Article

The legal effect of unlawful administrative acts: the theory of the second actor explained and developed

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THE CENTRAL CONUNDRUM: UNLAWFUL ADMINISTRATIVE ACTS ARE THE ORETICALLY VOID YET FUNCTIONALLY VOIDABLE

The decided cases make it clear that an unlawful administrative act is no act in law. Lord Reid in *Ridge v Baldwin* [1964] AC 40 said it all:

'Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void, and that was expressly decided in Wood v Woad (1874) LR 9 Ex 190. I see no reason to doubt these authorities'.

In *Anisminic Ltd v The Foreign Compensation Commission and another* [1969] 2 AC 147, the judgment of the House of Lords actually depended upon the fact that the unlawful administrative decision was a nullity. More recent authority is found in *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783 ,where Lord Lowry said 'the basic principle is that an ultra vires enactment, such as a byelaw, is void ab intio and of no effect'. Many other cases to like effect could be cited. An unlawful administrative act is thus undeniably void.

Unfortunately, it is equally clear that an unlawful decision is often effective until set aside by a court or other competent authority. And, if that unlawful decision is not successfully challenged, it will turn out to be as good as the most proper decision. The position is summed up by the following well known dictum from Lord Radcliffe's speech in *Smith v East Elloe Rural District Council* [1956] AC 736 at 769:

'An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders'.

This is a description of an act, which is *voidable*, i.e. effective until set aside by a court of competent jurisdiction. Yet, as we have seen, precedent requires that unlawful administrative acts are void. Moreover, it is contrary to the doctrine of *ultra vires*. This is because a voidable act exists, for a time at least, in law. Thus there must exist some power under which it is made. It follows that a voidable act is *intra vires* - yet every unlawful administrative act must be *ultra vires* and void.

The doctrine of *ultra vires* is vital to modern administrative law. It provides the constitutional basis for most of judicial review, it justifies the classic approach to ouster clauses (the reasoning of *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 depends upon the unlawful decision in question being *ultra vires* and void) and it is needed to ensure the availability of collateral challenge. For unless the challenged act is void it cannot be raised collaterally before a court that lacks power to quash an unlawful act administrative act, e.g. a magistrates' court. And it has recently made clear (*Boddington v British Transport Police* [1998] 2 WLR 639 (HL)) that the absence of collateral challenge undermines the rule of law and has consequences 'too austere and indeed too authoritarian to be compatible with the traditions of the common law' (Lord Steyn). Persons could be sent to gaol for doing an act that was not unlawful (I do not wish here to debate the merits of the *ultras vires* doctrine - which has been criticised by some in the recent past). The details of the debate are set out in *Judicial Review and the Constitution* (Hart, 2000, ed. C F Forsyth).

So here is the central conundrum that set me thinking about this problem: unlawful administrative acts are

theoretically void yet functionally voidable. As we have seen this conundrum lies near the heart of administrative law - both in terms of the constitutional justification for our subject and more pragmatically in the need for the survival of collateral challenge in order to buttress the rule of law. Theory, if it is to provide a sound basis on which administrative law may rest, must resolve this conundrum, while practice with such insecure and inconsistent theoretical foundations must be suspect.

A PRESUMPTION OF VALIDITY IS NOT THE WAY TO DEAL WITH THIS PROBLEM

The most common way in the past of approaching this problem has been to rely upon a 'presumption of validity'. For instance, this is what Lord Diplock said in *Hoffmann-La Roche v Secretary of State for Trade and Industry* [1975] AC 295 at 365:

'Unless there is [a successful challenge to the validity of a statutory instrument], the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed...' (Emphasis added).

But this is an unsatisfactory approach to the problem because:

(1) It is contrary to the rule of law in that it allows convictions to be founded on illegalities (e.g. *ultra vires* subordinate legislation creating offences is presumed valid until set aside by a court of competent jurisdiction) - this was understood (and approved!) by Lord Woolf in *Bugg v Director of Public Prosecutions* [1993] QB 473.

(2) The effect of the presumption is authoritarian in that it requires the ordinary citizen (who cannot afford to challenge questionable decisions in the courts) to accept as gospel everything that comes from somebody in apparent authority cf. *Christie v Leachinsky* [1947] AC 573 at 591 ('Blind unquestioning obedience is the law of tyrants and slaves...').

(3) The presumption undermines the *ultra vires* doctrine. The power that supports the validity of the unlawful administrative act (until set aside) must come from somewhere. Thus there must be implied a general warrant of power to officials to make decisions, however wrong or gross. There is no such statutory power.

(4) It is a blanket approach but there is no reason to suppose that a blanket approach is necessary or sound. A different response is needed in different circumstances.

(5) The displacement of the presumption requires the exercise of discretion (by the court) in making an appropriate order. But the rule of law should not depend upon the exercise of discretion - even by a judge.

THE THEORY OF THE SECOND ACTOR: RECONCILING THE EFFECTIVENESS OF UNLAWFUL ACTS IN CERTAIN CIRCUMSTANCES WITH THE CLASSIC PRINCIPLE OF ADMINISTRATIVE LAW

I had been aware of this conundrum and the great difficulties with the presumption of validity for many years but had never got anywhere near resolving them, until the time came to write an essay for Sir William Wade's *Festschrift*. I decided, with some trepidation, to tackle this most difficult of problems in my essay - which was eventually published under the title of ' "The Metaphysic of Nullity" - Invalidity, conceptual Reasoning and the Rule of Law' at p. 141 of the *Festschrift,* which was entitled *'The Golden Metwand and the Crooked Cord - Essays on Public Law in Honour of Sir William Wade'* (OUP 1998, editors Forsyth and Hare). And the theory of the second actor is the solution that I reached after much cogitation; it does, to my satisfaction, reconcile the effectiveness of unlawful acts in certain circumstances with the classic principle of administrative law.

The nub of the theory can be expressed in the following words from ' "The Metaphysic of Nullity" - Invalidity, Conceptual Reasoning and the Rule of Law' at p. 159.

'...unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depend upon the legal powers of the second actor. The crucial issue to be determined is whether the second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void'.

Although hedged about with jurisprudence and abstract analysis in the 'The Metaphysic of Nullity', the theory thus described is relatively simple. Unlike I believe all other academic approaches to the issue, the theory of the second actor turns the focus away from the unlawful act and on to the powers of the person who acts believing that the first act is valid. All the difficulties attendant upon seeking some interim validity within the first act are side stepped; and thus the classic principles of administrative law are reconciled with the effectiveness, in appropriate cases, of acts taken in reliance upon unlawful administrative acts.

Perhaps it may be useful to give some examples. Let us start with *R v Wicks* [1997] 2 WLR 876. Here the accused was charged with breach of a planning 'enforcement notice'. He had contested the validity of the notice unsuccessfully on appeal to the Secretary of State, but sought to raise it again as a defence to the charge. The House of Lords held that a true construction of the statutory words 'enforcement notice' meant simply a notice issued by the local planning authority that was

formally valid, i.e. the substantive validity of the 'enforcement notice' was not a precondition to the success of the prosecution. Here the first act is the making of the enforcement notice and the second act is Wick's conviction for breach of the notice. Clearly, while the enforcement notice had to exist *in fact* it did not have to be legally valid in order for a valid conviction to ensue. Thus, here the second actor could act validly notwithstanding the invalidity of the first act.

On the other hand, consider *Director of Public Prosecutions v Head* [1959] AC 83. Here the respondent was charged with having carnal knowledge of a mental 'defective' contrary to section 56(1)(*a*) of the *Mental Deficiency Act* 1913, but the certificate of two doctors certifying that the victim was a defective and the Secretary of State's order transferring her to an institution were *themselves* defective. That meant that the certificate and orders were void, yet their validity was fundamental to the offence. It followed that the Court of Appeal quashed the conviction and the Director of Public Prosecution's appeal to the House of Lords was dismissed. Clearly, the validity of the second act - the conviction of the accused - depended upon the validity of the first act, the victim's certification as a defective. In such cases the invalidity of the first act does involve the unravelling of later acts, which rely on the first act's validity. However, the voidness of the first act does not determine whether the second act is valid. That depends upon the legal powers of the later actor.

If the theory of the second actor does reconcile the effectiveness of unlawful acts in certain circumstances with the classic principle of administrative law, the important practical question remains: how can one determine when the second actor has power to act validly notwithstanding the invalidity of the first act? We will return to this question, but first I will consider the developments subsequent to the publication of 'The Metaphysic of Nullity'.

DEVELOPMENTS SUBSEQUENT TO THE PUBLICATION OF 'THE METAPHYSIC OF NULLITY'

(1) In Boddington *v British Transport Police* [1998] 2 WLR 639 (HL), the theory of the second actor as advanced in 'The Metaphysic of Nullity' approved by Lord Steyn (Lord Hoffmann concurring). It was not contradicted by any of the other law lords and there is nothing in their speeches inconsistent with it. I must be very grateful for this early recognition of the theory - it would doubtless otherwise have languished unseen for many years.

(2) Then in R *v Central London County Court, ex parte London* [1999] 3 WLR 1, the theory of the second actor was discussed but neither approved nor disapproved, but the analysis of the case is consistent with the theory.

(3) In *R v Governor of Brockhill Prison, ex parte Evans* [2000] 3 WLR 843 (HL), the theory of the second actor was not discussed but the outcome of the case is consistent with the theory (the case concerned a prisoner whose conditional release date had been calculated by the prison governor in good faith on the law, as it was then understood. But in decisions made while she was incarcerated, the Court of Appeal made clear that the law had been misunderstood. The result was that the prisoner was released 59 days after she should have been. The interesting point here is that the first act - calculating the date of release - and the second act - holding the applicant until that date - were performed by the same person - the prison governor. The prisoner-recovered damages showing that in fact the validity of the second act did require the validity of the first act).

(4) Then Pleming and Robb in [1999] Judicial Review 248 criticised the theory in terms. The theory was 'broadly welcomed' but, with respect, misunderstood. Pleming and Robb accept that 'if the legality of the second actor's actions are in issue...the analysis begins with an examination of the powers of the second actor', but they then go on to say that'...the theory [of the second actor] suggests that whenever the second actor (reasonably) relies on an unlawful administrative act, that the reliance will be protected and the second actor's actions will be justified' (at 256). But this is not the theory of the second actor.

According to the true theory, sometimes the second actor will have power to act validly notwithstanding the invalidity of the first act (as in *R v Wicks*) and sometimes he will not and the second act too will be invalid (as in *DPP v Head*). Whether the validity of the first act is required for the validity of the second depends upon the legal powers of the second actor, which have to be determined by the court facing this issue.

SOME EXAMPLES OF THE THEORY EXPRESSLY DEALT WITH IN STATUTE

Most often, of course, this issue of whether the second actor has power to act in the event of the first act being invalid is not expressly dealt with in the statute granting power to the second actor. But sometimes it is. And there are several statutes, which address the issues expressly - usually giving express power to the second actor to act even if the first act is invalid. Thus the *Marriage Act* 1949 provides in s. 48(2):

'A marriage solemnised in accordance with the provision of this Part of this Act [second act] *in a registered building which has not been certified as required by law as a place of religious worship* [first act] *shall be as valid as if the building had been so certified'.*

And in section 49 (d) the same Act provides:

'If any persons knowingly and wilfully intermarry under the provisions of this Part of this Act [second act]*...on the authority of a certificate* [first act] *which is void by virtue of subsection (2) of section thirty-three of this Act* [limiting the period of validity of a certificate]*.... the marriage shall be void'.*

It is interesting to note that all the examples that I have thus far found deal with ensuring that the second actor has power to act notwithstanding the invalidity of the first act.

THE WAY FORWARD

Where the powers of the second actor are not expressly delimited it is necessary to develop principles to guide the courts in deciding that issue as called for by Pleming and Robb in the following passage:

'The important question is: In what circumstances can the step from reliance [on the validity of the first act] *as a matter of fact to reliance creating lawful justification be taken? In other words, in what circumstances is it right to give greater weight to the principle of legal certainty than to the principle that the state is subject to the law. It is neither inevitable nor necessary that the fact of reliance should create a legal power.... in each case specific reasons* [why the second act is valid] *need to be adduced within a framework of principles. The criteria to be applied should be consistent with those applied by the courts in criminal collateral challenge cases, as the underlying principles are the same. The court ought to start the analysis with a strong bias in favour of keeping the state within the law...There is always a danger that the protection of legal certainty may slip into the protection of administrative convenience'.*

A start has already been made by the Lord Chancellor, who in his speech in *Boddington* said that a restriction on the availability of collateral challenge (i.e. second act having power to act not withstanding the invalidity of the first act) would be the more readily inferred where the challenge precluded was to:

'... administrative acts specifically directed at the defendants, where there had been clear and ample opportunity provided by the scheme of the relevant legislation for those defendants to challenge the legality of those acts, before being charged with an offence. By contract, where subordinate legislation ... is promulgated which is of a general character... the first time an individual may be affected by that legislation is when he is charged with an offence under it... In my judgment in such a case the strong presumption must be that Parliament did not intend to deprive the accused of an opportunity to defend himself in the criminal proceedings'.

Two further such principles may be proposed: first, where human rights would be infringed upon were the act of a second actor to be unexpectedly invalid, then a court may readily infer that the second actor has that power to act validly in the circumstances. The same principle must work the other way round. Where an act of the second act would infringe upon human rights if it were unexpectedly valid, this may justify an inference that the second actor lacked in those circumstances the power to act. This it seems to me flows readily from section 3(1) of the *Human Rights Act* 1998.

Secondly, where it is plain from the relevant legislation that the first act is intended to be relied upon by second actors and that there would be substantial injustice and administrative inconvenience if those second acts were afterwards found to be void because of the invalidity of the first act, then the court might infer an intent that the second actor could act validly notwithstanding the invalidity of the first act (N.B. I am **not** suggesting a balancing of 'legal certainty' and 'legality' on a case-by-case basis, but a general principle relevant to the interpretation of the statutes involved).

I am conscious as I conclude that these suggestions for the way forward are not as concrete as I would like. But, as the decided cases provide the anvil upon which the details will be beaten out the position might clarify and more precise principles will emerge. What I am sure about though, is that it is only the theory of the second actor's change of focus that allows such principles to be developed and takes this issue of the effectiveness of void acts away from the vagaries of discretion and into the realms of law.

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