PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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simply and always the lapdog of the executive branch. The contrast with the narrow ruling of the Special Immigration Appeals Commission in the first case arising under the new detention powers in the 2001 Act is stark, with the appellants succeeding on the basis that the Government had not also allowed for the detention without trial of British residents or derogated from Article 14 as well as Article 5.[78] On all other substantive matters the executive was successful. It is depressing to think that this human rights victory was only achieved because the Government has not been as repressive as it might have been.[79]

CONCLUSION

The argument in this chapter has been that, far from being rendered redundant by the Human Rights Act 1998, the need to think seriously about civil liberties has never been more important than it is at present. With the seeming collapse of socialist alternatives to liberalism, and the start of a war against terrorism that promises never to end, the state's commitment to civil liberties, indeed to representative democracy itself, cannot afford to be taken for granted. The HRA begs difficult questions of fit and compatibility of all branches of law, but it does so particularly in the field of public law. The attraction of the civil libertarian perspective is that it identifies for the judges, legal practitioners, parliamentarians and political activists a clear pathway through the HRA, and one moreover that is both firmly rooted in a theory of representative government and solidly grounded in the ECHR itself and the Strasbourg case law. The HRA does not in itself provide such guidance; it needs to be extracted from it by the kind of reasoning in which we have engaged here and for which (we would claim) the concept of civil liberties has provided such valuable theoretical support.

The benevolent power of the ECHR system lies in the clarity with which the protection for civil liberties has been accorded so distinct a priority, both within the document itself and in the case law under it. Without a clear grasp of principle, discussion about what it is right for the judges to do under the HRA quickly collapses into a fatuous question-begging set of queries about the proper remit for the 'discretionary area of judgment' to be accorded the legislature, and this then quickly produces passivity where there should be activism (and quite possibly activism where there should be passivity, though this is a different point). On the analysis provided here, it is the job of all three branches of government to uphold those principles of civil liberties without which our society would not be the self-governing community of equals that its claim to be a representative democracy

[78] *A and others v Secretary of State for the Home Department*, Special Immigration Appeals Commission, 30 July 2002.

[79] According to counsel for nine of the detainees quoted in the *Guardian*'s report of the appeal proceedings in the case, the Government 'botched' the new legislation by permitting British citizens to remain free of the threat of detention: *Guardian*, 9 October 2002. The Commission decision on this point was afterwards overruled by the Court of Appeal [2002] EWCA Civ 1502; [2003] 1 All ER 816.

suggests that it is. Properly read, the HRA requires such a commitment from all three branches. If this is what is meant by a 'culture of rights' then we should all be unqualifiedly in favour of it.

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Standing in a Multi-Layered Constitution

JOANNA MILES*

> It is surely absurd and unworkable to have different tests of standing according to whether the judicial review application is based upon: (i) ordinary common law principles; or (ii) common law principles matching or embodying [European Convention] rights; or (iii) directly effective European Community law; or (iv) convention rights; or (v) a combination of any of those four grounds.[1]

THE CURRENT LAW of standing is multi-faceted, the applicable rule being determined by the jurisdictional source of the legal argument being made. This multi-faceted system is a product of piecemeal accretions to the jurisdiction of domestic courts over the last 30 years, most recently those made by devolution and human rights legislation. It may be said that we now have a 'multi-layered', rather than unitary, constitution. The courts are required to interpret and apply laws deriving from several sources, each commanding a different level of constitutional authority. They are called on to interpret and apply measures emanating from the institutions of the European Community, in some cases disapplying domestic legislation which cannot be read and applied compatibly with those measures. They enforce the duty of public authorities to act compatibly with the European Convention of Human Rights(ECHR), ensuring 'so far as it is possible to do so' that the domestic legislation under which those authorities act is read and given effect compatibly with Convention rights, and having a discretion to make a declaration of incompatibility if the interpretive route cannot provide the compatibility sought. They are responsible for policing the limits to the competence of the new devolved institutions, declaring as ultra vires (in some instances, prior to enactment) any measure which exceeds the competence of the body in question. And they continue to exercise their traditional public law jurisdiction, reviewing the validity of the actions and decisions of statutory and non-statutory inferior

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[1] Lord Lester of Herne Hill, Hansard, HL Deb, 24 Nov 1997 vol 583, col 828, on the introduction into UK law of the 'victim test', by the Human Rights Act 1998, s 7.

bodies by reference to the familiar, but recently invigorated, standards of administrative law. In each part of their jurisdiction, the courts have different substantive laws to apply, and, often, persons wishing to invoke those laws will face different rules regarding standing and intervention. Should those same claimants wish to take their cases to either of the two European courts, they face further standing and intervention rules. Even in a case that falls squarely within the remit of what we might call 'traditional' or 'ordinary' domestic administrative law, the malleable 'sufficient interest' test can be stretched or restricted according to the nature of the complaint and the character of the claimant and, underlying it all perhaps, the theory of standing adhered to by the judge.

It is instructive to reflect on the current state of the law of standing with various questions in mind. What purposes are served by standing rules? What is the proper relationship between standing law and the rules permitting third party intervention? Can the deployment of the different tests be justified by reference to the subject matter of the disputes to which they relate, or are those tests based on inconsistent views about the type of interest sufficient to move the court, such that their co-existence can fairly be condemned as 'absurd'? Most basically, do we have a clear idea of the role that we want the courts to play, and that it is constitutionally appropriate for them to play, in judicial review? If so, what implications ought such an idea to have for the standing and intervention rules? Can the multiple standing and intervention rules encountered by UK litigants be satisfactorily sustained within our legal system (or systems)?

Before turning to those questions, the current standing and intervention rules are illustrated with a hypothetical case involving Greenpeace in order to demonstrate the variety of rules that will be encountered by such a body wishing to be heard in court in this multi-layered system. The survey is not comprehensive in regard to the details of all the rules, but provides a flavour of the current situation. An interest group is used for this exercise, since such claimants test (if not exceed) the outer limits of most standing and intervention rules. We shall see that an organisation such as Greenpeace receives very different treatment depending on the issue raised and the court in which it seeks to raise it.

A CASE STUDY: GREENPEACE AT HOME AND ABROAD

The Secretary of State, acting pursuant to an Act of the Westminster Parliament passed to implement a European Community directive, authorises an activity which Greenpeace believes will cause damage to the environment and to the health of residents in specific localities in the United Kingdom. Will Greenpeace have standing to challenge any aspect of this situation on any grounds, or be permitted to intervene in a challenge brought by another?

A. STANDING RULES

1 'Ordinary' Judicial Review in England, Wales and Northern Ireland: the 'Sufficient Interest' Test

Standing to argue traditional, domestic ultra vires grounds in judicial review of the Secretary of State's action before these courts is governed by the 'sufficient interest' test.[2] That rather flexible language sustains various approaches to standing. In some cases, the courts adopt a strict analysis, tying the question of standing to the topography of the statutory power whose exercise is being complained of, the ground of complaint, and the relationship of the claimant to the issue.[3] Even having opened the court door, a claimant cannot necessarily put forward every argument that might objectively be made, but may be permitted to challenge the decision on only some grounds.[4] Elsewhere, the courts take a much broader view, apparently willing to find that a claimant has standing simply by virtue of the seriousness of the illegality alleged,[5] or the public interest in having the matter judicially reviewed,[6] most fundamentally to uphold the rule of law.[7] Standing in such cases may be regarded as having been diluted to the most attenuated of concepts, though judges deny the existence of a universal citizen's action.[8] Many of these latter cases in the England and Wales courts[9] have involved applications from interest groups of various sorts. The case law suggests that Greenpeace will often be accorded standing in relation to issues falling within its expertise. That expertise, the likelihood that some Greenpeace members live within range of the activity causing concern (whom it may therefore be said to be representing) and the importance of the issue at stake, seem likely to afford the organisation a 'sufficient interest' in the matter.[10]

[2] Supreme Court Act 1981, s 31(3); Judicature (Northern Ireland) Act 1978, s 18(4).

[3] *R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co* [1990] QB 504.

[4] *Re McBride's Application for Judicial Review* [1999] NI 299.

[5] See *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 633, 647 and 662–63.

[6] *R v Felixstowe Justices, ex parte Leigh* [1987] QB 582; *R (on the application of Rusbridger and Toynbee) v Attorney-General* [2002] EWCA Civ 397, 2002 Westlaw 346980 (March 21, 2002), rev'd on other grounds [2003] UKHL 38; *R v Her Majesty's Treasury, ex parte Smedley* [1985] QB 657.

[7] Lord Diplock in the *IRC* case, above n 5 at 644; *R v Secretary of State for Foreign Affairs, ex parte World Development Movement* [1995] 1 WLR 386, at 395.

[8] *R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co* [1990] QB 504, at 520; *R v Somerset County Council, ex parte Dixon* [1998] EnvLR 111, at 117.

[9] Interest group cases in Northern Ireland are rare: P Maguire, 'The Procedure for Judicial Review in Northern Ireland' in B Hadfield (ed), *Judicial Review: a Thematic Approach* (Dublin, Gill and Macmillan, 1995).

[10] *R v Her Majesty's Inspector of Pollution, ex parte Greenpeace (No2)* [1994] 4 All ER 329; though they do not necessarily have standing to pursue any environmental matter: *ibid* at 351f-g.

2. 'Ordinary' Judicial Review in Scotland: 'Title and Interest to Sue'

It is doubtful whether Greenpeace would have standing to make a similar challenge in Scotland. The two-part Scottish rule 'title and interest to sue' is similar to the narrower interpretations of the 'sufficient interest' test. *Title* to sue rests on 'the individual or body seeking to challenge the minister's act or decision [showing] that, having regard to the scope or purpose of the legislation or measure under which the act is performed or the decision is made, he or they have [a right of challenge] conferred on them by law, expressly or impliedly.'[11] Empowering legislation may be held to confer title on any member of the public to challenge the legality of executive action, but a pursuer with *title* may still lack *interest* to sue, for example if its interest in the matter is purely ideological.[12] Whilst the Scots courts may be receptive to associational standing, which may offer Greenpeace some hope, the sort of public interest standing recognised by the English courts may not be accepted in Scotland.[13] The perceived divergence of attitude between English and Scottish courts is apparently encouraging attempts at forum shopping within the UK to avoid the restrictive Scottish rule, in one case by Greenpeace itself.[14]

3. Standing in EC Law Cases at Home and in Luxembourg

Domestic Challenges and EC Treaty Article 234[15] References

Those same 'sufficient interest' or 'title and interest' rules determine Greenpeace's entitlement to challenge the implementing domestic measures– the Act of Parliament included[16]—on EC law grounds in the domestic courts.[17] Those domestic proceedings also give Greenpeace access to the European Court of Justice if the national court makes a reference under EC Treaty Article 234 regarding the proper interpretation or validity in EC law of the underlying Community measure,[18] thus enabling Greenpeace to seek review of the EC measure via the domestic courts.

Direct Challenge to the EC measure in Luxembourg EC Treaty under Article 230(4)

However, it would not ordinarily be possible for Greenpeace, or (in the vast majority of cases) any of its members, to obtain direct review of the validity of the Euro-

[11] *Rape Crisis Centre v Secretary of State for the Home Department* 2001 SLT 389, per Lord Clark.

[12] *Scottish Old People's Welfare Council* 1987 SLT 179.

[13] Lord Hope of Craighead, 'Mike Tyson comes to Glasgow' [2001] *PL* 294; cf Lord Clyde and DJ Edwards, *Judicial Review* (Edinburgh, W Green, 2000), ch 10.

[14] *R v Secretary of State for Scotland, ex parte Greenpeace*, 24 May 1995, unreported; see C Munro, 'Standing in Judicial Review' 1995 SLT 279.

[15] Consolidated Version of the Treaty Establishing the European Community.

[16] *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] AC 603.

[17] Eg *R v Secretary of State for the Environment, ex parte Greenpeace* [1998] Env LR 415.

[18] Case 158/80 *Rewe-Handellsgesellschaft Nord mbH and another v Hauptzollamt Kiel* [1981] ECR 1805.

pean measure in the European courts. The standing of non-privileged natural and legal persons to bring such actions is restricted by the extremely narrow construction of the 'individual concern' element of the 'direct and individual concern' test, governing such applicants' access to the European courts.[19] *In general*, the applicant has to prove membership of a closed class of persons affected by the impugned measure.[20] Measures affecting wide and uncertain classes of persons (often true of measures in the environmental field) are thus almost immune from direct challenge by private persons. There is no scope for the sort of public interest/interest group standing permitted in England.[21] Greenpeace might try to bring itself within one of the special categories of individual concern, perhaps by virtue of its having participated by right in a formal consultation exercise with the EC institutions regarding the adoption of the impugned measure.[22] But communications between Greenpeace and the EC institutions not forming part of such a process will not afford the group standing.[23] In the absence of this possibility, Greenpeace will be forced to challenge the underlying EC measure domestically via EC Treaty Article 234, and so to wait until the measure has been implemented by some challengeable domestic measure or decision (if any) over which the domestic courts have jurisdiction.[24]

4. Judicial Review on Human Rights Grounds

Since the passage of the Human Rights Act 1998 (HRA), standing in cases relying on human rights arguments, especially those relying directly on Convention rights, merits separate consideration. There are various arguments that Greenpeace might wish to make against the domestic measures on human rights grounds, but whether they have standing to make the arguments is problematic.

Judicial review under HRA, section 6

The new public law illegality argument created by section 6 of the HRA—acting incompatibly with Convention rights—can be invoked in judicial review and other

[19] For 'privileged' applicants—Member States, Community institutions—see EC Treaty Article 230(2) and (3).

[20] *Plaumann v Commission* [1963] ECR 95, reaffirmed in Case C-50/00P *Unión de Pequeños Agricultores v Council*, [2003] QB 893, rejecting AG Jacobs' opinion; the Court of First Instance decision in Case T-177/01 *Jégo-Quéré et Cie. SA v Commission*,[2003] QB 854, seems destined to be overturned. There are a few further categories of 'individual concern': see for examples Joined Cases 67/85, 68/85, 70/85 *Van der Kooy v Commission* [1988] ECR 219, para 14; Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501, para 13; Case C-309/89 *Codorniu SA v Council* [1994] ECR I-1853, para 19. See A Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures' (2003) 62 *CLJ* 72.

[21] Case T-585/93 *Stichting Greenpeace Council v Commission* [1995] ECR II-2205, on appeal Case C-321/95 P [1998] ECR I-1651.

[22] See tests set out in Case T-122/96 *Federolio v Commission* [1997] ECR II-1559, para 61.

[23] See above n 21.

[24] There may sometimes be no such domestic measure, effectively rendering the EC measure immune from private challenge: AG Jacobs, *UPA v Council*, above n 20, at para 43.

proceedings only by a 'victim' of the alleged illegality, matching the standing rule of the European Court of Human Rights.[25] A 'victim' is one whose own Convention rights have been, or are at risk of being, violated by the impugned act or measure, either directly or indirectly. The European Court's interpretation of the test has not been consistent, but whilst broader than the EC law 'individual concern' test, its scope is clearly more limited than the standard sufficient interest test is capable of being. In particular, despite occasionally generous interpretation of 'victim,'[26] it affords no scope for public interest challenges.[27] As for other forms of representative standing, organisations such as Greenpeace may act in Strasbourg on behalf of any of their members who are victims, but only if they can positively identify those member-victims and demonstrate that they have their authority to act on their behalf.[28] However, *domestic* civil procedure rules only permit representative applications to be made by parties which have standing to make the claim in their own right. So it seems that, where the group itself cannot claim victim status, interest groups will be unable (as organisations) to bring section 6 proceedings in the domestic courts, even on behalf of their own members.[29] One option is to reverse the formal roles by finding an individual victim prepared to lend his or her name to an action which Greenpeace could informally support and direct.[30]

Standing to Make Human Rights Arguments Outside the Victim Test

However, Greenpeace may remain able itself to make human rights arguments on other grounds under the standard sufficient interest test (if not in Scotland). The literature is full of speculation regarding the ways in which non-victims, who are nevertheless regarded as having a 'sufficient interest,'[31] might complain about the violation of the rights of others, some of which are set out here.[32]

[25] Human Rights Act 1998, s 7(1), (3), (7); this applies equally in devolution cases where Convention rights are relied on: eg Scotland Act 1998, s 100.

[26] *Open Door and Dublin Well Woman v Ireland* (1992) 15 EHRR 244; see also *R (on the application of H) v Ashworth Hospital Authority* [2001] EWHC Admin 872; [2002] 1 FCR 206; cf failure to establish victim status in *R (on the application of Rusbridger and Toynbee) v Attorney General* [2002] EWCA Civ 397; at first instance: 2001 Westlaw 753344 (22 June 2001); contrast remarks of Lords Steyn and Rodgers [2003] UKHL 38 at paras 21 and 55.

[27] *Klass v Germany* (1978) 2 EHRR 214, para 33.

[28] *Confédération des Syndicats Médicaux Français v France* (1986) 47 DR 225; Rules of Procedure of the European Court of Human Rights, Rules 36 and 45; cf the 'democratic link' which Peter Cane demands of associational claimants: below n 56.

[29] Civil Procedure Rules, Part 19.6. See *In re Medicaments and Related Classes of Goods (No 4)* [2001] EWCA Civ 1217, [2002] 1 WLR 269: Clayton and Tomlinson regard this decision as '[difficult to justify] in the context of Convention case law': *The Law of Human Rights: First Annual Supplement* (Oxford, OUP, 2001), para 22–23; however, the fault seems to lie in the domestic rules' failure to permit representation in the manner allowed in Strasbourg.

[30] For the risks entailed with front man claimants see Loux, below n 46.

[31] *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275; contrast *McBride*, above n 4; the claimants' differing levels of expertise might justify the difference of approach: see Hare, below n 51.

[32] M Elliott, 'Human Rights and the Standard of Substantive Review' [2001] 60 *CLJ* 301; M Fordham, 'Human Rights Act Escapology' [2000] *JR* 262; R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford, OUP, 2000), paras 22.44–22.49; S Grosz, J Beatson and P Duffy, *Human Rights: the 1998*

(i) *HRA and related arguments*

Non-victims can arguably seek declarations regarding the interpretation of primary legislation thought to be potentially incompatible with Convention rights, inviting the court to engage in the interpretive exercise required by section 3 of the HRA, and if that fails, to issue a declaration of incompatibility.[33] Section 7 only restricts standing to claim that a public authority has acted in a way made unlawful by section 6 and the associated remedies in section 8. Where a declaration of incompatibility is sought, that cannot be the claimant's argument since to be unlawful under section 6 the incompatible action must not have been required by primary legislation; in declaration cases the legislation *does* require such action, so no section 6 question arises. In similar vein, it has been argued that non-victim claimants can assert Convention rights via section 3 as part of a traditional illegality argument in relation to powers whose source is statutory.[33a] The legislation empowering the defendant authority, interpreted in accordance with section 3 to confer a power to infringe Convention rights only to the extent that the Convention allows, restricts the authority's power—and so gives grounds for a traditional illegality argument—without any need to refer to section 6, and so again avoiding the victim test. The victim test is thus left little if any exclusive area of substantive operation. Greenpeace may thus be able to make arguments against the Secretary of State's action resting on, for examples, ECHR Articles 2 and 8, via an ultra vires argument supported by HRA, section 3.

(ii) *Common Law and EC Rights Jurisprudence*

The HRA aside, the common law has its own jurisprudence of human rights, with an emergent doctrine of proportionality, which places its own limits on the legality of public action.[34] It seems clear that the courts remain determined to maintain and develop common law-based human rights review, despite the availability of direct Convention-based review under the HRA.[35] This jurisdiction opens up increasingly wide possibilities for non-victim claimants, though the common law has yet to recognise 'environmental rights' as such, so may offer no assistance here.

Act and the European Convention (London, Sweet and Maxwell, 2000) para 4.42–4.44; M Supperstone and J Coppel, 'Judicial Review after the Human Rights Act' [1999] *EHRLR* 301; D Feldman, 'Remedies for Violations of Convention Rights under the Human Rights Act' [1998] *EHRLR* 691.

[33] This was apparently conceded in *R (on the application of Rusbridger and Toynbee) v Attorney General* [2003] UKHL 38, per Lord steyn, para 21. Cf recent suggestions that s 4 declarations will not 'ordinarily' be available to non-victims: *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] AC 291, para 88.

[33a] Compare the responses to the arguments made in *R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin); [2003] 1 FLR 484 and *R (Medway Council) v Secretary of State for Transport* [2002] EWHC 2516 (Admin); 2002 Westlaw 31523297, para 20.

[34] *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539; *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.

[35] See *Daly*, above, n 34.

In some cases, EC law will also afford a basis for human rights arguments.[36] Sufficiently interested non-victims will be able to invoke these arguments in the domestic courts.

5. Judicial Review of Legislation and the Devolution Settlement

We have seen already that Greenpeace may have standing to challenge the validity of Acts of the Westminster Parliament in the English courts on EC law grounds, and probably to seek a declaration of incompatibility with Convention rights. If the case, for example, involved an Act of the Scottish Parliament, the limitations on the legislative competence of the Parliament would render that legislation vulnerable to further challenge, for example on Convention grounds.[37] Standing to seek concrete review of devolved legislation post-enactment is governed by the ordinary rules of each jurisdiction discussed above, amended only where the victim test holds sway.[38] Owing to the restrictive nature of the Scottish standing rules, Greenpeace may therefore be unable to challenge legislation of the Scottish Parliament in the Scottish courts, and it is doubtful whether an English court (before which Greenpeace might have standing) would have jurisdiction over the matter. One other novel feature of the devolution scheme is the possibility of abstract review by the Judicial Committee of the Privy Council of the validity of devolved legislation, both before it comes into force and post-enactment in a freestanding application absent any concrete dispute.[39] However, it is only possible for law officers of the United Kingdom and of the devolved government to make the referral,[40] so this new mode of challenge, unlike concrete, dispute-based post-enactment challenge, is unavailable to non-governmental claimants.

B. INTERVENTION RULES

Instead of bringing its own claim, Greenpeace might intervene in proceedings begun by another. This option of course depends upon such proceedings having been commenced, and on Greenpeace being aware of those proceedings early enough to organise an effective intervention.[41]

[36] See Grosz, Beatson and Duffy, above, n 32, at paras 4.35–4.36.
[37] Scotland Act 1998, s 29.
[38] *Ibid*, s 100.
[39] Eg Scotland Act 1998, s 33, Sch 6 paras 4 and 34.
[40] Contrast countries where pre-enactment review can be initiated by elected representatives: A Page, 'Constitutionalism, Judicial Review and "The Evident Utility of the Subjects Within Scotland"', in L Farmer and S Veitch (eds), *The State of Scots Law: Law and Government After the Devolution Settlement* (Edinburgh, Butterworths, 2001), 17–18.
[41] See the Public Law Project's findings regarding obstacles to intervention: below n 54.

1. Intervention in 'Ordinary' English Judicial Review Proceedings, HRA and Domestic EC Cases

The Civil Procedure Rules' intervention provision[42] covers ordinary judicial review proceedings, HRA and domestic EC review. 'Any person' may apply for permission to file evidence or to make representations at the hearing.[43] Whether permission to intervene will be granted and if so under what conditions is left to the discretion of the judge in his management of the case.[44] It is also possible for interested parties to intervene (more cheaply and quickly, and without the court's permission) via a witness statement filed as part of one of the parties' case.[45]

2. Intervention in Scotland

The HRA has prompted the belated adoption of rules permitting intervention by persons 'directly affected' and by public interest interveners in judicial review proceedings before the Court of Session.[46] Unlike the English rules, these Rules provide in detail for the form and procedure for applications to intervene and for the purpose of the proposed intervention. So although Greenpeace may lack standing to bring a claim in Scotland, it will be able to seek permission to intervene.

3. Intervention in Abstract Review of Devolved Bodies' Measures

Although standing to initiate this form of review is highly restricted, the Privy Council has unfettered discretion to allow interventions in those proceedings.[47]

4. Intervention before the European Courts

Should an EC-based domestic case be referred to the European Court of Justice under EC Treaty Article 234, all those who intervened in the national proceedings, but only those, are entitled to make submissions to the European Courtof Justice; it is not possible for other interested parties, save the Commission and Member States, to intervene in those proceedings by the time they reach the Court, even if

[42] Northern Ireland courts remain governed by the Rules of the Supreme Court (Northern Ireland) 1980, SR 1980/346, as amended.

[43] Rule 54.17.

[44] Practice Direction: Judicial Review, para 13.2 gives no further guidance to putative interveners. Cf the Scottish provisions: below n 46.

[45] This mode of intervention was employed by the Public Law Project in *R v Lord Chancellor, ex parte Witham* [1998] QB 575.

[46] SSI 2000, No 317, Act of Sederunt (Rules of Court of Session) (Amendment No 5) (Public Interest Intervention in Judicial Review) 2000; see A Loux, 'Writing Wrongs: Third-party Intervention Post-incorporation' in A Boyle, C Himsworth, H McQueen and A Loux (eds), *Human Rights and Scots Law: Comparative Perspectives on the Incorporation of the ECHR* (Oxford, Hart, 2002).

[47] Judicial Committee (Devolution Issues) Rules 1999, SI 1999/665, rule 5.54.

the Article 234 reference is the first they hear of the case.[48] Those wishing to intervene in a direct action under EC Treaty Article 230 must be able to show an interest in the result, and the intervention must support the form of order sought by one of the parties.[49] Whilst organisations such as trade associations and trade unions, which can show that the decision will have an impact on their members' rights, are regularly permitted to intervene, public interest intervention by non-governmental organisations of the sort familiar to the Strasbourg and domestic courts is almost unheard of, 'almost precluded by the stringency of the rules.'[50] Greenpeace may therefore again be excluded from participation in the direct challenge, but appear at Luxembourg as an intervener in an Article 234 case.

THE FOUNDATIONS OF STANDING AND INTERVENTION RULES

Having outlined the rules currently operating in the multi-layered UK/European system, we turn our attention to the questions posed at the start of the chapter, to examine the rationale, if any, for those rules and to identify criteria against which the appropriateness of the prevailing situation, and of given rules to a given jurisdiction, can be evaluated.

Some Initial Observations

It may be helpful to start by sketching out some basic ideas about the roles of, and relationship between, standing and intervention rules, and to note that, to the extent that both sets of rules raise similar questions, they should be developed consistently with each other.

The Roles of Standing and Intervention Rules: Initial Observations

In discerning the purposes to be served by standing rules, it is essential to avoid misleading arguments which relate not to standing but to some other canon of judicial restraint. It is easy to conflate standing with matters which are more properly described in terms of the ripeness, mootness or justiciability of the dispute, or with the appropriateness or otherwise of the remedy sought, perhaps given a delay in making the application, or with a simple lack of merits. It is important to tease out these distinct arguments, in particular because calls for wider standing are often opposed on these sorts of confused bases, and it can be too readily assumed that the problems that these separate doctrines are designed to tackle are an

[48] Articles 37 and 39 of the Statute of the Court of Justice are inapplicable to Article 234 proceedings; see D Denman, 'Third Parties and Art 234 References' [2001] *JR* 211.

[49] Statute of the Court of Justice, Article 37.

[50] C Harlow, 'Access to Justice as a Human Right' in P Alston (ed), *The European Union and Human Rights* (Oxford, Oxford University Press, 1999), 197.

unavoidable 'secondary infection' that will be contracted from allowing wider standing.[51]

Standing is also often considered with a view to efficiency and economy with judicial resources, and a concomitant concern for access to justice, ensuring that cases deemed most important reach the court promptly. By limiting the types of persons with standing, it is hoped that time will be devoted to the most pressing cases. This exercise clearly rests on a fundamental evaluation of the types of cases with which the courts should be chiefly concerned, whether because of an assessment of those cases' intrinsic importance or because of the courts' qualification (or otherwise) to deal with them. However, putting that issue to one side for now, narrow standing rules (for example excluding interest group claimants), often justified on this resource-saving basis, may fail to promote the resource-saving objective. A directly affected claimant is not necessarily best equipped to put the argument, and where one measure affects a large constituency, the courts may face numerous ill-argued cases brought by individual victims. It may be preferable to allow interest group actions, so that the courts are presented with prompt, focused and well-informed cases, whose resolution will benefit all members of the affected class.[52] In any event, a standing rule must be clear and straightforward to apply if it is not itself simply to attract protracted litigation; experience teaches that that goal is rather elusive, particularly where the test requires a detailed contextual analysis of the claimant and his case.[53]

Turning to intervention, it is proper to ask first for what purpose the putative intervener is applying to be heard. This may affect our view of the propriety of the intervener being heard at all, and, if it is to be heard, may affect both the mode of the permitted intervention, and the scope of the argument or evidence which is allowed to be adduced, and the status of the intervener in the proceedings.[54] The intervener may be seeking to provide the court with information or expertise, empirical or legal, to inform its decision; or (or additionally) it may wish to protect its own interests, or interests belonging to a particular constituency, or to assert some view of the public interest. Where the interests represented (or information provided) by the intervener coincide with those of one of the parties to the claim, and the evidence or argument that the intervener wishes to introduce supports that of the original party, it may be possible (without seeking the court's permission) to intervene by way of written evidence submitted by that party. But

[51] See I Hare, 'The Law of Standing in Public Interest Adjudication' in M Andenas and D Fairgrieve (eds), *Judicial Review in International Perspective* (The Hague, Kluwer, 2000); cf C Himsworth, 'No Standing Still on Standing' in P Leyland and T Woods (eds), *Administrative Law Facing the Future* (London, Blackstone, 1997), 201–2.

[52] For further discussion of this point and reference to the parliamentary debates, see J Miles, 'Standing under the Human Rights Act: Theories of Rights Enforcement and the Nature of Public Law Adjudication' (2000) 59 *CLJ* 133, 144–47; Hare argues that standing rules should be developed in pursuit of this pragmatic objective: above n 51.

[53] Hare, above n 51.

[54] See generally *A Matter of Public Interest: Reforming the Law and Practice on Interventions in Public Interest Cases* (London, Justice/Public Law Project, 1996), 17–22; *Third Party Interventions in Judicial Review: an Action Research Study* (London, Public Law Project, 2001), 4–6; P Bryden, below n 105.

where the intervener wishes to introduce a different perspective on the matters before the court, it will be necessary to apply for separate intervener status; if the purpose of the intervention is one of information rather than interest representation, representation by way of written submissions may be adequate.[55]

To the extent that the intervener's purpose is one of interest representation, questions about the true representativeness of the intervener may arise. There is no problem when a materially affected person seeks to intervene; such a person can claim a relationship with the issues at stake akin to that held by those with victim status and as such is clearly a proper person to be heard by the court. Potential difficulty arises where the application to intervene comes from an intervener who purports to represent the interest-holder in question, but who is itself prevented by the standing test from bringing any claim directly. Peter Cane's analysis of representative standing provides guidance here:[56] if it is felt proper that there be a 'democratic link' between a *claimant* and a constituency which it purports to represent, there is arguably no less a need for such a link to exist if the interests of that constituency are to be put before the court by means of an *intervention* in an application made by some other person. By contrast, if the intervention is more in the manner of a conventional *amicus curiae*, providing the court with empirical or legal expertise without representing any particular perspective, such link between intervener and a constituency (if any) may be considered unnecessary.

Having clarified the pertinent issues, we get a better view of the purposes standing and intervention rules can and should serve. Such rules should be essentially concerned with *who* can be heard in court in relation to what sorts of issue. A rule may be highly restrictive of the class of persons entitled to move (or intervene before) the court, or it may confer a right on all citizens to complain (or intervene) in relation to every public decision and action. But whether narrow or entirely open, the rules should be based on a view about (1) the appropriateness and legitimacy of different types of claimant or intervener asserting their concern for the particular issue in the judicial (rather than political) sphere, and (2) the character of the courts' jurisdiction and the place of the courts within the constitutional balance. Identifying the basis of the current rules in these terms is not easy. The vague language used to formulate standing tests, such as 'sufficient interest' or 'individual concern,' means that the tests do not attract an obvious interpretation; intervention rules are even more broadly framed, conferring a large measure of discretion on the judge to determine the source and scope of interventions to be permitted. Needless to say, the normative basis of the standing and intervention rules is rarely, if ever, articulated by the legislature creating the jurisdictions either of the court or of the authorities under challenge. It is left to the court to discern the proper scope of its own function, and to determine whether the given claimant or intervener has a right to engage in the judicial as opposed to the political process in the particular case.

[55] *Ibid.*

[56] 'Standing up for the Public' [1995] *PL* 276; 'Standing, Representation and the Environment', in I Loveland (ed), *A Special Relationship? American Influences on Public Law in the UK* (Oxford, Clarendon Press, 1995).

The Relationship Between Standing and Intervention Rules: Initial Observations

Some parts of the courts' jurisdiction—HRA cases being an obvious example—allow for wider intervention than standing.[57] If the putative intervener's interest in the matter would be insufficient to afford him standing in relation to the type of decision under challenge, it might be asked whether such a person or group ought to be allowed to intervene where a claim is brought by someone with standing. For example, if only a victim can move the court, it might be felt inconsistent for that court, once moved, to admit evidence and arguments from non-victims.[58]

The HRA requires us to augment Harlow and Rawlings' useful set of metaphors for different models of judicial review proceedings. The original trio are: the 'drain-pipe'—the traditional bipolar adversarial dispute, where standing and intervention rules are narrow, as are the grounds for review, the opportunity for discovery and the available remedies; the 'freeway'—where all aspects of the process, including standing and intervention, are much broader, the grounds for review more intensive, the range of available remedies allowing for greater judicial creativity and control; and the hybrid, compromise model represented by the 'funnel'—where standing is broad, but the opportunities for discovery and intervention are narrow, and the grounds for review and remedies traditional.[59] English law has perhaps recently developed from the hybrid to the extent that it is increasingly receptive to third party intervention; we might say that the cup of the funnel is larger.

Enter the Human Rights Act 1998. The Government, through Parliament, adopted the Strasbourg model,[60] reassuring interest groups that they would get their HRA day in court by intervention.[61] So the funnel remains wide, receptive to interventions from all quarters, but now has a 'lid' for cases under the HRA. That lid can only be lifted by a victim, but once opened, potentially allows a large number of persons and interests to be represented before the court. The original 'funnel' model was regarded as problematic; it was felt that reception of broader standing would inevitably put pressure on the system, leading to demands for more intensive standards of review and improved information mechanisms for the court, via more generous intervention and disclosure.[62] The added feature—increased opportunity for intervention but only after the 'lid' has been lifted—may appear to create an inconsistency. One possible justification for the availability of wide intervention alongside narrow standing in the human rights context is suggested in the next section.[63] The necessity for and propriety of permitting wide interest representation before the court at all is addressed in more detail later.

[57] Intervention in abstract devolution review is similarly situated alongside a very narrow standing test.

[58] See Lord McCollum CJ in *In re Northern Ireland Human Rights Commission* [2001] NI 271 at 280e, implicitly overturned by the House of Lords' decision, below n 138.

[59] C Harlow and R Rawlings, *Pressure Through Law* (London, Routledge, 1992), 310–17.

[60] ECHR Article 36(2); Lord Lester, '*Amici Curiae*: Third Party Intervention before the ECHR', in F Matscher and H Petzold (eds), *Protecting Human Rights: the European Dimension*, (2nd edn, Cologne, Heymann, 1990).

[61] See the Lord Chancellor, Hansard, HL Deb, 24 November 1997, vol 583, col 833–4.

[62] R Rawlings, 'Courts and Interests' in I Loveland (ed), above n 56, at 109.

[63] Below text to n 75.