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## Judicial Review at 30

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There is nothing quite like an anniversary to provoke reflection: about where we have come from, about where we find ourselves; and, inevitably, about where next we might be headed. Taking as their cue the thirtieth anniversary of the introduction of rule 260B to the Rules of Court,<sup>4</sup> the essays gathered in this special edition each, in their own way, attempt to address these questions as they relate to the practice and the evolution of judicial review in Scotland.<sup>5</sup>

Of course, in one sense, it seems somewhat misleading to celebrate now (just) thirty years of judicial review. After all, the supervisory jurisdiction of the Court of Session – that by which it “keep[s] inferior judicatories and administrative bodies right, in the sense of compelling them to keep within the limits of their statutory powers”<sup>6</sup> - has a history as long as that of the court itself.<sup>7</sup> However, and as Lord Reed explains in the opening contribution to this edition,<sup>8</sup> the procedure that we now recognise as judicial review can be traced to the introduction of rule 260B, which – following (though not in their entirety)<sup>9</sup> the recommendations of the Dunpark Report<sup>10</sup> - sought to create “a relatively rapid and accessible means for challenging the legality of decisions,”<sup>11</sup> where once recourse to that jurisdiction was infrequent and unduly cumbersome. Indeed, early research into the success of those reforms painted a mostly positive picture of a steadily increasing judicial review case load that was nevertheless expeditious and (reasonably) user-friendly.<sup>12</sup> On their thirtieth anniversary, however, we believe that the time has come to revisit some key research questions around the operation of these reforms as well as to ask some anew, and this for (at least) three reasons.

The first is the dearth of academic research, and indeed of corresponding teaching materials, dedicated to the study of judicial review in Scotland that has been produced during the period since those studies. As Alan Page notes in his contribution, the most recent comprehensive academic research was conducted almost two decades ago,<sup>13</sup> whilst the most recent comprehensive practitioner and student textbooks were also published before the turn of the twenty-first century.<sup>14</sup>

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<sup>4</sup> RCS 1965, rule 260B, inserted by SI 1985 No 500 (now rule 58).

<sup>5</sup> Each of the contributions to this collection were first presented at a conference – 30 Years of Judicial Review - held jointly by Strathclyde and Glasgow University Law Schools on 26<sup>th</sup> January 2015, with the generous support of the Clark Foundation and the UK Constitutional Law Association.

<sup>6</sup> *Moss' Empires v Assessor for Glasgow* 1917 SC (HL) 1, per Lord Shaw at 11.

<sup>7</sup> See Lord Hope's lengthy historical analysis in *West v Secretary of State for Scotland* 1992 SC 385 at 396-402.

<sup>8</sup> **ADD CROSS REF TO L REED CONTRIBUTION**

<sup>9</sup> For example, the recommendation that a panel of nominated judges be appointed by the Lord President to hear and decide judicial review petitions was not taken up. See Tom Mullen, Kathy Pick and Tony Prosser, *Judicial Review in Scotland* (Chichester: John Wiley & Sons, 1996), p.10.

<sup>10</sup> *Report to the Rt Hon Lord Emslie, Lord President of the Court of Session, by the Working Party on Procedure for Judicial Review of Administrative Action* (1984).

<sup>11</sup> Mullen et al (fn 6), p.135.

<sup>12</sup> Alan Page, 'Judicial Review in the Court of Session' in *Socio-Legal Research in the Scottish Courts, Volume 2* (Scottish Office, Central Research Unit, 1987); Mullen et al (fn 6).

<sup>13</sup> Mullen et al (fn 6). **ADD CROSS REF TO A PAGE CONTRIBUTION**

<sup>14</sup> See Aidan O'Neill, *Judicial Review in Scotland: a practitioner's guide* (London: Butterworths, 1999) and Scott Blair, *Scots Administrative Law: Cases and Materials* (Edinburgh: W Green/Sweet & Maxwell, 1999). Compare

This omission in the literature is all the more problematic given the link made by Lord Reed between (until recently) the paucity of administrative law teaching in Scottish law schools and (certainly by way of comparison to its expansion across the border during the 1970s) the stunted development of judicial review here in Scotland.<sup>15</sup> Certainly, judicial review is now a staple part of legal education in all Scottish law schools. Nevertheless, if we are to take seriously its distinctiveness (on which more below) the lack of research and teaching materials which pay adequate (and critical) attention to the nuances and idiosyncrasies of Scots administrative law must be addressed. The thirtieth anniversary therefore affords us a convenient opportunity to reflect upon the experience of the intervening period, to (re)assess the success (or otherwise) of the existing procedures, and in so doing to provide a much needed resource that will be of broad interest to fellow academics and students, as well as to practitioners in the field.

Secondly, the evolution of the supervisory jurisdiction has been accelerated during the past thirty years, first by membership of the European Union and by the constitutional reforms brought about by the New Labour government, and laterally by way of reforms made to that jurisdiction itself by an active Supreme Court. So, on the one hand, the impact of the Human Rights Act 1998 and the Scotland Act 1998 has been to confer upon the Court of Session (and, in relation to devolution issues, the Supreme Court) some of the characteristics of a constitutional court.<sup>16</sup> Meanwhile, and as Denis Edwards explains in his contribution, the fundamental effects on UK public law that flow from membership of the European Union have been felt on judicial review procedures (the making of preliminary references to the CJEU, for example), substantive grounds (most notably, proportionality review) and remedies (establishing a *right* to claim compensation from public authorities for damage caused as a result of their violation of rights or obligations conferred by EU law).<sup>17</sup> More than the authority to compel inferior bodies to remain within the limits of their statutory powers, the Court is now possessed of the authority to declare primary legislation made by the UK Parliament to be incompatible with the European Convention on Human Rights,<sup>18</sup> to strike down as unlawful primary legislation made by the Scottish Parliament that is deemed to fall outwith its legislative competence,<sup>19</sup> and to disapply primary legislation of the UK Parliament that brings UK law into conflict with EU law.<sup>20</sup> On the other hand, the jurisprudence of the Supreme Court has been equally

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the paucity of Scottish materials with the vast array of up to date student texts which deal with judicial review primarily in England & Wales but which, for the most part, pay lip service to the nuances of Scots law.

<sup>15</sup> ADD CROSS REF TO L REED CONTRIBUTION

<sup>16</sup> On which, see Lord Neuberger's address to the Legal Wales Conference 2014, 'The UK Constitutional Settlement and the Role of the UK Supreme Court' (10 October 2014), available at <https://www.supremecourt.uk/docs/speech-141010.pdf>.

<sup>17</sup> ADD CROSS REF TO D EDWARDS CONTRIBUTION

<sup>18</sup> Human Rights Act 1998, s4. Such a declaration was made by the Court of Session sitting as an election court in *Smith v Scott* 2007 SC 345, relating to the vexed question of prisoner voting.

<sup>19</sup> See the complex and tragic case of *Salvesen v Riddell* [2012] UKSC 22, in which it was successfully argued that s72(10) of the Agricultural Holdings (Scotland) Act 2003 was incompatible with Article 1 Protocol 1 of the European Convention on Human Rights and therefore outwith the legislative competence of the Scottish Parliament.

<sup>20</sup> [1991] 1 AC 603. More recently, in *Benkharbouche and Janah v Embassy of the Republic of Sudan and others* [2015] EWCA Civ 33, the Court of Appeal upheld the decision by the Employment Appeals Tribunal to disapply elements of the State Immunity Act 1978 which conflicted with rights conferred on individuals by the European Charter of Fundamental Rights and Freedoms (ECFR). See also *R (on the application of Davis) v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin), where the ECFR was used to disapply aspects of the controversial Data Retention and Investigatory Powers Act 2014 (DRIPA). Given the more direct

transformative: chipping away at the stubborn distinction between *intra vires* and *ultra vires* errors of law; liberalising the law of standing so as to allow public interest litigants to petition the court in lieu of a private interest capable of enforcement; asserting the Rule of Law enforced by the courts as a constitutional fundamental capable of trumping primary legislation;<sup>21</sup> as Lord Reed has said, the Scots law on judicial review can no longer, as arguably was the case in 1985, presuppose that “the only function of the court’s supervisory jurisdiction [is] to redress individual grievances [but must recognise and perhaps even give priority to] its constitutional function of maintaining the Rule of Law.”<sup>22</sup>

Thirdly, as well as giving us an opportunity to look back on these developments, *this* anniversary is significant because it also marks a new beginning: thirty years after the introduction of rule 260B the civil court system in Scotland is about to undergo radical reforms with, *inter alia*, important procedural implications for judicial review that take effect from 22<sup>nd</sup> September this year. Whilst, as we have seen, early studies into the impact of the new procedure pointed to its success in creating an efficient means of challenging public authorities, Lord Gill’s *Report of the Scottish Civil Courts Review* (the Gill Review), published in 2009, proposed a number of reforms that sought to improve the procedure further still, both for petitioners (placing a less onerous sufficient interest test on a statutory footing, and amending the rules of court to cater for the making of protective expenses orders) and for respondent public authorities (the introduction of a permission stage and three month time limit to raise proceedings). These reforms have not been uncontroversial: both their necessity and their capacity to improve the judicial review procedure have been strongly contested.<sup>23</sup> In his contribution, however, Tony Kelly looks beyond that prior debate to shift our focus towards the possible impact of these impending reforms and to lessons that we might learn from the application of similar procedures in England and Wales.

As we seek to take stock of the development of the supervisory jurisdiction over the past thirty years, and to look forward to the next thirty years, there are two key questions to ask about judicial review in Scotland. The first is how well equipped the Scottish procedure is to carry out its constitutional functions. As already noted, the fundamentally important role of judicial review in upholding the Rule of Law is more and more emphasised, and here the courts have an increasingly directive<sup>24</sup> role to play, not merely in ensuring that decision-makers stay within the letter of their

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and immediate remedial consequences of disapplication as opposed to the making of a declaration of incompatibility under s4 of the Human Rights Act, one might expect the ECFR to become an increasingly significant feature of the UK public law landscape.

<sup>21</sup> However, note the subtly different approaches taken to reach this conclusion by Lords Hope and Reed in *AXA General Insurance v Lord Advocate* [2005] UKSC 56. For Lord Hope the rule of law is a separate and distinct source of constitutional authority which might, in extreme circumstances, trump not only Acts of the Scottish Parliament but perhaps Acts of (the UK) Parliament too (at [42]-[52]). Whilst Lord Reed agreed that Acts of the Scottish Parliament might be struck down where they conflict with the rule of law, for his Lordship this result would be achieved by way of statutory interpretation, applying the principle of legality to the Scotland Act 1998 (at [135]-[154]).

<sup>22</sup> *Walton v Scottish Ministers* [2012] UKSC 44 at 90.

<sup>23</sup> See, for example, A McHarg, ‘Access to Judicial Review in Scotland’ (30 July 2013) *UK Constitutional Law Association Blog*, available at <http://ukconstitutionalaw.org/2013/07/30/aileen-mcharg-access-to-judicial-review-in-scotland/>.

<sup>24</sup> The terms ‘directive’ and ‘protective’ are taken from Aileen McHarg, ‘Border Disputes: the Scope and Purposes of Judicial Review’, in Aileen McHarg and Tom Mullen (eds), *Public Law in Scotland* (Edinburgh: Avizandum, 2006), pp. 234 – 236.

legal mandates, but also in articulating the values that they understand to be encompassed within the Rule of Law. This in turn requires judges conducting judicial review to negotiate the tensions contained within an increasingly complex constitutional landscape: between the Rule of Law and Parliamentary Sovereignty, as well as both horizontal and vertical Separations of Powers. It is, however, important not to lose sight of the fact that judicial review continues to perform its traditional, protective function, that is, to act as a remedy of last resort for those with grievances against governmental bodies – and in Scotland also against a range of other decision-makers upon whom a jurisdiction has been conferred.<sup>25</sup>

In evaluating the effectiveness of judicial review, a number of issues need to be addressed. One important thing to know is how judicial review is actually used in practice. Page's article confirms that use of the jurisdiction in Scotland continues to be low, certainly as compared with England and Wales, and that moreover petitions are concentrated in a few areas, particularly immigration and prisons. As he rightly notes, statistics by themselves do not allow us to conclude whether judicial review is over- or under-used. Nevertheless, they provide a useful benchmark against which to assess the implications of recent or pending procedural reforms for the judicial review caseload. Kelly's discussion of the new time limit and permission requirement suggests that, paradoxically, litigation is likely to increase, at least in the short term, as practitioners try to work out what approach the courts will take to the grant of permission and application of time limits, but also as the stakes regarding choice of procedure (judicial review or ordinary action) become higher. Tom Mullen's essay considers the impact of reforms to standing, intervention and costs rules on the ability of pressure groups and others to use judicial review to advance public interest objectives.<sup>26</sup> The opening up of judicial review in this way is essential to the successful performance of its Rule of Law function, and many would argue that reform was long overdue. However, Mullen argues that barriers to public interest litigation remain, and that the Court of Session still appears to be more wedded to a grievance-remedial conception of the functions of judicial review.<sup>27</sup> Finally, it is also imperative to understand how judicial review fits into the wider landscape of administrative justice in Scotland. As Brian Thompson reminds us in his contribution,<sup>28</sup> judicial review is only one of a range of mechanisms that citizens may use to resolve their disputes with public bodies, and it has important interactions with those other mechanisms, both as the remedy of last resort, when others are not available or suitable, and as the apex dispute-mechanism, overseeing tribunals, ombudsmen and complaints-handlers as well as primary decision-makers. We therefore need to understand what are the distinctive and valuable functions that judicial review performs that other mechanisms cannot, and how well the administrative justice 'system' – if it can be called that – works as a whole.

The second question that arises is what, if anything, is distinct about the way in which judicial review *in Scotland* performs its constitutional functions. It is notable that, while the introduction of Rule 260B was inspired by similar reforms in England, the two procedures were not identical. In *West*, decided seven years later, the Inner House was also at pains to ensure that Scots law did not follow the approach of English law to the determination of the scope of judicial review, setting out instead a distinctive – some might say idiosyncratic – approach, which eschewed a public law/private law

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<sup>25</sup> See *West*, above n?.

<sup>26</sup> Cross-reference to Mullen.

<sup>27</sup> See also Chris McCorkindale and Paul Scott, 'Public Interest Judicial Review in Cross-Border Perspective' (2015) 26(2) *King's Law Journal* (forthcoming, September). ???

<sup>28</sup> Cross-reference to Thompson.

distinction. Other differences could also be found, particularly in relation to remedies, but also on matters of substantive law. More fundamentally, Scottish judges and textbook writers have frequently insisted upon the distinctive nature and different historical roots of judicial review in Scotland as compared with England.<sup>29</sup> As recently as 2011, in *Eba v Advocate General for Scotland*,<sup>30</sup> the Supreme Court held that those differences were sufficiently great as to require the question as to the amenability of the Upper Tribunal to judicial review in both jurisdictions to be decided separately, even though the decision finally adopted was the same in both cases.<sup>31</sup>

In reality, however, the differences between Scots and English judicial review have been substantially eroded. Recent procedural and substantive reforms, as well as the processes of constitutionalisation and Europeanisation, have served to bring judicial review in Scotland much closer to its English counterpart. Indeed, it is important to acknowledge that most of the development, both procedural and substantive, of judicial review over the past thirty years has been led by the English courts, with Scotland belatedly catching up.

This does not, of course, mean that judicial review is now identical north and south of the border. For instance, as Chris Himsworth argues in his article, despite the abolition of the *intra vires/ultra vires* errors distinction in *Eba*, there may be a continuing (albeit different) divergence in the approach to review for error of law in Scotland and England.<sup>32</sup> New differences are also opening up in relation to procedure as, rather ironically, judicial review in England is becoming *less* accessible to claimants due to the UK Government's attempts to rein in what it sees as excessive use of the remedy, and in particular its claimed *abuse* by campaign groups for political purposes.<sup>33</sup> The scope of review also remains an area of substantial divergence, although here too the difference is less than it was, as Scots judges have been forced to concede that judicial review is, at least sometimes, a public law remedy.<sup>34</sup>

Whether these differences are enough to support the claim that judicial review in Scotland and England are fundamentally different, or indeed whether there *should be* fundamental differences, are questions which cannot be fully explored here.<sup>35</sup> Nevertheless, as we look forward from this thirty year anniversary, we hope that the contributions to this special issue will stimulate further debate about, and further research into, both the theory and practice of judicial review in Scotland.

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<sup>29</sup> See, e.g., Lord Clyde and Denis J. Edwards, *Judicial Review* (Edinburgh: W. Green, 2000), ch. 2.

<sup>30</sup> [2011] UKSC 29.

<sup>31</sup> The equivalent English case is *R (Cart) v Upper Tribunal* [2011] UKSC 28.

<sup>32</sup> Cross-reference to Himsworth.

<sup>33</sup> See Criminal Justice and Courts Act 2015, Pt 4; Ministry of Justice, *Reform of Judicial Review: Proposals for the Provision and Use of Financial Information*, Cm 9117, July 2015.

<sup>34</sup> *Davidson v Scottish Ministers (No 1)* [2005] UKHL 76. However, what precisely are the differences between public law and private law judicial review remains elusive. The distinction as to standing introduced in *AXA*, where Lord Hope held that the old title and interest test should be retained for private law cases, has proved to be short lived. The sufficient interest test now contained in the Courts Reform (Scotland) Act 2014, s. 89, makes no distinction between public law and private law cases.

<sup>35</sup> But see McHarg, above n?, pp. 238 – 240, and Aileen McHarg, 'Public Law, Private Law, and the Distinctiveness of Scots Judicial Review' (20 January 2012) *UK Constitutional Law Association Blog*, available at: <http://ukconstitutionalaw.org/2012/01/20/aileen-mcharg-public-law-private-law-and-the-distinctiveness-of-scots-judicial-review/>.