PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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> best institutions to achieve these aims will not necessarily be courts ...; and (4) that the goal of this project should be to enhance individual and collective liberty where liberty is conceived of as something which is, if not constituted by the state, then ... at least facilitated by it, and ... certainly not necessarily threatened by it.[132]

An important aspect of the green-light/functionalist position is hostility to the courts, which are seen as opposed to the values of administration, and as unrepresentative and therefore undemocratic mechanisms for regulating executive action.[133] Supporters of this position are therefore keen, according to Harlow and Rawlings, to promote 'alternative, democratic forms of accountability'.[134] While red-light theorists favour external, retrospective, *judicial* controls over decision-making, green-light theorists favour prospective, internal, *political* controls, causing Harlow and Rawlings to emphasise the 'characteristic reliance of green light theorists on political and administrative institutions'.[135] The logical consequence of this reliance is, of course, a demand for judicial restraint: courts should not seek to substitute themselves for the rightful decision-maker chosen by Parliament.[136] This view of the appropriate roles of the various institutions is explained by the green-light theorists'/functionalists' enthusiasm for interventionist government—the fourth aspect identified by Tomkins in his summary. Harlow and Rawlings characterise early theories within this school as:

> *administration centred*—the role of administrative law was not to act as a counterweight to the interventionist state but to facilitate legitimate government action—and *collectivist* in character, advancing the claim to promote the public interest or common good.[137]

Loughlin seemingly goes further, arguing that functionalism 'has a certain affinity with a political theory of socialism'.[138] Having characterised courts as unrepresentative and predominantly conservative bodies which were inclined to stand in the way of the democratic will, green-light theorists/functionalists were naturally hostile to extensive judicial review of executive action.

According to both Harlow and Rawlings and Loughlin, amber-light theory or liberal normativism has emerged in recent years as a consensus position, with theorists who might previously have fallen into other camps coming to favour at least some components of this approach.[139] Tomkins characterises such theorists as believing:

> (1) with red-light theorists that law is both discrete from and superior to politics; (2) that the state can successfully be limited by law, although that law ought properly to allow for

[132] N 127 above, pp 158–9; see also M Loughlin, n 125 above, pp 60–1.

[133] C Harlow and R Rawlings, n 124 above, pp 72–3.

[134] N 124 above, p 74; see also M Loughlin, n 125 above, pp 189, 204–5.

[135] N 124 above, p 76. See also M Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Oxford, Hart, 2000), pp 208–13, ch 15.

[136] N 124 above, p 79.

[137] N 124 above, p 71; see also M Loughlin, n 125 above, pp 167–8.

[138] N 125 above, p 105; see also below, pp 133–7.

[139] C Harlow and R Rawlings, n 124 above, p 90; M Loughlin, n 125 above, ch 9.

> the administration to enjoy a degree—albeit a controlled degree—of discretionary authority; (3) that the best way of controlling the state is through the judicial articulation and enforcement of broad principles of legality; and (4) that the goal of this project is to safeguard a particular vision of human rights.[140]

Amber-light/liberal normativist theorists thus stress the use of principles, the structuring of administrative discretion, the notion that rights may sometimes trump policy considerations, and reliance on a combination of fire-watching (internal) and fire-fighting (external) controls over public power. Such theorists focus on judicial remedies, like their red-light counterparts, but prioritise the constitutional role of the judiciary to a far greater extent. Given that amber-light theory/liberal normativism is a middle position, it is perhaps unsurprising that there has been speculation concerning the degree to which it is distinctive from its rivals. Tomkins suggests, for example, that on the one hand, amber-light theory/liberal normativism is part of the broader idea of liberal-legalism, which is not confined to administrative law and instead concerns the role of courts in all areas of the constitution;[141] on the other hand, due to its stress on the role of courts, amber remains a 'shade of red'.[142]

There is, it must be said, a degree of ambiguity about the coherence of the three approaches described above,[143] and about the extent to which players in contemporary public law—whether judges or theorists—can easily be characterised using such terms of reference.[144] It remains the case, however, that the three approaches have been widely seen as providing a useful and illuminating guide—even if only a rough guide, in which certain boundaries are contestable—to the ways in which we think about public law. This being so, it is important to consider the extent to which they can properly explain the multi-layered constitution which now exists. Cause for doubt on this front is provided by the fact that the analyses of and arguments about many of the cases discussed so far in this chapter seem to be guided, not just by competing perspectives concerning the proper role of national courts as opposed to the Westminster Parliament and the national government, but also by competing views concerning the appropriate role of national courts *in the light*

[140] N 127 above, p 159.

[141] However, it should be noted that Loughlin does not himself deploy the term 'liberal-legalism' in his book, *Sword and Scales* (n 135 above).

[142] N 127 above, p 158. Note also Loughlin's suggestion that both amber- and red-light theories have their origins in normativism, n 125 above, pp 62 ff, 102–4.

[143] See P Craig, n 126 above.

[144] Two examples will demonstrate this. First, Harlow and Rawlings and Loughlin both suggest that Sir William Wade has shifted from the red- to the amber-light camp in recent years (*Law and Administration*, n 124 above, ch 4; *Public Law and Political Theory*, n 125 above, pp 213–4, 221, 223). However, Wade's own view—both of theory in general and of the theoretical stance attributed to his work—may not entirely match up with this: see Wade & Forsyth, n 19 above, pp 6–7, 8–9. Secondly, Michael Taggart characterises Sir John Laws as a contemporary Diceyan ('Reinvented Government, Traffic Lights and the Convergence of Public and Private Law. Review of Harlow and Rawlings: *Law and Administration*' [1999] *PL* 124 at 132)—suggesting, using the above analyses, that he should perhaps be seen as a red-light theorist/conservative normativist. However, Sir John Laws' extra-judicial writings—for example his discussion of fundamental common law rights in 'Law and Democracy', n 27 above—are not necessarily consistent with this view.

of the requirements of EC law and/or the Convention, mediated via the domestic constitution.[145] In other words, one's opinion about the exact nature of the multi-layered constitution—about whether, for example, EC law takes priority over domestic law due to factors of a national or purely European character, or about how far domestic courts can rely upon the jurisprudence of the Strasbourg Court where that jurisprudence appears to challenge arrangements of a long-established constitutional nature at national level—can be just as, if not more, influential in cases involving either EC law or Convention points than the bare answer to the question whether one is a red-, green- or amber-light theorist.

The words 'can' and 'bare' are used in the preceding paragraph since there is frequently, in practice, an overlap between a particular theorist's position in terms of the red-light/green-light/amber-light scale and their view concerning 'multi-layered' issues. Given their emphasis on the importance of individual rights, amber-light theorists would, for example, tend to be more intuitively sympathetic to Convention norms—and to their importance in domestic law—than might theorists falling within other camps.[146] Murray Hunt's analysis of the actual and potential use of Convention rights by national courts in the period prior to the enactment of the Human Rights Act is a justifiably influential example of such an approach.[147] Nonetheless, a proper understanding of the role of the courts requires us to recognise that there is, as a matter of *logic*, a conceptual distinction between 'multi-layered' issues and red-light/green-light/amber-light issues, even if the two frequently overlap in practice. Three practical examples will illustrate this. First, regardless of the divisions between the red-light, green-light and amber-light schools concerning the appropriate allocation of powers between institutions at the national level, views still vary in practice—even within each school—concerning the nature, extent and desirability of European influences. For example, some theorists within the green-light/functionalist camp have, historically-speaking, accorded greater significance to the reception of EC law norms within domestic law than have others.[148] More recently, other green-light theorists have come to support a role for courts in cases involving Convention rights, if only for pragmatic reasons.[149] Equally, it is not inevitable—even within the amber-light/liberal normativist camp—that every theorist will attach the same significance to the Convention. This can be shown by considering the work of Trevor Allan. Allan is rightly regarded as a leading figure in contemporary amber-light/liberal normativist thought. However, when discussing fundamental constitutional rights, he is keen to emphasise the role played by domestic common law, rather than the

[145] See further M Taggart, n 144 above, pp 128–9, concerning the restructuring of modern government.

[146] See, for example, J Jowell and A Lester's analysis of proportionality in 'Beyond *Wednesbury*: Substantive Principles of Judicial Review' [1987] PL 368.

[147] M Hunt, n 84 above.

[148] See M Louglin, n 125 above, pp 195–7, concerning JDB Mitchell and his growing sympathy for European institutions (and parallel disillusionment with domestic political institutions), by contrast with other functionalists (infra, pp 197–206) who did not share this concern.

[149] M Taggart, n 144 above, p 136.

Convention, as a guarantor of individual rights—an approach which appears to differ considerably from that employed by Murray Hunt.[150] In consequence, the degree of overlap between one's position in terms of the red- to green-light spectrum and in terms of 'multi-layered' issues would seem to be contingent rather than necessary.

Secondly, the red- and green-light approaches sometimes fail to provide a basis for determining how questions of a 'multi-layered' nature should be answered. This is well illustrated by the debate concerning the constitutional basis on which national courts must accord priority to EC law, considered in section 1 above. As Martin Loughlin perceptively remarks, conservative normativism/red-light theory:

> lived on as the dominant tradition in public law thought throughout the twentieth century, even though the political environment [was] transformed. [It] ... fastened on to such ideas as sovereignty, the universal rule of ordinary law, and a conception of the rule of law which places the judiciary beyond reproach and ... tried to re-order the world through this ideological grid. On occasion, this can be seen starkly, as when, in debates over European Community relations, words like 'federalism' come to be treated with the same sort of disdain which ... Dicey reserved for *droit administratif*.[151]

These comments neatly capture the impression of unreality, when considering the role of EC law, which is ultimately conveyed (albeit without any display of disdain) in Wade's analysis of *Factortame(2)*—an analysis which concludes with what amounts to an intellectual shrugging of the shoulders in Wade's assertion that academics should 'turn a blind eye to constitutional theory' and follow the judges in bowing to the winds of political change.[152] The fact that Wade—as someone who is characterised as a leading defender of red-light theory—regards it as appropriate to conclude his analysis at this point must surely raise questions about the ability of the red-light approach, *in and of itself*, to provide a satisfactory account of the role of national courts in EC law cases. A related but not identical point can be made about green-light theory/functionalism. Michael Taggart has implied that, in so far as Harlow and Rawlings refer to the roles of EC law and the Convention when articulating their preferred green-light approach, little attention seems to have been paid to the possibility that these European influences might challenge their hostility to the public law-private law distinction at national level.[153] If correct, Taggart's point would suggest that—at least for some influential theorists—there is no necessary connection between their approach to the influx of European norms at national level and their approach to other, 'national' level questions.[154]

[150] See, eg, TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford, Clarendon Press, 1993).

[151] M Loughlin, n 125 above, p 233.

[152] HWR Wade, n 21 above, p 575.

[153] N 144 above, pp 129–30. EC law and the Convention are generally mentioned only in passing by Harlow and Rawlings: n 124 above, pp 23–5, 123–4, 170–5.

[154] One might perhaps also that while there *are* direct links between the red-light/amber-light/green-light approaches and underpinning (and competing) political philosophies, 'multi-layered' issues have at least a veneer of political neutrality, in that they are concerned with 'technical' questions

Finally, there are examples in the case law of situations where there is either no correlation—or no connection at all—between a court's affiliation measured in terms of the red-light/green-light/amber-light scale and its approach to questions of a 'multi-layered' nature. Domestic courts were careful—prior to the entry into force of the Human Rights Act 1998—to stress that the explicit emphasis which was placed on the role of common law fundamental rights in the case law of the 1990s was a factor which was distinct from, although frequently parallel to, the requirements of the Convention.[155] One such case—namely *Brind*—is an excellent illustration of a lack of correlation. For the House of Lords was keen to stress the importance of common law fundamental rights—arguably demonstrating an amber-light leaning—while simultaneously rejecting the idea that the Convention could be relied upon directly at national level.[156] An example of a complete lack of connection arises in the EC law context. In *Factortame(1)*, the House of Lords ruled that national law did not allow for the granting of interim relief against a Minister of the Crown acting *qua* Minister.[157] However, after the European Court of Justice ruled that interim relief must be granted if it was the sole obstacle to the effective enforcement of a directly effective EC law right, the House of Lords altered both its reasoning and its conclusion when the case returned to it as *Factortame(2)*.[158] The sole motivating factor behind their Lordships' shift of position was the perceived need to respond to the judgment of the Court of Justice. The only decisive issue for the House of Lords was, in other words, a 'multi-layered' one, which was capable of determining the case in and of itself.

To enable us to engage in a theoretical assessment of the role of courts which is suitable in a 'multi-layered' constitution, it is tentatively submitted that we need to consider what might be termed notions of 'minimalism' and 'maximalism' alongside the now traditional red-light, green-light and amber-light perspectives. Both 'minimalism' and 'maximalism' relate to the reception of EC law and the Convention. A 'minimalist' perspective would suggest that the European Communities Act and the Human Rights Act merely provide basic, outline frameworks for national courts, within and around which they are free to give such priority as they deem appropriate to rules of EC law or Convention rights.[159] Furthermore, in determining the appropriate level of priority, a national court might well seek to invoke European norms on the basis that, in the absence of any specific legislative prohibition at national level, this is a useful or normatively desirable thing to

to do with the *structure* of the national constitution. One's answer to a question of the second type may be influenced by one's political perspective, but as the examples discussed in the text suggest, this connection is neither necessary nor inevitable.

[155] See, eg, *R v Secretary of State for the Home Department, ex p. Brind*, n 81 above; *Derbyshire County Council v Times Newspapers* [1993] AC 534.

[156] The formulation adopted by the House of Lords was that the Convention could only be employed as an aid to interpretation when resolving ambiguities in statutes.

[157] *R v Secretary of State for Transport, ex p. Factortame (1)* [1990] 2 AC 85.

[158] N 1 above, following Case C-213/89, *R v Secretary of State for Transport, ex p. Factortame* [1990] ECR I-2433.

[159] See also G Anthony, n 8 above, pp 77–9, 157–8 , although note that Anthony employs the reverse interpretation of the term 'minimalist' to that used here.

do.[160] Supporters of this perspective may, in consequence, feel comfortable with the idea of national courts openly employing proportionality review in cases which involve no EC law or Convention point. A 'maximalist' perspective would, by contrast, suggest that the 1972 and 1998 Acts should be recognised as setting clear boundaries around the areas in which courts may develop national law to reflect EC law or the Convention. Analytically, supporters of this viewpoint would be committed to a strongly dualist approach: courts should only employ 'European' standards of review such as proportionality in those areas in which the relevant domestic statutes permit them to do so.[161] A key issue for maximalists concerns the range of powers which the 1972 and 1998 Acts should properly be read as construing upon national courts. Given that the 1972 Act does not expressly state that national courts should accord priority to EC law over subsequent national statutes—although it would, on one reading, have been possible prior to *Factortame (2)* to infer that the Act had such consequences—a maximalist would presumably have regarded it as entirely correct for the House of Lords to have avoided reaching a 'radical' conclusion on this point in *Factortame(1)* until the European Court of Justice had made it clear that such a conclusion was unavoidable.

The minimalist and maximalist standpoints outlined here fall at opposite ends of a spectrum, on which most judges and theorists would seem likely in reality to occupy some sort of middle position. Whilst it lies beyond the scope of this chapter to delineate all such positions, it is to be hoped that—by analysing the positions falling at each end of the spectrum—a start will have been made. For present purposes, the key point to reiterate is that while a theorist's position concerning 'multi-layered' issues will frequently overlap with their position on the red-light/green-light/amber-light scale, this need not—for the analytical reasons highlighted above—necessarily be the case. In consequence, it is necessary for us to consider whether a theorist or a judge is a minimalist or a maximalist—quite apart from their position in terms of the red-light/green-light/amber-light scale—in order properly to analyse their stance viewed against the backdrop of the contemporary, multi-layered constitution.

CONCLUSION

A number of questions have been considered in this chapter. It has been argued that the force of 'European' norms depends, in the contemporary constitution, on

[160] The conclusion that something is 'useful' need not be for explicitly political reasons and could indeed be for reasons which appear to be entirely legal—for example, to ensure consistency between different areas of domestic law.

[161] Lord Hoffmann's views concerning proportionality, the impact of EC law at national level, and the nature of the changes made to domestic law by the Human Rights Act 1998 might be categorised as broadly maximalist in approach: see his judgments in *Stoke-on-Trent CC v B&Q*, n 80 above (as Hoffmann J); *R v Secretary of State for the Home Department, ex p. Simms*, n 3 above, 341–2; *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions*, n 69 above, para [76]. For further examples of a 'maximalist' approach, see G Anthony, n 8 above, pp 105–10.

whether an EC law or Convention issue is in play—but that, in both contexts, the exact force of the relevant norm will depend upon the explanation one adopts as to *why* it should be accorded some degree of priority. While the possible explanations vary, many—at least, many of the more plausible explanations—would appear to tie the force of the relevant norms to factors which operate within the 'national' layer of the constitution. Whatever one's explanation of the force of either EC law or Convention rights at national level, it therefore seems likely that—in explaining that force—one will refer back to the 'multi-layered' nature of the contemporary constitution. It is inevitable, within any constitution, that uncertainty—if not disagreement—will exist concerning the respective powers of different institutions, and this is certainly the case in a 'multi-layered' constitution. As in many areas falling within their field, public lawyers must therefore make use of normative criteria in order to determine which explanation is preferable. An absence of theory—or a recourse to the notion that fundamental constitutional questions are 'all politics'—cannot, as the discussion of EC law in this chapter has indicated, provide us with an adequate answer. This being so, it is ventured that a combination of red-light/green-light/amber-light theory and minimalist and maximalist arguments must be employed in order to offer a coherent normative justification for the role of courts in a multi-layered constitution.

12

Reinventing Administrative Law

MICHAEL TAGGART*

> I have not the slightest doubt that the adoption of a written constitution, providing generous opportunities for judicial review of legislation, would revolutionise the study and transform the status of constitutional law in this country. Great issues of state would be determined in a judicial forum, and the attention of newspaper readers would be diverted from the criminal courts to the drama of the latest constitutional law case. Fortunes would await the specialist practitioners of constitutional law. The university courses would devote a second year to the subject. Animation would intrude into the discussion class; the case method of teaching would make its appearance; books, Ph.D. theses and law review articles would pour forth in spate; the political and social philosophies of our judges would be dissected (with the greatest of respect, of course); and we might ultimately come to rival Italy, where more than half the judges of the Constitutional Court are university professors.[1]

SO SPOKE ONE of the leading public law scholars of the post-Second World War period about the likely impact of an entrenched UK Bill of Rights. More than 40 years on, notwithstanding the fact that the United Kingdom has neither a written Constitution nor a curial power to invalidate statutes,[2] Professor de Smith anticipated the air of excitement and controversy surrounding the constitutional reforms of the Blair Government, one of which has been the 'incorporation' of the European Convention on Human Rights. What Lord Steyn described recently as 'renaissance constitutionalism'[3] is as much in the air in the United Kingdom as in other parts of the common law world.

This chapter is about administrative law, and its place in the multi-layered constitution. The argument is that the central tenets of the 'classic model' of administrative law are being undermined by constitutionalism from within the United Kingdom and internationalisation without, and by the constitutional

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[1] SA de Smith, *The Lawyers and the Constitution* (London, G Bell & Sons Ltd, 1960), 10–11.

[2] E Barendt, 'Is there a United Kingdom Constitution?' (1997) 17 *OJLS* 137.

[3] Lord Steyn, 'The New Legal Landscape' (2000) 6 *EHRLR* 549 at 552.

methodology that is an integral part of these phenomena. It is argued that British administrative law is in the process of being reinvented.

The first part of this chapter sets out briefly the central tenets of the 'classic model' of administrative law. The legendary *Wednesbury* case,[4] which is taken to exemplify that model, is considered in the second part. In the third part, the *Wednesbury* case is reconsidered in the light of the Human Rights Act 1998. The analysis of how that case would be decided today illustrates the extent to which administrative law is being reinvented. The final part considers briefly the vital element of justification in this process.

THE CLASSIC MODEL OF ADMINISTRATIVE LAW

Carol Harlow has described the key elements of the 'classic model' of judicial review that prevailed in the United Kingdom up to the 1960s as:[5]

- restricted grounds of review coupled with a strict application of the doctrine of precedent;
- highly individualistic orientation and conspicuously marked by judicial restraint;
- interest-oriented, a fact reflected in the law of locus standi;
- the absence of any substantive distinction between public/private law;
- remedy-oriented.

This restrictive attitude to judicial review was manifested in terms of proof and onus of proof.[6] The common law's aversion to requiring decision-makers to give factually supported and legally reasoned decisions, which flowed from the freedom judges enjoyed in that regard,[7] meant that reasoned decisions were rarely given by inferior decision-makers (unless, of course, required by statute[8]). Discovery was very limited.[9] Disclosure of error was restricted to what would appear on the face of the record or could be deposed to by way of affidavit. Judicial review proceeded on the papers. Permission to issue interrogatories or to cross-examine deponents was rarely granted.[10] There was and still is no duty on respondents to

[4] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) (hereafter referred to as *Wednesbury*).

[5] C Harlow, 'A Special Relationship? American Influences on Judicial Review in England' in I Loveland (ed), *A Special Relationship? American Influences on Public Law in the UK* (Oxford, Clarendon Press, 1995), 79, 83.

[6] See M Fordham and T de la Mare, 'Identifying Principles of Proportionality' in J Jowell and J Cooper (eds), *Understanding Human Rights Principles* (Oxford, Hart Publishing Ltd, 2001), 27, 32.

[7] See generally M Taggart, 'Should Administrative Tribunals be Required to State Findings of Fact?' (1980–81) 9 *NZULR* 162; 'Should Canadian Judges be Legally Required to Give Reasoned Decisions in Civil Cases' (1983) 33 *UTLJ* 1.

[8] This was first done on a widespread basis in the Tribunal and Inquiries Act 1958. See generally AP Le Sueur, 'Legal Duties to Give Reasons' (1999) 52 *Current Legal Problems* 150.

[9] See *O'Reilly v Mackman* [1983] 2 AC 237 at 280, per Lord Diplock (HL).

[10] *George v Secretary of State for the Environment* (1979) 38 P & CR 609 at 615, per Lord Denning MR (CA); *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA). Admittedly in *O'Reilly v Mackman*, above at n 9 at 282 Lord Diplock referred to *George's* case, saying it 'may well be for the reasons given by Lord Denning ... it will only be in rare occasions that the interests of justice will require

file an affidavit to explain why a decision was made.[11] Indeed, there is an obscure but strongly supported common law doctrine against permitting litigants to 'to probe the mental processes of the administrator.'[12] The danger of not filing affidavits informing the court of the basis of the decision is that the respondent may not discharge the evidential onus put upon them by the applicant's case. But where the threshold that the applicant must meet is very high—as the stated *Wednesbury* unreasonableness test is—the respondent will often get away with uninformative or otherwise self-serving affidavits.[13]

In these ways the classic model purported to keep the judges' noses out of the tent of politics—restricting who could seek judicial review, avoiding 'policy' issues, ensuring the dispute was justiciable, restricting the proof and requiring the satisfaction of high thresholds for intervention, deferring to legitimate authority, and ensuring that the remedy matched the wrong. All of this is exemplified by the *Wednesbury* case,[14] which has become the emblem of the classic model of administrative law.

WEDNESBURY: THE CASE

Behind the emblem that is *Wednesbury* lies the case that gave it the name. There is a school of thought that study of the case is irrelevant to understanding the emblematic significance of *Wednesbury*. This is not a view I share. The common law develops by the adjudication of cases. A contextual understanding of the *Wednesbury* case and speculation how it might be decided today, throws important light on what has changed and what has remained constant in the last half century.

Some Context[15]

The cinema emerged at the very end of the nineteenth century, and quickly became an extremely popular form of mass entertainment.[16] Initially, the two

that leave be given for cross-examination of deponents' in judicial review applications, but he went on to point out that since a rule change in 1977, cross-examination should be allowed whenever the justice of the case requires. There is little evidence of any subsequent liberalisation in the United Kingdom.

[11] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 at 554, per Cooke P (CA).

[12] *United States v Morgan*, 313 US 409, 422 (1941), per Frankfurter J. See the cases referred to in Taggart, above n 7, at 37 n 148 and *Comalco New Zealand Ltd v Broadcasting Standards Authority* [1995] 3 NZLR 469 (HC), upheld on appeal: (1995) 9 PRNZ 153 (CA). See generally N Nathanson, 'Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and other Federal Statutes' (1975) 75 *Col LR* 721.

[13] See, eg, JAG Griffith, 'Judicial Decision-Making in Public Law' [1985] *PL* 564.

[14] *Wednesbury*, above at n 4.

[15] With the notable exceptions of *Roberts v Hopwood* [1925] AC 578 (HL) and *Liversidge v Anderson* [1942] AC 206, leading administrative law cases have not received the same amount of contextual attention that private law cases have. See AWB Simpson, *Leading Cases in the Common Law* (Oxford, Clarendon Press, 1995).

[16] R Vorspan, '"Rational Recreation" and the Law: The Transformation of Popular Urban Leisure in Victorian England' (2000) 45 *McGill LJ* 891, 956.

matters of concern in the *Wednesbury* case, the Sabbath and entry of children to cinema, were dealt with by the general prohibition on Sunday entertainment (in place since 1780)[17] and the common law privilege of cinema owners to decide who to admit and who to exclude from their cinemas.[18]

Apparently, the initial impetus for statutory regulation of the cinema industry was public safety. The Cinematograph Act 1909[19] was prompted by a series of deadly cinema fires in the preceding two years.[20] This Act covered the exhibition of 'inflammable films,' and was intended, in the words of its long title, 'to make better provision for securing safety at cinematographic and other exhibitions.' A major side-effect of this Act was to increase markedly the number of cinemas and the amount of capital invested in the industry.[21]

The licensing was in the hands of local authorities, and licences were granted to such persons or companies as the licensing authority thought fit, and subject to such conditions as it might determine.[22] The power to impose conditions generated a number of reported cases. However, with one exception, legal attempts to restrict the powers of licensing authorities to matters of public safety failed.

The leading early case, which set the pattern, is *London County Council v Bermondsey Bioscope Co Ltd.*[23] There the imposition of a condition that the licensed cinema should be closed on Sunday, Good Friday and Christmas Day, survived legal challenge. The Divisional Court rejected the argument that to be valid the conditions had to relate to public safety. The scope of the discretion was wider than that, the court said, as long as the condition was reasonable (or not unreasonable), and hence within the licensing authority's power. As regards the prohibition on Sunday opening, which was the basis of the impugned prosecution for breach of licence, this condition did no more than restate the general law against Sunday entertainments and so was within power.

The interests of children were also a reoccurring theme in the cinema licensing case law. It was found to be reasonable to require licensees to undertake not to give sweets to children as an enticement into the cinema.[24] Also upheld were licence conditions designed to ensure that only appropriate films were shown to unaccompanied children under the age of 16 years.[25]

[17] Sunday Observance Act 1780 (Geo III, c 49). See generally J Wigley, *The Rise and Fall of the Victorian Sunday* (Manchester, Manchester University Press, 1980), especially Appendix III (listing the major statutes relating to Sunday observance in Britain). For the modern legal position in the United Kingdom, see A Bradney, *Religions, Rights and Laws* (Leicester, Leicester University Press, 1993), ch 6.

[18] *Said v Butt* [1920] 3 KB 497 at 502, per McCardie J (KB) (theatre not movie house). See generally MW Turner and FR Kennedy, 'Exclusion, Ejection, and Segregation of Theater Patrons' (1947) 32 *Iowa LR* 625 and SC Isaacs, *The Law Relating to Theatres, Music Halls, and other Public Entertainments, and to the Performers Therein, Including the Law of Musical and Dramatic Copyright* (London, Stevens & Sons Ltd, 1927), 85–94.

[19] 9 Edw 7, c 30.

[20] A Field, *Picture Palace: A Social History of the Cinema* (London, Gentry, 1974), 18–22.

[21] See M Chanan, 'The Emergence of an Industry' in J Curran and V Porter (eds), *British Cinema History* (London, Weidenfeld and Nicolson, 1983), 39, 49.

[22] Cinematography Act 1909, s 2(1).

[23] *London County Council v Bermondsey Bioscope Co Ltd* [1911] 1 KB 445 (KB). See also *Ellis v North Metropolitan Theatre* [1915] 2 KB 61 (KB).

[24] *R v Burnley Justices* [1916–17] All ER Rep 346 (KB).

[25] *Mills v London County Council* [1925] 1 KB 213 (KB). Cf *Ellis v Dubowsky* [1921] 3 KB 621 (KB).

Not all conditions of this ilk were upheld, however. A condition barring entry into a cinema after 9 pm of any child under 10 years old, as well as any children between 10 and 14 years old who were not accompanied by a parent or guardian, was held to be ultra vires. A majority of the Divisional Court in *Theatre de Luxe (Halifax) Ltd v Gledhill*[26] held these conditions did not reasonably relate to the use of the premises. The future Lord Atkin dissented, but in terms that supported reasonableness review by the court.[27] The majority judgment was out of step with the case law, and was uniformly distinguished or doubted. In *Wednesbury*, Lord Greene MR took the view that the majority in *Gledhill's* case put 'much too narrow a construction upon the licensing power given by that Act [of 1909], which, of course, is not the same Act as we have to consider here.'[28]

By the end of the Second World War, the cinema was a booming business. The crest of the wave of popularity was 1946, when attendance at British cinemas reached the giddy height of 1,635 million patrons, grossing £118.3 million, in what was the last year before facing competition from television.[29]

The Case

The facts of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[30] are so well known that it might be thought gratuitous to recite them. But familiarity has bred contempt, and a closer look throws new light on the case.

Wednesbury is one of the smaller industrial towns in the Midlands, in the centre of the district that was known in the time of the industrial revolution as 'the Black Country'.[31] Famous for its coal mining and iron ore, when the coal ran out in the nineteenth century, iron and steel production took over as dominant industries in Wednesbury, until those industries too fell on hard times during the first quarter of the twentieth century. In 1951 the population of Wednesbury stood at just over 34,000, having increased little over the previous 50 years.

[26] [1915] 3 KB 49 (KB).

[27] Sir Robin Cooke, 'The Struggle for Simplicity in Administrative Law' in M Taggart (ed), *Judicial Review of Administrative Law in the 1980s: Problems and Prospects* (Auckland, Oxford University Press, 1986), 1, 15 (suggesting that Lord Greene reinterpreted what Atkin LJ had said and meant in the earlier case).

[28] *Wednesbury*, above n 4, at 232.

[29] See P Corrigan, 'Film Entertainment as Ideology and Pleasure: A Preliminary Approach to a History of Audiences' in Curran and Porter, above at n 21, at 30; HE Browning and AA Sorrell, 'Cinemas and Cinema-going in Great Britain' (1954) 117 *Journal of the Royal Statistical Society, Series A (General) Part II* 134. Thereafter, there is a clear correlation between the rapid expansion of TV licences and declining cinema patronage: see *ibid* (Table 2).

[30] *Wednesbury*, above at n 4.

[31] The information in this and the following paragraph is drawn from JF Ede, *History of Wednesbury* (Wednesbury, Wednesbury Corporation, 1962). Wednesbury is in the county of Staffordshire in the West Midlands, about eight miles northwest of Birmingham. While I am not aware of any study of the cinema and cinema-going in Wednesbury, there is for Birmingham. See J Richards, 'The Cinema and Cinema-going in Birmingham in the 1930s' in JK Walton and J Walvin (eds), *Leisure in Britain 1780–1939* (Manchester, Manchester University Press, 1984), 31 and D Maynall, 'Palaces for Entertainment and Instruction: A Study of the Early Cinema in Birmingham, 1909–18' (1985) 10 *Midland History* 94.

Church and religion pervade the history of the town. The first known church at Wednesbury dates from the beginning of the thirteenth century, and a census in 1894 showed that 30 per cent of the then population of 25,000 attended church regularly. Almost certainly that percentage would have dwindled by the 1940s.

There had been a Picture House on Walsall Street, Wednesbury since 1915.[32] It was built and owned by Associated Provincial Picture Houses Ltd (APPH), and had seating for 900 patrons. APPH was a subsidiary of Provincial Cinematograph Theatres (PCT), which by the late 1920s was a leading cinema chain with nearly 100 cinemas throughout England. In 1929 PCT/APPH was bought by Gaumont–British Picture Corporation, although thereafter PCT/APPH continued to trade in their names.[33] The original Wednesbury Picture House was demolished in 1938 to make way for a new Gaumont cinema, with a wide auditorium seating 1,594, at a cost of £45,000.[34] This is the cinema which was the subject of the litigation.

By virtue of the Sunday Entertainments Act 1932, in certain circumstances a local authority was empowered to allow cinemas to open on Sundays, 'subject to such conditions as the authority thinks fit to impose.'[35] In 1946 Wednesbury Corporation granted the Gaumont cinema permission to operate on Sundays under the 1932 Act, subject to the condition that no children under fifteen years of age would be admitted on Sundays, regardless of whether or not they were accompanied by an adult.

The Picture House sought a declaration that the defendant's decision was ultra vires and/or unreasonable. As is so often the case in administrative law cases, there was a happy coincidence of the applicant's financial interest and the public interest in ensuring that a public authority acts lawfully. Obviously the primary motivation for the challenge was financial, as such a condition not only directly limited the pool of potential Sunday patrons, by excluding children under 15 years of age,[36] but also would have dissuaded many parents from patronizing the theatre on Sunday due to the need to make alternative arrangements for the care of their children.[37] Of course, that was exactly what the Corporation intended.

[32] The information in this paragraph is taken from A Eyles, *Gaumont British Cinemas* (London, Cinema Theatre Association, British Film Institute, 1996), ch 3, 97, 220.

[33] The Gaumont 'empire' of cinemas was vast. In 1929 it owned or controlled 270 cinemas. Competition was stiff in the 1930s, and by the end of that decade Associated British Picture Corporation and the Odeon theatre group were snapping at Gaumont's heels. In 1941 Odeon took over Gaumont, but the two cinema chains were not allowed by the Board of Trade to merge until the late 1950s. See D Crow, 'The British Film Industry: The Advent of Leviathan (1927–36)' (1954) 23 *Sight & Sound: The Film Quarterly* (April-June 1954, No 4) 191.

[34] It was renamed 'Odeon' in March 1964, and taken over by an independent operator in 1972, when it was renamed 'Silver.' The cinema doors closed for the last time on 19 April 1974, and it became a Bingo Hall.

[35] Sunday Entertainments Act 1932, s 1(1).

[36] It appears from various studies that children aged between 5–9 went to the cinema on average three times a month, and those aged between 10–15 went about 4½ times a month. See Browning and Sorrell, above n 29, at 134.

[37] British statistics from slightly earlier (which may not, of course, reflect the composition of audiences in Wednesbury) show that 57 per cent of regular cinema-goers were 18–40, although that group made up 42 per cent of the population. Moreover, more women attended regularly than men. It is this 18–40 year old group that would be most heavily hit by the condition prohibiting children attending Sunday cinema. For figures, see Corrigan, above n 29, at 33. See also S Harper and V Porter, 'Cinema Audience Tastes in 1950s Britain' (1999) 2 *Journal of Popular British Cinema* 66, 67–68.

There was much concern around this time about the impact of the cinema on children. Indeed, at the end of 1947 the Home Office and the Department of Education set up a Departmental Committee to consider the effects of cinema attendance on children under the age of 16 years, with a view to seeing whether changes were necessary to conditions of admission.[38] But local authorities were not imposing conditions as to entry by children on other days,[39] so one is drawn back to the significance of Sunday.

It is highly likely that the councillors of Wednesbury were reacting to fears, expressed long and loud by churches throughout Britain, that the cinema was rivalling the church, and Sunday cinema would draw townspeople away from the church and from traditional forms of recreation (as distinct from amusement), especially those based around the church.[40] Apparently some local authorities only allowed Sunday cinema after church services or in the evening.[41] The blanket prohibition on cinema admission of children all day on the Sabbath can only mean that Wednesbury Corporation thought that children (no doubt, with their parents) should do other things on the Sabbath, whether this be church-going, reading, walking or just spending 'quality time' together.[42]

It appears from several places in the judgment that the 'the well-being and the physical and moral health of children' was a relevant factor for the Corporation.[43] This was a 'relevant' or 'germane' factor that the local authority 'can properly have in mind,' 'a matter of public interest,' and therefore not something the courts can interfere with. It is not clear from the judgment how the court was informed that the physical and moral well-being of the children was taken into account by the local authority, or how the decision was intended to further that objective. There is no reference to affidavit evidence from councillors or officials in the reported judgment. Perhaps it was a matter of surmise. It certainly could not be brought under the rubric of judicial notice.

That surmise was coupled with an implicit interpretation of the open-ended discretion that the physical and moral well-being of the children was germane to the imposition of conditions on Sunday cinema openings. The Corporation took

[38] See *Report of the Departmental Committee on Children and the Cinema* (Cmd 7945, May 1950) and for a useful summary see G Keir, 'Children and the Cinema' (1950–51) 1 *British Journal of Delinquency* 225. This report led directly to the provision in the Cinematograph Act 1952 giving the Secretary of State power to make regulations concerning, inter alia, 'the health and welfare of children in relation to attendance at cinematograph exhibitions': s 2(1)(b). See ERH Ivamy, 'The Legal Background of the Motion Picture Industry' (1953) 20 *The Solicitor* 35, 37.

[39] Exceptionally, one local authority did impose a condition that cinemas close (to all patrons of whatever age) on Thursdays. Professional opinion viewed this as ultra vires: (1933) 97 *JP* 629.

[40] See generally J Richards, *The Age of the Dream Palace: Cinema and Society in Britain 1930–1939* (London, Routledge & Kegan Paul, 1984) 1–2, 50–53. For evidence of this in particular localities, see P Wild, 'Recreation in Rochdale, 1900–40' in J Clarke, C Critcher and R Johnson (eds), *Working-Class Culture: Studies in History and Theory* (London, Huchinson of London, 1979), 140 and Richards, above n 31 (Birmingham).

[41] See (1948) 112 *JP* 378.

[42] For the recreational options on Sunday, see Richards, above n 40, at ch 3.

[43] *Wednesbury*, above n 4, 230 (see also 233). The court quoted from *Harman v Butt* [1944] KB 491, 499, per Atkinson J (KB)('the defendants were entitled to consider matters relating to the welfare, including the spiritual well-being, of the community and of any section of it').

into account a relevant 'implicit' consideration.[44] That foredoomed the judicial review application. The rest of the judgment, as famous as it has become, was really surplus to requirements.

Sunday Entertainments Act 1932

It is necessary to look a little more closely at the Sunday Entertainments Act 1932. As noted above, public entertainment of any kind, including cinema showings, was illegal on the Sabbath. The Act in force went back to 1780, but its antecedents went back much further. As regards cinemas, several local authorities imposed a condition on licences granted under the 1909 Act that cinemas not open on Christmas Day, Good Friday or Sundays. As regards Sundays, this prohibition was otiose but harmless as long as everyone was aware of the general statutory prohibition.[45] However, in due course, some local authorities (particularly in London) forgot about the general prohibition and on occasions relaxed the licence prohibition on Sunday cinema exhibitions.[46] Moreover, there were many unauthorised breaches of the 1780 Act, particularly by cinemas in seaside towns at holiday times.[47] This all came to a legal head when the London County Council's practice of approving licensee applications to open on Sundays was correctly held by the Court of Appeal to be contrary to the Sunday Observance Act 1780 and hence unlawful.[48] This created difficulties, not the least of which was the spectre of common informers seeking substantial fees for identifying Sunday-opening cinemas.[49] Something had to be done quickly, and the upshot was the Sunday Entertainments Act 1932.[50]

The long title of the Sunday Entertainments Act 1932 states in relevant part it is 'to permit and regulate the opening and use of places on Sundays for certain entertainments.' It legalised such Sunday openings as had been purportedly permitted earlier and prescribed a procedure by which any licensing authority could apply for an order allowing Sunday opening in that licensing area. For those municipalities

[44] Lord Greene MR says as much in this passage: '[i]f, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising it must have regard to those matters' (*ibid* at 228). This pre-dates the modern splitting of relevant considerations into mandatory considerations and permissive ones (see below text following n 91). In *Wednesbury*, although Lord Greene suggests the physical and moral well-being of children is a mandatory relevant consideration ('must have regard to'), nothing turned on the future distinction because the court assumed or inferred that the local authority did take it into account.

[45] See *London County Council v Bermondsey Bioscope Co Ltd*, above n 23.

[46] This occurred elsewhere, and certainly did in Birmingham and neighbouring Smetwick: Richards, above n 40, at 52.

[47] 'Sunday Entertainments' (1949) 207 *LT* 212.

[48] *R v London County Council, ex parte Entertainments Protection Association Ltd* [1931] 2 KB 215 (CA).

[49] Above n 47, at 213.

[50] There is a tangled history. 'In all, two Parliaments, three Governments and four Bills were necessary to deal finally with the matter' of Sunday cinema opening: SG Jones, *Workers at Play: A Social and Economic History of Leisure 1918–1939* (London, Routledge & Kegan Paul, 1986), 175. See also 'Sunday Entertainments' (1932) 96 *JP* 640.