**WHAT’S WRONG WITH JUDICIAL REVIEW IN THE AARHUS CONTEXT?**

**Thesis**

It is, perhaps, fitting that in a Conference in honour of Professor Richard Macrory I should try, however imperfectly, to discuss and then to evaluate some of his ideas about environmental justice in the context of the Aarhus Convention.

As is, of course, well known to the delegates to this Conference, Article 9 of the Aarhus Convention mandates effective access to review procedures. In particular, Article 9(4) on which I shall focus exclusively today stipulates that a review procedure shall provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive.

As is possibly less well known Professor Macrory has recently canvassed the potentially superior merits of a tribunal system of review as opposed to our current UK court-based system of judicial review for environmental cases.[[1]](#footnote-1) This has direct and obvious relevance to the more effective implementation of Aarhus in the United Kingdom.

I should say at once that this is not an idea to be derived either from first principles or from any *a priori* criticism of judicial review in the Administrative Court. The case that the modern tribunal regime in the United Kingdom promises more for Aarhus than does traditional judicial review in the courts is less philosophical than it is practical.

Thus my respectful endorsement of Professor Macrory’s restrained but persistent advocacy of tribunal environmental justice seeks to compare the modern tribunal system with the modern Administrative Court administering traditional judicial review from three different perspectives. These are from the perspectives of: (i) history, (ii) politics and (iii) structure. My thesis is that our modern tribunal system wins – not by a knockout but definitely on points – on all three scores.

First, though, let me introduce the Macrory thesis before coming to my own.

**The Macrory Thesis**

In 2003 Richard Macrory was commissioned by the Department of the Environment, Food and Rural Affairs to examine the case for a specialised environmental tribunal. Although his remit was directly concerned with the possibility of a tribunal dealing with regulatory appeals arising out of environmental regulation he saw a link between that task and the nature of judicial review in the Administrative Court. The link was there, he conjectured, not least because the less coherent or less complete the system of regulatory appeals, the more pressure there would be on judicial review as a legal remedy.

Richard was – for the purposes of his study - given access to judicial review files in the High Court and in the course of his study acquired a familiarity with the way in which judicial review operates in practice in our courts and, specifically, with how environmental judicial review cases are dealt with.

He came to the view (and set this out in a series of well reasoned submissions to the Lord Chancellor in his recent proposals for reform of judicial review) that there would be considerable merit in establishing a specialist tribunal environmental jurisdiction for judicial review cases in the Upper Tribunal (that part of our Tribunal system with a specialist judicial review jurisdiction). He considered that such a tribunal would: (i) be specialist in nature, (ii) provide an identifiable jurisdiction, (iii) have a greater ability to delve into complex factual questions and (iv) act with greater flexibility than the conventional court review process.

**History**

I turn, now, to the first of my suggested comparative perspectives – history. There can be little doubt that if one wound the clock back thirty years or so (when I first began my judicial review practice and long before Aarhus was more than a gleam in anybody’s eye) judicial review would have promised more than our tribunal system in terms of effective environmental access to justice.

That was the dawn when (to paraphrase Wordsworth) to be a lawyer may have been bliss but to be a judicial review lawyer was very heaven. To use another more homely paraphrase, in the late 1980s judicial review as a remedial process reached the parts that other procedures could not reach. As Richard Macrory was to discover more than two decades later our tribunal system was a muddle. It had been developed piecemeal over the years and there was little rationale, let alone consistency, in the myriad of procedures, appeal routes and cul-de-sacs that faced the unwary litigant.

In those days it was judicial review that was the forensic blue chip. It emerged as a new streamlined procedure fortified by the adding of declarations and injunctions to the prerogative orders as remedies that could be obtained by the unlawful acts or omissions of organs of the State.

Yet it was in those supposedly halcyon days that judicial review may have come to sow the seeds of its later vulnerability. The creation of a new procedure called Judicial Review brought with it the need to make claims for its own distinctiveness. And the distinctiveness to be accorded to judicial review was that it was said to be a process devoid of any interest in the substantive merits of a case. It was concerned solely with legality and process and not at all with substantive outcome.

There are, and were, many reasons for this; some historical, some constitutional. But the key point is that judicial review of its very nature did not require expertise in anything but law. A judge hearing a planning or environmental judicial review case did not need to have any background in planning or environmental law.

These points become important when applying the Macrory thesis to Aarhus. Also important to that thesis in the historical context is that judicial review was to become a victim of its own success. From a mere handful of cases in the 1970s, to a few hundred in the late 1980s, the number of judicial review cases in the High Court expanded exponentially to reaching several thousands of cases annually by the turn of the millennium. This had a number of consequences. Some were procedural (or in my terminology structural) such as increasing delays in cases being heard; some were political since the very success of the process led to a degree of politicisation of judicial review (hastened along by the passing of the Human Rights Act 1998) and to a concomitant and increasing unpopularity with politicians.

History had a different fate in store for the tribunal system. By 2007 following a Report by Sir Andrew Leggatt, the tribunal system was rationalised and modernised as a result of the Tribunals, Courts and Enforcement Act 2007 from its former chaos into its existing two tier system. The modern two tiers are divided into chambers representing different specialisations, each led by a chamber President. Their members are given the same status as court judges and, uniquely as it seems, the Senior President is statutorily required to have regard to *‘the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.’* Importantly, it is the specialist chambers of the Upper Tribunal that possess a judicial review jurisdiction.

Put shortly (and I will develop this when I come to making a few brief points on structure) whereas court-based judicial review became to an extent bogged down with its own structural and political problems, the tribunal system has been able (in part by virtue of being able to start with a *tabula rasa*) to develop specialist expertise, a higher degree of flexibility and a more focused concentration on particular types of cases with a greater ability to explore the factual and specifically environmental context of those cases.

In terms of giving effect more effectively to Article 9(4) of Aarhus, then, history provides an explanation of why the modern tribunal system is more likely to provide better environmental access to justice than the current court system of judicial review.

I turn, now, to politics.

**Politics**

As I have perhaps foreshadowed, court-based judicial review has become the subject of suspicion by politicians. Only last week-end David Cameron giving an interview to the Times Magazine had this to say (in reminiscing mood) on the subject of (amongst other things) judicial review:

*‘I wish we’d spent more time in opposition thinking about how to de-clutter government. What I call the buggeration factor, of ... judicial review..’*

It is fruitless to debate the reasons for this in a talk of this nature but it is clear that the present Government mistrusts judicial review; hence the enactment of Part 4 of the Criminal Justice and Courts Act 2015. This contains provisions which in my view are likely to have a chilling effect on environmental challenges despite Aarhus.

It will, for example, make intervention more difficult and, for example, render interveners potentially liable to an adverse costs award in favour of a party to the main proceedings if even one of a number of conditions is satisfied.

It may be thought that at least two of these conditions have a particular application to environmental challenges where points of principle are often raised aside from the specific application of the facts to the main parties and where these points of principle may be the subject of representations by non-governmental bodies appearing as interveners.

The conditions that particularly trouble me are contained in s. 87(6)(b)-(c). An adverse award of costs may be made against an intervener where:

*‘(b) the intervener’s evidence and representations, taken as a whole, have not been of significant assistance to the court;*

*(c) a significant part of the intervener’s evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings.’*

Now it does not take a great deal of imagination to see how impecunious organisations with specialist environmental expertise that would have been likely to intervene in an environmental challenge without any real costs risk may, in future, be deterred from doing so because of the impending threat of an adverse costs order being made against them.

We must add to these provisions s. 84 of the new Act which (save in cases of exceptional public interest) requires courts hearing judicial review applications to refuse to grant relief on an application for judicial review if it appears to the court that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Plainly, the outcome for a specific applicant is not the same as the outcome more generally in terms of establishing environmental principle.

Although there is provision for environmental judicial review cases in the courts to be transferred to the Upper Tribunal there are three problems. First, there has not, as far as I am aware, yet been the transfer of any such case. Secondly, by specific statutory fiat many if not all of the provisions in the new Act will apply to tribunals. Thirdly, there is as yet no jurisdiction in the Upper Tribunal to hear and decide environmental judicial review cases. All this means that in practice environmental judicial review does not exist within our existing Tribunal system.

The politics that has engulfed judicial review is not especially intended to be directed at environmental cases. Indeed, because of Aarhus there is a regulation-making power in the new Act to exempt Aarhus-type cases from the cost-capping provisions that apply to other judicial review cases.

But the real point is that as long as successive governments see judicial review as a *‘buggeration factor’* all judicial review cases in the High Court at least are likely to be tarred with the same restrictive procedural brush whether or not they are transferred to the Tribunal. This means that only where Aarhus has been held to mandate a special immunity will there be exemptions from the general constraints. Put shortly, though, the cases are only clarifying where Aarhus does or does not apply on an incremental basis that is by no means easy to anticipate in advance. This is obviously unsatisfactory. It is also, I suggest, a back-to-front approach to environmental protective justice which, consistently with Aarhus, should be principled and effective.

This takes me, finally, to structure.

**Structure**

If history and politics have resulted in deficiencies in environmental judicial review protection what might creating a new environmental review jurisdiction for the Upper Tribunal do to improve the situation (including making us more Aarhus compliant)?

I believe that there are three elements of the tribunal system that would, in terms of environmental justice, be a considerable improvement on the present stasis in conventional court-based judicial review.

First, the Tribunal system is still quite new. Perhaps for that reason it seems to have a greater detachment and independence from the government than older procedures. The importance of this is that it is better equipped to create an identifiable jurisdiction with its own rules distinct from court-based review.

To quote the former Senior President of Tribunals, Lord Carnwath in a lecture he gave two years or so ago which included some interesting observations about the development of the tribunal system:

*‘[A] sense of partnership between judges and administrators was important in helping to give us a sense of cohesion and shared purpose to the new organisation. Not everyone had been convinced of the merits of bringing such an apparently disparate collection of jurisdictions into a single organisation. But as Leggatt had envisaged, it brought collective strength and a sense of common purpose to our dealings both with the courts and with the MoJ and other government departments, and a shared determination to work together for the improvement of the service for our users.*

*The Chambers structure has proved very effective, and could perhaps be replicated elsewhere in the judicial system. It gave the Chamber Presidents the power and authority to look in detail at the workings of their different jurisdictions, and to develop innovative ways of improving things...’*

The second point is related to the first. Precisely because each specialist jurisdiction in each Chamber is unique with different specialisms and with close monitoring by each of those Chambers’ respective specialist Presidents there is far more scope than in court-based judicial review to focus on context and to deploy expertise in a focused way. In court-based judicial review any judge may hear any case. There is no clear rationale for which judge hears which case and even in a court such as the new fast-track planning court my brief examination of the cases coming before the new planning branch of the Administrative Court does not suggest that all the judges hearing them have a planning background.

But my final point is, perhaps, the most fundamental. It is that conventional judicial review remains hidebound by an approach to law which detaches the judge from any interest in outcome. A system of tribunal justice has greater potential to examine the facts.

This is a complicated subject and no doubt capable of taking up hours of discussion in itself. But the potential for the relatively newly established tribunals to go beyond that which court-based judicial review can achieve was commented on by Lord Carnwath some years ago. He said this:

*‘With ... encouragement at the highest level, it is possible to consider how the Upper Tribunal might develop a role which goes beyond the traditional limits of judicial review, as practised by the courts. Even if the jurisdiction of the Upper Tribunal is limited to appeals on points of law, there is scope for it to develop a more extensive supervisory role, which may cross the traditional boundaries between law and fact as understood by the courts ... the solution even of problems categorised as “legal” may require specialist expertise going beyond that of the ordinary courts.’[[2]](#footnote-2)*

1. Macrory (2013) *Judicial Review – Proposals for Further Reform*. Submission to Ministry of Justice. Reproduced in Macrory (2014) Regulation, Enforcement and Governance in Environmental Law (2nd ed) [↑](#footnote-ref-1)
2. Robert Carnwath *Tribunal Justice – A New Start* [2009] Public Law 48 para 35 [↑](#footnote-ref-2)