Court Act 1981, which regulates the procedure on an application for judicial review: see below, 17.5.) The court's power simply rests upon the fact that society generally accepts that the courts possess this role because the courts have always had it, or because we continually consent to their having it, or because judges have the power to enforce it, or for one of a number of different reasons which a legal philosopher could provide. The court's power to intervene is often referred to as the court's 'inherent jurisdiction'.

### 11.3.2 System of review versus system of appeals

However, the important feature of judicial review, so the traditional theory goes, is that the court's power is *limited* to this 'checking' role. A court, in judicially reviewing a decision of a public body, does not have a right to re-take the challenged decision, or to hear an appeal from the decision. Its role is simply to ensure that the public authority has not acted outside its powers or, to use the ubiquitous Latin terminology, to check that the authority has not acted *ultra vires.*

There is, therefore, a fundamental distinction between a system of judicial review and a system of *appeals*. On an appeal, the court can concern itself (at least to some extent) with the merits of the decision under challenge. In

judicial review, the court is concerned merely to check the *legality* of the decision which the public body has made – whether the decision is *ultra vires* or *intra vires*. If the court finds that the public body has exceeded its powers, then it has the power to quash the decision, or to require the public body to act in accordance with a duty placed on it by the law, but the court does not ordinarily have the power to re-take the decision itself, or to exercise the discretion in the way which it, the court, thinks would be best. The reason that it does not have this power is simple: Parliament has conferred the discretion upon the public body in question, not upon the court. The court merely has the role of supervising the exercise of power by the public body. For this reason, the court's power to intervene by way of judicial review is sometimes described as the court's *supervisory jurisdiction* (derived from the idea that the court is supervising the exercise of public power). This is distinct from the *appellate jurisdiction* that the courts exercise in other areas.

### 11.3.3 The concept of jurisdiction

Another concept frequently used in this context is that of *jurisdiction*. In essence, jurisdiction simply means power; the limits of the jurisdiction of a public body are the limits of its power. A public body which acts *ultra vires* may also be described as acting 'outside its jurisdiction'. When it does so, it commits what is known as a *'jurisdictional error'* – that is, an error which takes it outside its jurisdiction. Thus the *ultra vires* doctrine and the concept of jurisdiction are closely linked; according to the *ultra vires* doctrine, a court can only intervene by way of judicial review if a jurisdictional error is established. How far this theory is actually consistent with practice will be examined below.

### 11.3.4 Summary of the *ultra vires* doctrine

A useful recent summary of the traditional theory of the court's power of review – demonstrating its continuing influence today – is contained in the judgment of Lord Browne-Wilkinson in the decision of the House of Lords in *R v Hull University Visitor ex p Page* (1993):

> Over the last 40 years the courts have developed general principles of judicial review. The fundamental principle is that the courts will intervene to ensure that the powers of public decision making bodies are exercised lawfully. In all cases, save possibly one, this intervention ... is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense ... reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting *ultra vires* his powers and therefore unlawfully.

This passage is particularly useful because it shows how the traditional theory seeks to explain each of the different 'grounds' of judicial review, considered above.

## 11.4 Problems with the traditional analysis

Having sketched out the traditional theoretical explanation for the court's power to exercise powers of judicial review, it is necessary to look at some of the elements of that explanation rather more closely. Commentators have increasingly suggested that the *ultra vires* doctrine does not provide a neat explanation for the whole of judicial review. There are a number of problems which that theory has to overcome.

### 11.4.1 *Ultra vires* is artificial in some situations

Lord Browne-Wilkinson, in the passage from *ex p Page*, quoted above, 11.3.4, explained that the traditional theory is based on the 'underlying assumption' that powers given to a public body were only intended to be exercised in accordance with fair procedures, etc. But is this realistic? For example, in relation to natural justice, it may be unconvincing to claim that Parliament intended that the public authority exercising a particular power should give a fair hearing before it takes the decision. Parliament may not have thought (in so far as Parliament can collectively be said to 'think') about the question of a prior hearing; it may even have assumed that no prior hearing would be required. A similar criticism can be levelled at the justification of judicial review for irrationality. In each case, the objection goes, it is entirely artificial to claim that the court is merely 'supervising' the exercise of power by the public body; or that the court is merely ensuring that the body only exercises the power in accordance with the wishes of Parliament. When the court reviews a decision for breach of the principles of natural justice, it does not do so (the objection runs) because it has looked at the legislation and decided that Parliament impliedly included the principles of natural justice in the legislation. Instead, the court simply asserts that the principles of natural justice are important, and that the decision maker has failed to live up to them. This last sentence is the seed of the alternative theory, to which we shall return shortly.

### 11.4.2 Existence of 'error of law on the face of the record'

Lord Browne-Wilkinson stated (in the quotation from his speech in *ex p Page*, above, 11.3.4) that intervention by way of judicial review can be explained by the traditional theory 'in all cases, save possibly one'. The exception to which he was referring is review for 'error of law on the face of the record'. Some commentators dismiss this ground of review as being anomalous and obsolete

– but it is a major headache for supporters of the *ultra vires* doctrine. Put simply, a decision may be reviewed under this head if the court detects an error of law which appears 'on the face of' (that is, 'obvious on') the record of the decision of the tribunal or other public body. If such an error exists, then the court can review the decision even if the error is not one which is *ultra vires* the decision maker (that is, *even if* it is not an error which takes the decision maker outside its jurisdiction). For practical purposes, as we shall see, the existence and ambit of error of law on the face of the record is not important today, but the significance from our perspective is that:

(a) error of law on the face of the record, even if now obsolete, is long established, arising out of a traditional jurisdiction asserted over inferior tribunals and courts (see, for example, *R v Northumberland Compensation Appeal Tribunal ex p Shaw* (1952)); and

(b) it is entirely inconsistent with the *ultra vires* doctrine, and with traditional theory of judicial review, because a decision may be struck down under this head even if the decision maker (or inferior court) has not acted outside its jurisdiction.

### 11.4.3 The court's ability to review the exercise of prerogative powers

Thus far, we have been considering judicial review of statutory powers and duties – that is, those which are conferred (directly or indirectly) on public authorities by Acts of Parliament. But, as we saw in Chapter 2, some government powers are derived from the prerogative rather than Acts of Parliament. The courts are prepared to review the exercise of prerogative powers: *R v Criminal Injuries Compensation Board ex p Lain* (1967), reaffirmed in *R v Minister for the Civil Service ex p Council of Civil Service Unions* (1985)). This is not easily explainable in terms of the *ultra vires* doctrine. How, for example, can the doctrine justify the ability of the courts to hold that an exercise of the prerogative is *Wednesbury* unreasonable? Where the power to make the decision originated in an Act of Parliament, the doctrine would hold that there is a presumption that Parliament did not intend the decision maker to exercise it unreasonably. However, this explanation is not available in the case of the prerogative, because no one 'confers' the power on the person exercising the prerogative (certainly not Parliament). That person (whether the sovereign, or a minister) cannot be 'presumed' not to want to allow himself or herself to exercise the power unreasonably. Thus, the critics argue, the traditional theory fails to explain the fact that the prerogative is judicially reviewable.

### 11.4.4 The court's discretion to refuse a remedy

Finally, the *ultra vires* doctrine is hard to reconcile with the court's undoubted discretion to decline to grant a remedy to an applicant for judicial review, even

once a ground of review has been established (see below, 17.4). If one applies the *ultra vires* doctrine strictly, then where the court finds that a public authority had no power to act as it did, it should logically find that the purported decision was a *nullity* (that is, was void and of no effect), because it is as if a decision had never been made. Where a decision is held to be *ultra vires*, it should automatically follow that the court holds it to be void. But, if that were the case, how is it that the court has a discretion not to grant a remedy? Once it has found that a ground of review has been made out, then there is no valid 'decision' for the court to decide not to overturn. It would, therefore, appear that the traditional theory is not consistent with the existence of the discretion to refuse to grant a remedy.

## 11.5 A new theory of judicial review?

An alternative theory has emerged from the objections set out above. It starts from the premise that the court has now become more confident of its constitutional role, which is to uphold the rule of law. The court no longer needs to resort to the fiction of 'jurisdictional error' to strike down a defective decision; it does not need to pretend that Parliament did not 'intend' to allow the decision maker to act as it did. Instead, the courts have the power to strike down errors of law (whether due to failure to give a fair hearing, irrationality, or whatever) simply because they have asserted the power do so, and because that abrogation of power is generally accepted in our society. This view has been well expressed by Dawn Oliver, when she suggests that 'judicial review has moved on from the *ultra vires* rule to a concern for the protection of individuals, and for the control of power ...' ('Is the *ultra vires* rule the basis of judicial review?' [1987] PL 543). She concludes:

> Notwithstanding the supremacy of Parliament, the courts impose standards of lawful conduct upon public authorities as a matter of common law, and it is arguable that the power to impose such standards is a constitutional fundamental ... In place of the *ultra vires* rule a doctrine is emerging that, in the public sphere, the courts in exercising a supervisory jurisdiction are concerned both with the vires of public authorities in the strict or narrow sense ... and with abuse of power. If abuse of power is established, the courts may properly intervene [p 567].

So, on this view, the court's power to intervene (in cases of 'abuse of power', at least) is justified not by reference to the presumed intention of Parliament, but by the court's own self-asserted constitutional right to interfere when it detects abuse of power. Judicial review has, it is said, outgrown the need to rely upon fictions like the *ultra vires* doctrine. This is particularly so given the artificiality of the *ultra vires* doctrine in explaining the power of the courts to disapply primary legislation where it is not in conformity with directly effective EC legislation (see above, 5.2.4 and 7.9.1) or the impending power to interpret legislation against its natural meaning to ensure conformity with the

Human Rights Act 1998 (see below, 19.10.1). It also has difficulty in explaining the increasing readiness of the courts to strike down delegated legislation or rules which infringe what the courts regard as a 'common law constitutional right', such as the right of access to the court (see *R v Lord Chancellor ex p Witham* (1997)), unless expressly authorised by primary legislation.

We will see some of the practical implications of this debate in the next few chapters. It is important to remember, however, that the *ultra vires* doctrine is certainly not dead and buried. Indeed, it remains the conventional explanation for at least most of judicial review (as illustrated by Lord Browne-Wilkinson's recent endorsement of the doctrine in *ex p Page*; see, also, for a recent re-assertion of the conventional view, Forsyth, CF, 'Of fig leaves and fairy tales: the *ultra vires* doctrine, the sovereignty of Parliament and judicial review' (1996) 55 CLJ 122); its advocates would question whether the alternative view has any legitimate constitutional basis (relying simply upon self-asserted judicial power). But it would appear that adherents of the 'newer view' have increased in number, and include senior members of the judiciary; see, for example, Lord Woolf, '*Droit public* – English style' [1995] PL 57, p 66; Sir John Laws, in Supperstone, M and Goudie, J (eds), *Judicial Review*, 2nd edn, 1997, London: Butterworths; and Craig, P, '*Ultra vires* and the foundations of judicial review' (1998) 57 CLJ 63.

# INTRODUCTION TO JUDICIAL REVIEW

## The grounds of review

The grounds of review are the bases on which the court can hold that a public authority's decision is unlawful. They may be divided up in a number of different ways; the most convenient is to follow the approach of Lord Diplock in the *GCHQ* case (*R v Minister for the Civil Service ex p Council of Civil Service Unions* (1985)), where he separated the grounds under three headings.

### Illegality

In essence, this is the principle that 'a decision maker must understand correctly the law that regulates his decision making and must give effect to it'. Under this head may also be included the requirements that a decision maker shall not *fetter his discretion* (by deciding how to exercise it in advance of the decision), nor unlawfully *delegate his discretion* (by giving the power of decision to another person).

### Procedural impropriety

This covers those heads of review which specify procedural standards to which public decision makers must adhere. These include:

(a) the duty to give a fair hearing to a person affected by a decision;

(b) the duty not to be affected by bias (both examined in Chapter 13); and

(c) the obligation not to disappoint a legitimate expectation (Chapter 14).

### Irrationality

This includes what is sometimes known as *Wednesbury* unreasonableness. To a limited extent, this ground ventures into principles of 'substantive' review – that is, into the merits of the decision.

In addition, there are arguably the following heads of review:

(a) breach of EC law;

(b) breach of s 6 of the Human Rights Act;

(c) devolution issues.

## The constitutional basis of judicial review

The court's power to review public law decisions is traditionally explained by the *ultra vires* doctrine. This states that a body exercising statutory powers cannot act outside the powers conferred upon it, either expressly or impliedly, by statute. If the body acts outside its powers, then it goes beyond its *jurisdiction*, and its decision may be reviewed for *jurisdictional error*. The court's power to intervene in this way is not conferred by statute; it is part of the court's *inherent jurisdiction*. The power is (in principle) confined to 'checking' the limits of the decision maker's power; it is not an appeal against the decision. Thus, judicial review is a *supervisory jurisdiction*, not an appellate jurisdiction.

## Objections to the traditional analysis

There are a number of objections to the traditional explanation of the basis of judicial review. It is said that:

(a) *the theory is artificial* in its reliance on 'presumed' parliamentary intention;

(b) it fails to explain the power of the court to review for *error of law on the face of the record*;

(c) it fails to explain *judicial review of prerogative powers*;

(d) it is inconsistent with the *court's discretion to refuse to grant a remedy*.

## New theory of judicial review

As a result of these objections, it has been suggested that judicial review does not need to rely upon the 'fiction' of the *ultra vires* doctrine. Instead, the courts may intervene simply because they detect an abuse of power; because of a self-asserted constitutional right to control errors of law, and procedural and substantive abuses of power. However, the *ultra vires* doctrine is still influential (see, for example, Lord Browne-Wilkinson in *R v Hull University Visitor ex p Page* (1993)). The practical implications of the debate will appear in the next few chapters.