Introduction

I want to start with some observations about labels. The term Public Law is one with which as a lawyer trained in Scotland I have always had some difficulty. When I was at Edinburgh University, Public Law was the label which was given to jurisprudence, the philosophical aspects of law and legal systems. Administrative Law was the label given to those laws and processes which belong to local government and administration, roads, sewers, licensing, taxation and such like. The process for challenging the legality or propriety of the exercise of powers did not have any clear label. It was buried in the forms of procedure, in Constitutional Law and in relation to the practices of local government in Administrative Law. It had no independent standing on its own. Up until the middle of the last century there was no problem about that. As Lord Reid observed in the English case of Ridge v Baldwin [1964] AC 40, 77: “We do not have a developed system of administrative law, perhaps because until fairly recently we did not need it”.

When the need did arise and came to be recognised, the category of cases which then came to the fore, and in particular the cases which we now see as falling under the supervisory jurisdiction of the Court of Session, required a label. Lord Reid had referred to Administrative Law. That is a label which has been used by some, as for example the editors of Session Cases who index the cases of judicial review under that heading. But as Lord Wilberforce explained in Davy v Spelthorne BC [1984] AC 262, 276, England proceeded to import the terms “private law” and “public law” from the continental countries which had separate systems concerning public law and private law in a way which was foreign to the legal systems in the United Kingdom. What then appears to have happened was a quiet adoption in Scotland of the terminology which was being adopted in England and people began to use
the term Public Law in a sense which was alien to Scottish tradition. Public Law was now understood as the law which enforces the proper performance by public bodies of the duties which they have to the public.

One vice which this practice carried in its train was the idea that these terms were more than mere labels but contained within them a difference of substance which could be used as a measure to define the boundaries for judicial interference in administrative acting. That may have suited the English approach but it was dangerously limiting for Scotland. While Public Law may include much of the material of judicial review, it does not comprehend the whole of it. Judicial review should be available both in so-called public matters as well as disputes where there is no truly public element in the ordinary sense of that word, such as an arbitration between ingoing and outgoing private tenants as in the old case of Forbes v Underwood (1886) 13 R 465, or the disciplinary proceedings of a club or association (e.g. St. Johnston Football Club Ltd v Scottish Football Association 1965 SLT 171). Correspondingly, while judicial review may comprise a significant part of Public Law, there are other methods of enforcing the duties of public bodies than the ultimate resort to judicial review.

In the first part of this talk I am going to say something about the development past and future of judicial review. I shall turn at a later stage to say something about the development of what might broadly be referred to as Administrative Law. I hope thereby that I shall have substantially covered the subject matter of this conference.

**History**

It is the more curious that Scotland should have adopted the terminology of Public Law from England when one recalls that the history, source and procedures for what we now know as judicial review were significantly different in the two jurisdictions.

It is of course not to be supposed that judicial review sprang fully created from the head of Lord Dunpark when he drafted the original of what is now Chapter 58 of the Rules of the Court of Session. The remedy with which he
was concerned had been available in some form or other for over 300 years, and the jurisdiction had been long recognised with appropriate procedural remedies relating to the control of administrative action. At an early period it was part of the jurisdiction of the old Scottish Privy Council. The Council would intervene to nullify unlawful civil proceedings or provide a remedy for fundamental errors in criminal convictions. When the old Scottish Privy Council was abolished following the union of the parliaments of Scotland and England, this jurisdiction which the Council had exercised then devolved onto the Supreme Court.

It is important to note that this jurisdiction is firmly based on principle. That principle was, in the words of Lord Kames, that every wrong must have a remedy (Historical Law Tracts (4th ed), 228). He looked forward to a time when it would be a recognised maxim “That it is the province of this court, to redress all wrongs for which no other remedy is provided”, although he believed that this rule had not yet in his day produced any steady influence on the practice of the court. But the principle had been for long recognised by the court. Some fifty years before Lord Kames was writing, in the case of Proprietors in Carruber’s Close v William Reoch (1762) M 13175, it was expressly declared that the Court of Session might correct unsuitable regulations made by the Dean of Guild “upon the principle that every evil must have a remedy”. The origin of the jurisdiction in the Court of Session was recognised by Lord Kames as being the inherent equitable power in a supreme court to provide a remedy where no other existed. In a broad sense of the term it is an expression of the nobile officium of the Court of Session. It is of course a power which is available both in civil and in criminal matters.

There are countless examples in the books of the courts exercising their supervisory jurisdiction upon grounds familiar to us today. The records of the proceedings of the old Scottish Privy Council provide examples from the 16th century. Later examples can be found under the title "Public Police" in Morison’s Dictionary. That now outdated but once invaluable textbook by Muirhead on the Burgh Police Acts contains a store of illustrations from the 19th and early 20th centuries. The older volumes of reported cases contain even earlier examples, such as the decision of the Court of Session in 1752 that
the Town of Perth was acting beyond the scope of certain statutory powers on which it was founding when it tried to stop a distiller from importing ale into the burgh of Perth to sell it to the inhabitants (Town of Perth v Clunie (1752) Elchies, Burgh No 34).

**England**
The position in England has been significantly different. In England the process for what later came to be judicial review was for a long time carried on through the procedure of the prerogative writs. These were issued in the name of the Crown with the aggrieved person being added ex parte. The system did not rest on the broad equitable principle which was the foundation of the Scottish approach. Equity in England was originally the preserve of a particular jurisdiction. The remedies available were also more limited. In particular the availability of a declarator in Scotland was noted with some jealousy and admiration in England, at least by Lord Brougham, who closed his speech in the case of Earl of Mansfield v Stewart (1846) 5 Bell’s App 139 at 160 with these words: “My Lords, I cannot close my observations in this case without once more expressing my great envy, as an English lawyer, of the Scotch jurisprudence, and of those who enjoy under it the security and the various facilities and conveniences which they have from that most beneficial and most admirably-contrived form of proceeding called a declaratory action”.

Reforms in England gradually began to bring the two systems closer together. Equity came to be merged into the general legal system by the Judicature Acts of 1873 and 1875. The remedy of the declaration was introduced through a series of statutes between 1850 and 1875. The grounds on which judicial review might run came to be seen as substantially the same in the two jurisdictions. On the procedural side England introduced a new special form of action by the Supreme Court Act 1981, namely an application for judicial review. Prompted by the observations of Lord Fraser of Tullybelton in Brown v Hamilton District Council 1983 SC (HL) 1, Scotland introduced its own form of procedure for applications to the supervisory jurisdiction by an amendment to the Rules of Court in 1985. But while England was the first to introduce a special procedure for judicial review, Scotland was able to be the first directly to invoke rights provided by the European Convention on

**Northern Ireland**

It is not to be forgotten that Northern Ireland has its own courts and its own legal system, and that a process of judicial review is available there. That process is much like the English system, and while there have been some interesting and important cases decided in the judicial review court in Northern Ireland I do not propose to go further than note its existence in the context of the United Kingdom.

**Leave**

While the grounds for review have become broadly the same in Scotland and England, differences remain both in basic principle and in procedure. One initial difference in procedure lies in the English requirement for leave to make an application. It appears from the available statistics that a considerable proportion of applications in England fail at the stage of leave. Scotland appears to manage perfectly well without such a preliminary consideration of the case. If the proposed application is obviously without merit then it can be dismissed at the stage of the first order. The number of applications in Scotland would not appear to justify the addition of a distinct hearing to obtain leave to proceed. Sadly however, as I shall note later, it appears that this is not to be recognised in the work of the new Upper Tribunal.

**Growth**

Both the introduction of the new procedure and the accessibility to the Convention rights in the courts of Scotland and England gave rise to a significant increase in the number of cases of judicial review. There is a lesson to be learned here in the way in which a reform of procedure can open the way to a greater access to the courts. One has been the introduction of the rapid process for judicial review which was achieved simply by a change in the Rules of Court in 1985. It gave rise to a quantity of applications raising issues which could no doubt have been trailed through the earlier procedures,
but which were left alone because the procedures were too slow and too costly. Another example can be seen in the passing of the Human Rights Act 1998 which gave a direct access to the local courts on questions of human rights. That prompted a quantity of litigation on issues which could well have been aired before the Act was passed by application to the Strasbourg court but which no one had troubled to pursue. The moral is that if you simplify procedure you will open the way for the airing of grievances which will otherwise remain unresolved.

The number of cases which have come before the courts in England and in Scotland reflects the continuing importance of the availability of a remedy against administrative action. Between 2000 and 2005 the number of applications for judicial review in England has year upon year fluctuated, but overall discloses a general upward trend. England has developed its own administrative court and the suggestion has been made that that court should extend its sittings to certain regional centres in order to accommodate the quantity of business. In the same period in Scotland there was a similar upward trend albeit with fluctuations. That trend has continued quite markedly in Scotland. The number of applications rose from 229 in 2005 to 231 in 2006, to 239 in 2007 and to a surprising 372 in the first nine months of 2008. In both countries immigration cases have featured as the most prominent single category and various aspects of human rights have become regular ingredients in the grounds on which review may be sought. It seems likely that the current trend will continue. There is a very real concern nowadays that governmental powers may be open to abuse and that powers which may encroach upon private freedoms may be used for purposes different from those for which they were originally granted. One reads for example from time to time of cases where provisions made in the interests of countering terrorism have been used to deal with activities which no one would ordinarily see as involving a terrorist threat.

The future
What then of the future? The whole system of civil justice in Scotland is presently the subject of formal consideration. The recent report by the Scottish Executive on Civil Justice says little about judicial review. It observes that
changes in immigration law may affect the amount of judicial review cases coming before the Court of Session (para. 1.8) But it does not detail particular concerns or deficiencies about the remedy or its availability. It remains to be seen what views will be expressed in the ongoing comprehensive review of the structure, jurisdiction, procedures and working methods of the civil courts. The Scottish Committee of the Administrative Justice and Tribunals Council, which has submitted its first report in October 2008, is keeping a vigilant eye on the development of administrative justice particularly at tribunal level. It may be hoped that the work of that committee will not only achieve an improvement in the functioning of tribunals and inquiries but enable there to be a greater coherence of the whole system of administrative justice in Scotland.

**Developments**

Developments in administrative law, and in judicial review in particular, can be usefully inspired by conferences such as this present one. Reform sometimes requires legislation. Other improvements may be managed by changes in practice or by the developing jurisprudence of the courts as and when opportunity arises. But in that context one observation may be made. The courts can only develop the law when a particular case happens to arise which gives the court the opportunity to do so. Much of the initiative for such development accordingly lies in the hands of those who advise in advance of litigation and who argue the case before the court. Something at least of the credit for the progress made in many leading cases should be give to those whose thought and imagination prompted the argument and persuaded the judges. I believe that every encouragement should be given to practitioners to start the process which leads to reform, whether by a piece of lateral thinking, or by the determination to secure a remedy where the situation seems to demand one or to tread where no one else has trod before.

**Locus standi**

One subject which may deserve consideration is that of locus standi. It might even be suspected that England has developed in this connection more liberally than has been yet managed in Scotland. England has looked simply to the qualification of a sufficient interest. Scotland has for some years been
wrestling with the twin requirements of title and interest, concepts which may have fitted well with the definition of locus standi in other contexts, particularly that of the enforcement of feudal conditions, but which may be overelaborate for the needs of judicial review. I should like to think that that matter has now been substantially resolved. Indeed the test for the purposes of judicial review proceedings before the new Upper Tribunal (s 16 of the Tribunals, Courts and Enforcement Act 2007) is simply one of a sufficient interest. But there may still be room for development in the ability for representative bodies to raise proceedings for review. Of course in many cases it may be possible to find one or more individuals who are personally affected by the issue and in whose name proceedings may be taken, but it would be advantageous not to have to resort to such devices to raise a challenge but more easily enable bodies who are not themselves directly affected to raise proceedings for review where there is a real matter of concern to the community.

Error
Another area where at least clarification may be desirable is that of error of law, as a ground for review. The old view that a tribunal might with impunity commit what was called an error of law within jurisdiction or an intra vires error lingered on in Scotland longer than was perhaps appropriate. English law has been more liberal in this regard. But there now seems to be no good reason for supposing that the laws of Scotland and of England are not the same in this regard. Error of law may not be a universal ground for challenge in Scotland. Cases can occur where it is not available (e.g. Diamond v PJW Enterprise Ltd 2004 SC 430). But it would be useful for the scope and extent of the concept to be explored further and for this ground for review be comprehensively analysed and clarified.

Judicial activism
One more general matter which may give rise to concern and which may deserve some consideration is the achievement of a better understanding or a more co-operative relationship between the executive and judiciary. I would like to think that this is a problem which is more real south of the border than it is in Scotland. But one often hears charges of so-called judicial activism. The
executive may find themselves frustrated by the judges. Well-intentioned policies are found to be illegal, contrary to human rights, or simply ultra vires. The judges are then accused of becoming involved in politics. Politicians urge the judges to show restraint in deference to the sovereignty of Parliament when exercising their powers of judicial review. Questions arise whether the executive is becoming too autocratic and whether the judges are overstepping the limits of their proper function. It is pointed out that the judges are not accountable within the confines of the electoral system. But on the other hand they are bound to set out in their judgments the reasoning on which their decisions have been given so that the process is open to public scrutiny. Moreover their judgments may be open to appeal. And they remain the eventual constitutional guardians of the rule of law.

Of course the kinds of questions which now come before the courts may bring the judges very close to the political arena. But the distinction between the functions is and has always been perfectly clear. Matters for political judgment are not matters with which the courts are properly concerned. Where the courts can intervene, the executive should recognise that the judges are not doing otherwise than preserving the constitutional rights of the citizen. The judges must also be aware of the political dimension of the issues with which they have to deal. The respective functions of the executive and of the judiciary must be recognised and respected. The ideal would be that both should perform their different functions with mutual respect and understanding for the eventual benefit of society and its citizens.

In looking for possible ways of improving the relationship between the judiciary and the executive one might consider the relative restraint on the readiness of the courts to entertain future or hypothetical questions. It has of course been well settled that the courts will not entertain questions which are not real or immediate. As Lord Justice Clerk Thomson once observed (Macnaughton v Macnaughton’s Trs 1953 SC 387, 392): “The courts are neither a debating club nor an advisory bureau”. On the other hand what does constitute a live practical issue such as to make the matter justiciable is not always easy to determine. Reality and immediacy may come to depend on the circumstances of the particular case. But I wonder if there could be advantages in the
opportunity to bring questions to the court in advance of legislation, to test the legality or otherwise of proposed measures in advance, rather than allowing bad legislation to be passed and requiring it to be subjected later to challenge in the courts. I am not suggesting that we should develop a distinct branch of the administration which would be charged with the vetting of proposed legislation in the style of the consultative or advisory sections of the French Conseil d’Etat. The matter must remain one of a judicial process. There would require to be at least a potential issue and presumably a friendly contradictor. But the opportunity for challenges to be made to the legality of proposed legislation in advance of its presentation might assist towards mitigating the supposed confrontation which is sometimes thought to exist between the executive and the courts.

Administrative law
I turn now to the more general consideration of what I have referred to as administrative law.

The latter part of the last century saw the development of an extensive series of tribunals. The enormous growth of regulation and control which then occurred necessarily gave rise to the need for mechanisms to resolve the many and varied kinds of dispute which arose in the course of their implementation. The kind of questions which required to be decided were not such as were readily open to resolution by the traditional application of legal principle but called for an approach which looked to public interest and social policy. They also required a speed of resolution and simplicity of procedure which the traditional court process did not provide. For a variety of reasons the machinery for resolving the many potential disputes to which the new legislation gave rise was found in the creation of a multitude of specialised inquiries and tribunals. This diffuse development grew considerably during the latter half of the last century while the courts stood somewhat on the sidelines, taking perhaps too little positive initiative in the process. Appeal from the statutory tribunals was one link with the courts, and the remedy of judicial review provided another. But what was clearly lacking was a coherent scheme for the whole processes of administrative law. What also
remained unresolved was a clear structural relationship between the tribunal system and the courts.

The solution advocated by the late Professor John Mitchell to the problem of providing a sufficient judicial control of administrative acting was the establishment of a new body with a real administrative jurisdiction. He wrote (Administrative Law (2nd ed), 322) that “the power of a court is needed to match the power of government, but the law it administers must be attuned to the needs of a modern state”. What he proposed was the creation of a new court charged with these purposes, as “Only a new body can break the established patterns easily enough to establish a coherent and efficient jurisprudence in this vital field of the modern relationship of man and the state”. He continued by indicating that the problems of keeping the executive with all the powers which are needed for the efficient control of the realm under control are not insoluble. “An administrative jurisdiction can be, and has been proved to be, an effective solution, providing proper protection for the interest of the state and individual with all the weight of a judgment while at the same time avoiding the danger of trying to convert government into a judicial process”.

Much has of course happened since he wrote these words. We have developed various forms of remedy such as the greater availability of ombudsmen or commissioners who can receive complaints and process them at little or no cost to the complainer. Access to such remedies can be direct and simple, but such bodies may lack teeth. The effectiveness of a court order should not be underrated. And we do now have a special expeditious procedure for cases of judicial review. The developing strength of the remedy of judicial review has gone a considerable way to providing a powerful judicial control. But on the other hand administrative law has developed significantly over the last 50 years. And now a potentially major change is about to be developed in the working out of the Tribunals, Courts and Enforcement Act 2007. Under its provisions the whole tribunal system acquires a coherence and control which has long been seen as desirable. Here is a new and vital structure for administrative law. But there are to my mind two matters which remain for concern.
Under this Act, certain areas of the work of judicial review will be transferred away from the Court of Session to the new Upper Tribunal. That the development of administrative law has taken this direction is in my view a matter for regret. This has broken the principle on which the Scottish system of judicial review has rested hitherto and may simply water down the importance of the unique remedy which was the prerogative of the supreme court. Moreover the new system necessarily covers the whole of the United Kingdom, and the distinctions between Scottish and English practice can in that context readily become blurred. It seems from s 16 of the Act that the English requirement for leave and the English test for locus standi have been adopted for the Upper Tribunal on both sides of the border. The full scope of the change has yet to be seen and the effect of it yet to be assessed. But it could be thought that it would have been preferable to work towards a cohesion of the whole system of administrative law and practice rather than dividing off parts of the jurisdiction of the supreme court in judicial review and entrusting them to a new body.

The second matter is that of the structural relationship between the new tiered system of tribunals and the courts. Court of Session judges and sheriffs may be judges on the first-tier tribunals and the Upper Tribunal. But is there a sufficiently solid structural link between the two institutions?

**An Administrative Court**

One course which might be suggested could be the creation of what at least in name would be a new administrative court. It could initially be achieved by a simple allocation of the business of the Court of Session to a special department or division of the court. It could have both courts of first instance and courts of appeal. Thus it could include within its jurisdiction the exercise of the supervisory jurisdiction in civil matters and also take over administrative appeals, such as appeals from the decisions of the Upper Tribunal Chambers where such appeals may lie. The present statutory appeal courts, such as Lands Valuation Appeal Court, could also be included. There may indeed be advantages for the Court of Session in separating off the considerable bulk of statutory appeals which presently impose a heavy burden on the existing work of the court.
The purposes of such a development would be to involve the courts more closely with the overall system of administrative law, to accelerate the progress of any matter falling within the scope of administrative law and to provide a more particular expertise in the work of administrative law. The relationship between the Upper Tribunal and the new court would one matter for development. But while the new department would still be a part of the Supreme Court, it could be the more free to develop its own processes with a greater flexibility than those of the ordinary civil courts. Ideas might then be developed towards easing access to judicial review, even without, at least initially, the need for professional assistance or professional legal representation. It might be possible for a judge with the powers but perhaps not the panoply of the Court of Session to be available for direct access to the citizen, to deal at least with those more minor infringements of rights which irritate without being over-serious but which if allowed to pass unchecked may encourage a lowering of standards and further neglect of the rights of the citizen. At the least a separate department with its own processes and procedures, calculated to secure economy, simplicity and speed, might well secure processes which are proportionate to the character of the particular issues involved and a system which gives real value for money - and those are the two key principles which the executive has formulated for the current civil justice reform (Civil Justice, p 15).

Perhaps at a later stage, if the business of the administrative court grows as it might well do, then it might not only relieve pressures within Parliament House but also enhance the image of administrative justice if the administrative courts could be housed in some separate building nearby. Indeed in time it might be possible to combine in one building the administrative wing of the Court of Session and some senior elements of the new tribunal structure so as to achieve a more real unification of the whole system of administrative law. The financial implications of such a course would require to be considered, but if administrative law continues to develop as presently seems likely it is a course which might need serious consideration.
Public awareness
It is one thing that there should be remedies available to the citizen in his or her complaints against the state, but it remains of vital importance that the availability of those remedies should be well known to everyone. It is said that judicial review does not have the prominence in the legal system or the public mind which it deserves to have. Certainly when you appreciate the standing which a Conseil d’Etat enjoys in the continental countries which possess one, the Scottish equivalent can seem quite undistinguished. In the days when the jurisdiction was exercised by the Privy Council, the Scottish Conseil d’Etat if one can make that parallel, then the pre-eminence of the jurisdiction was assured. But when the matter passed to the Court of Session there was a real risk that it would simply become submerged in the general run of cases within the scope of the work of the Supreme Court, and not retain the prominence which as the prerogative of a supreme court it deserved to have. The remedies which were available in judicial review cases, such as for example interdict, suspension, implement and declarator, were not unique to those cases and it was only the subject matter or the particular ground of complaint which remained to identify these cases. One consequence has been that it was not immediately obvious to the lay public that there was here a special jurisdiction which was being exercised, with remedies available for them in a multitude of situations where they had grounds for complaint about illegalities or improprieties.

In relation to the particular remedy of judicial review the introduction of the special expeditious procedure for dealing with these particular kinds of case has gone some way to bringing the remedies available to the notice of the public. As I mentioned earlier, it is surprising how a procedural change can open the way to a greater accessibility for the public to the justice system. A special department of the Court of Session denominated as the Administrative Court might go some further way towards enhancing the importance of administrative law and making its availability more evident to the public mind. The Scottish court system would then be seen to rest on three pillars: the criminal courts, the civil courts and the administrative courts.
I began this talk with some observations about labels. May I conclude with some observations on a similar theme.

This speech has been billed as a keynote speech. I do not know when this phrase first became into fashion but it certainly seems to be that no conference nowadays can exist without a keynote speech. Often it is given by some senior governmental figure who will appear briefly at the start of the proceedings, make some important announcement about government policy or government intentions relating generally to the subject matter of the conference and then disappear leaving the conference to get on with its own business. But I have often wondered what the particular magic of the keynote element was meant to be. The problem is that one who has not been engaged with the original planning of the conference will probably not know precisely in what key the conference is intended to be. I do not know the messages which your speakers today will bring. Will they be full of concerns and distress? Is the key note then a gloomy C sharp minor, worrying about the present or future state of Public Law in Scotland? I hope not. What I would propose is the joyful key of D major, full of pride for the past tradition and full of confidence for the future. Scotland has a solid base of principle on which to develop a jurisdiction the value of which has become all the more evident over the past 50 years. The task of ensuring that government lives by the rule of law and respects the rights and principles of a free democratic society remains one of major importance. Scotland is well placed to secure that that work continues to be efficiently performed.

A conference such as this provides a great opportunity to collect information about the development of public law and also to air ideas, whether meritorious or not, on the way in which things might progress. I hope that such thoughts as I have expressed may at least serve to stimulate discussion and I wish this conference every success.

LORD CLYDE