§ Law in Context

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Transforming judicial review

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1. Beginnings

Kenneth Culp Davis, a leading American academic visiting England in the 1960s, described English judicial review as restricted by an old-fashioned, positivist corset 'astonishing to one with a background in the American legal system'. English judges strove to avoid consideration of the policy aspects of the issues they decided and the typical lawyer:

> responds with consternation to an inquiry into the soundness of the policies embodied in a judicial decision, and, if he persists, the inquirer is gently reminded that judges do not consider policy questions and that only Parliament can change the law; the task of the judge is wholly analytical – to discover the previously existing law, and to apply it logically to the case before the court.[1]

Not only were judges precluded from considering 'policy questions' but the lawmaking powers of the judiciary were scarcely recognised.[2] The judicial

[1] K. C. Davis, 'The future of judge-made public law in England: A problem of practical jurisprudence' (1961) 61 *Col. Law Rev*. 201, 202.

[2] P. Atiyah and R. Summers, *Form and Substance in Anglo-American Law: A comparative study of legal reasoning, legal theory and legal institutions* (Clarendon Press, 1987).

function was seen as limited to 'discovering' previously existing law and applying it logically to the case before the court. A strict interpretation of the doctrine of precedent inhibited rapid changes of direction and it was accepted that only Parliament could change the law. As Lord Reid (perhaps too modestly) put it, if doctrine had developed in such a way as to cause injustice, appellate judges should, if they could, 'get the thing back on the rails', but 'if it has gone too far we must pin our hopes on Parliament'.[3] Jaffé attributed the different behaviour of English and American judges to constitutional factors; it had always been anticipated that the federal American judge would 'assume a role in the polity far greater than that played by his *confrère* in Britain'.[4]

English political scientists confirmed this view of courts. For King, the judiciary was not at this time 'an autonomous source of political power' in the British system of government:

> The courts were important, of course, as they are in every properly functioning constitutional system. British judges' independence of both the government and Parliament, and their insistence that the state as well as its citizens should be subject to the rule of law, were and are essential bulwarks of good government. Compared, however, with the role of the courts in many other countries, the role of the courts in the United Kingdom was severely circumscribed. Judges might occasionally be said to have 'made policy' as a result of their individual decisions or series of decisions, but they could not declare Acts of Parliament unconstitutional, because there was no capital-C constitution in Britain, and they could not determine that Acts of Parliament or acts of government were in breach of the bill of rights because there was no bill of rights.[5]

World War II had marked a period of exceptionally strong executive government, acceptable only in periods of national emergency. It marked too a period of judicial deference, when judges joined with Parliament to endorse executive authority and power. Their obsequious attitude was encapsulated by the majority speeches in *Liversidge v Anderson*.[6] The draconian Defence of the Realm Act 1914 and the regulations made thereunder had empowered the Home Secretary to intern an alien without trial if 'he had reasonable cause to believe' that the internee was of hostile origin or associations. The

[3] Lord Reid,'The judge as law-maker' (1972) XII *Journal of the Society of Public Teachers of Law* 22.

[4] L. Jaffé, *English and American Judges as Lawmakers* (Clarendon Press, 1969), p. 83, a view traceable to the classic work of Alexis de Tocqueville, *Democracy in America* (1835). By the late 1990s, Jaffé's remark might have seemed controversial to Americans: see A. Scalia, *A Matter of Interpretation: Federal courts and the law* (Princeton University Press, 1997); M. Tushnet, *The New Constitutional Order* (Princeton University Press, 2003).

[5] A. King, *Does the United Kingdom Still Have a Constitution*? (Sweet & Maxwell, 2001), p. 25. See also Barker, p. 3 above.

[6] *Liversidge v Anderson* [1942] AC 206. See also *McEldowney v Forde* [1971] AC 632 (Lord Diplock dissenting).

question for the House of Lords was whether this formula conveyed an *objective* or *subjective* discretion: in other words, did the Home Secretary have to spell his reasons out to a court? By a majority of four to one, the House held that he did not: the discretion was subjective. One lonely member of the House of Lords (Lord Atkin) maintained that the formula permitted, nay demanded, review for reasonableness.[7] Seven years later, Sir Alfred Denning was prepared to defend the decision. The wartime powers of detention represented 'the high-water mark of power of the executive of this country' but the power was not abused; 'it was administered by men who could be trusted not to allow any man's liberty to be taken away without good cause'. There was parliamentary accountability in the shape of 'a conscientious and careful Home Secretary who was answerable to a Parliament which was ever vigilant in defence of liberty'.[8] But the lecture series stressed also the historical role of the common law in keeping the balance 'between individual freedom and social duty'. While not denying the necessity of strong executive powers for social purposes, Sir Alfred pointed to their increasing extent: 'they touch the life of every one of us at innumerable points: and they are an inseparable part of modern society'.[9] Over the substance of the powers, the courts could have little control; these were matters for government and Parliament; the courts' 'most important task' was to see that the powers are not exceeded or abused.

Schwarz and Wade blamed the 'lingering effect of the wartime spirit of abnegation and sacrifice' for an administrative law 'at its lowest ebb for perhaps a century. The leading cases made a dreary catalogue of abdication and error.'[10] But the authors thought a turn-around still possible if it were realized that 'Britain had in the past developed much more administrative law than the legal profession understood';[11] they looked, in other words, for a renaissance. According to Wade, it was the judges who 'executed a series of U-turns which put the law back on course and responded to the public mood'. In response to a 'public reaction against administrative injustice' too strong to be ignored, a new judicial policy was adopted 'to build up a code of rules of administrative fair play which [judges] take for granted as intended by Parliament to apply to all statutory powers, and perhaps even to prerogative powers, and to insist on preserving their jurisdiction even in the face of legislation purporting to exclude it'.[12] The move was justifiable to Wade because 'the judges appreciate,

[7] R. Heuston, '*Liversidge v Anderson* in Retrospect' (1970) 86 *LQR* 33.

[8] A. Denning, *Freedom under the Law* (Stevens, 1949), p. 16. History does not support his view: see A. Simpson, *In the Highest Degree Odious: Detention without trial in wartime Britain* (Clarendon Press, 1992).

[9] Denning, *Freedom under the Law*, p. 100.

[10] B. Schwarz and H. Wade, *Legal Control of Government: Administrative law in Britain and the United States* (Clarendon Press, 1972), pp. 320–1.

[11] *Ibid*. See similarly Sir Leslie Scarman, *English Law: The new dimension* (Stevens, 1974).

[12] H. W. R. Wade, *Constitutional Fundamentals* (Stevens, 1980), p. 62.

much more than does Parliament, that to exempt any public authority from judicial control is to give it dictatorial power, and that this is so fundamentally objectionable that Parliament cannot really have intended it.'[13] In these classical red-light pictures of the evolution of 'administrative law', our present happy state is owed to the judiciary. And Lord Diplock (only too willing to take credit) regarded 'the progress towards a comprehensive system of administrative law . . . as having been the greatest achievement of the English courts in my judicial lifetime.'[14]

A quantum leap had been taken by the millennium, when King called the judiciary a 'living presence in the constitution in a way that it was not before'. How had this significant turn-around been achieved? As we shall see, judicial review expanded exponentially during the 1970s and 1980s, as the judiciary regained confidence lost during two wartime regimes. The common law, which Lord Scarman saw as incapable of rejuvenation, confounded his pessimistic predictions and, with some assistance from continental Europe, showed a remarkable capacity for renaissance. Accession to the European Communities brought structural change, as national courts were incorporated into the 'new legal order' of Community law (see *Factortame*, p. 180 below). The indirect effect was to re-balance the relationship between judiciary, executive and legislature, very much to the profit of the judges. (Discussion of these momentous developments is reserved for Chapter 4.) Alongside, human rights law was flowing in through the European Convention. Finally, the HRA gave the judiciary a new power base, underpinning its authority. Today, as Lord Diplock forecast in the *GCHQ* case (p. 107 below), the jurisprudence of the ECJ and ECtHR form important components of the 'multi-streamed jurisdiction' that has come into being – a new context where judges are learning to grapple with and domesticate European and international law. In the rest of this chapter, we shall examine the 'onward march of judicial review' under the following heads:

- *Rebuilding judicial review* in the post-war period, when old principles were affirmed and new principles set in place
- *Rapid expansion* of judicial review during the 1970s and 1980s, with executive discretion as its target
- *Rationality* as the key concept of judicial review
- *Rights-based review*
- *The shadow of the Convention*
- *Rights, unreasonableness and proportionality*
- *The Human Rights Act and after*

[13] *Ibid*., p. 65.

[14] *R v IRC, ex p. National Federation of Self-Employed* [1982] AC 617, 641. Speaking extrajudicially, Lord Diplock had claimed that the English system was 'nearly as comprehensive in its scope as *droit administratif* in France': see [1974] *CLJ* 233, 244.

2. Rebuilding judicial review

A formalist agenda for administrative law accompanied judicial formalism.[15] Cotterell, situating judicial review within constitutional theory, described it as a 'modest underworker', by which he meant that the judicial role was no more and no less than to police the rule of law through interpretation (compare Lord Reid's earlier account above).[16] Less restrained was Hutchinson's metaphor of 'mice under the executive chair' (though we should note that the author thought mice better suited than lions to a popular democracy).[17] Judges were concerned to avoid accusations of meddling in policy. They perceived themselves to be debarred from substituting their decision as to the merits of a case for that of the primary decision-maker, a view expressed by Lord Greene in his classical *Wednesbury* judgment (p. 42 above). A passage from a judgment of Lord Donaldson makes the point nicely. The Court of Appeal was faced with an application from Michael Foot, then Leader of the Opposition, to review the findings of the Boundary Commission, an independent statutory body set up by and answerable to the Home Secretary which exists to review the boundaries of parliamentary electoral constituencies. Faced with the argument that the matter was not justiciable, Lord Donaldson was careful to explain why this was not so:

> Since a very large number of people are interested in this appeal and since it is most unlikely that our decision, whether for or against the applicants, will meet with universal approval, it is important that it should at least be understood. In particular it is important that everyone should understand what is the function and duty of the courts.
>
> Parliament entrusted the duty of recommending changes in English constituency boundaries to the commission. It could, if it had wished, have further provided that anyone who was dissatisfied with those recommendations could appeal to the courts. Had it done so, the duty of the court would, to a considerable extent, have been to repeat the operations of the commission and see whether it arrived at the same answer. If it did, the appeal would have been dismissed. If it did not, it would have substituted its own recommendations. Parliament, for reasons which we can well understand, did no such thing. It made no mention of the courts and gave no right of appeal to the courts.
>
> There are some who will think that in that situation the courts have no part to play, but they would be wrong. There are many Acts of Parliament which give ministers and local authorities extensive powers to take action which affects the citizenry of this country, but give no right of appeal to the courts. In such cases, the courts are not concerned or involved as long as ministers and local authorities do not exceed the powers given to them

[15] M. Taggart, 'Reinventing administrative law' in Bamforth and Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003).

[16] R. Cotterell, 'Judicial review and legal theory' in Richardson and Genn, *Administrative Law and Government Action* (Clarendon Press, 1994). See also R. Cranston, 'Reviewing judicial review', *ibid*.

[17] A. Hutchinson 'Mice under a chair: Democracy, courts and the administrative state' (1990) 40 *UTLJ* 374.

> by Parliament. Those powers may give them a wide range of choice on what action to take or to refrain from taking and so long as they confine themselves to making choices within that range, the courts will have no wish or power to intervene. But if ministers or local authorities exceed their powers – if they choose to do something or to refrain from doing something in circumstances in which this is not one of the options given to them by Parliament – the courts can and will intervene in defence of the ordinary citizen. It is of the essence of parliamentary democracy that those to whom powers are given by Parliament shall be free to exercise those powers, subject to constitutional protest and criticism and parliamentary or other democratic control. But any attempt by ministers or local authorities to usurp powers which they have not got or to exercise their powers in a way which is unauthorised by Parliament is quite a different matter. As Sir Winston Churchill was wont to say, 'that is something up with which we will not put'. If asked to do so, it is then the role of the courts to prevent this happening.[18]

Rigorously applying the *Wednesbury* test, the Court of Appeal ruled that the applicant had failed to show that the Commission had reached conclusions that no reasonable Commission could have reached.

We can relate this statement to Lord Wilberforce's description of the role of judges in judicial review made in the celebrated *Bromley* case (p. 103 below). According to Lord Wilberforce, two possibilities were open to the judge:

- to construe statute to determine the extent of administrative powers (the principle of 'narrow' ultra vires) or
- in addition to apply general principles of administrative law, such as the reasonableness doctrine ('wide' ultra vires).

In reality, the formulation is ambiguous. When, for example, Lord Donaldson tells us that the courts 'can and will intervene' if public authorities do or refrain from doing something when 'this is not one of the options given to them by Parliament', is he describing 'narrow' or 'wide' ultra vires? The difference, as this chapter will reveal, could be significant. A similar ambiguity is evident when Allan says that judicial review 'exists to safeguard legality. The rule of law requires that public authorities act only within the limits of their powers, *properly understood*.'[19] There is scope for a good deal of judicial activism in the two emphasised words. He himself admits that 'administrative and political choice may become closely intertwined with legal principle'.

In a trilogy of famous cases decided at the end of the 1960s, the House of Lords intervened decisively to give judicial review a new lease of life. The 1969 case of *Anisminic* (see p. 27 above) used the idea of a body of general administrative law principles to render null and void virtually any decision taken in defiance of these principles. Also in 1963, *Ridge v Baldwin* (see p. 622 below)

[18] *R v Boundary Commission for England, ex p. Foot* [1983] QB 600.

[19] T. Allan, *Law, Liberty and Justice: The legal foundations of British constitutionalism* (Clarendon Press, 1993), pp. 183–4.

reinstated into decision-taking rules of procedural fairness that had fallen into abeyance, using them as an aid to statutory interpretation. In *Padfield*,[20] the third case in the trilogy, the House of Lords moved to control ministerial discretionary power, boldly walking down the path they had refused to take in *Liversidge v Anderson*.

The Agricultural Marketing Act 1958 set up a milk-marketing scheme that forced producers to sell their product to the Milk Marketing Board, which periodically fixed prices on a regional basis. Section 19 provided that, in case of dispute, complaints could be referred to a committee of investigation 'if the Minister in any case so directs'. On receipt of the committee's report, the minister could revoke or amend the scheme, 'if he thinks fit so to do after considering the report'. Producers in the south-east region complained that the fixed price did not adequately reflect increased costs in transporting milk from other regions but the Board declined to fix new prices on the grounds that an increase to the complainants would be at the expense of other areas. The minister refused to refer the matter to the committee of investigation, stating in a letter that, if the complaint were upheld, the minister would be expected to give effect to the committee's recommendations by laying a statutory order before Parliament, which he was unwilling to do. Padfield sought mandamus to compel a reference. By a majority, Lord Morris dissenting, the House of Lords issued the order:

> *Lord Reid:* The Minister is, I think, correct in saying that the board is an instrument for the self-government of the industry. So long as it does not act contrary to the public interest the Minister cannot interfere. But if it does act contrary to what both the committee of investigation and the Minister hold to be the public interest the Minister has a duty to act. And if a complaint relevantly alleges that the board has so acted, as this complaint does, then it appears to me that the Act does impose a duty on the Minister to have it investigated. If he does not do that he is rendering nugatory a safeguard provided by the Act and depriving complainers of a remedy which I am satisfied that Parliament intended them to have . . .
>
> It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint to the committee, that if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him in a worse position. But I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act.
>
> *Lord Morris:* The language here is, in my view, purely permissive. The Minister is endowed with discretionary powers. If he did decide to refer a complaint he is endowed with further discretionary powers after receiving a report . . . If the respondent proceeded properly to exercise his judgment then, in my view, it is no part of the duty of any court to act as a Court of Appeal from his decision or to express any opinion as to whether

[20] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

> it was wise or unwise . . . A court could make an order if it were shown (a) that the Minister failed or refused to apply his mind to or to consider the question whether to refer a complaint or (b) that he misinterpreted the law or proceeded on an erroneous view of the law or (c) that he based his decision on some wholly extraneous consideration or (d) that he failed to have regard to matters which he should have taken into account.

The minister duly referred the dispute to the committee, which recommended change. In turn, the minister reported to the House of Commons that 'it would not be in the public interest for me to direct the Board to implement the change'.[21]

Austin accused the House in *Padfield* of ignoring an important distinction between 'objective' and 'subjective' discretion: objective discretion was derived from statute and imposed 'defined or ascertainable predetermined criteria' by which, and solely by which, the decision-maker had to make his choice: in other words, it was always confined and structured. Formulae such as 'if in his opinion', 'if he thinks fit', 'if he deems', 'if he considers', etc., ought to be interpreted as conferring subjective discretion because they contain no benchmarks against which the decision-maker's choices can be measured. The implication of *Padfield* must be that:

> if the source of the power does not impose any objective criteria, the courts will imply such criteria; the disturbing element in this development is that the courts may simply be replacing their own subjective views for those of a person such as a Minister who is better qualified and equipped to exercise the power. In short, they may supply their own criteria rather than implying them from the terms of the empowering legislation.[22]

There are two accusations here: first that, in substituting their subjective views for those of the appointed decision-maker, the judges had strayed outside the traditional boundaries of their constitutional function; secondly, that the principles on which they operated were just as discretionary and unstructured as the discretions they purported to discipline. Judicial review did not, in other words, measure up to the standards of rational decision-making imposed by the judges on the executive and administrators. Rationality was to become the focal point of judicial review.

3. Rapid expansion

Padfield, with its emphasis on control of discretionary power, was to set the tone of judicial review for the next two decades. As Jowell observes:

[21] HC Deb., vol. 781, cols. 46–7 (Mr Cledwyn Hughes).

[22] R. Austin, 'Judicial review of subjective discretion: At the Rubicon: whither now?' (1975) 28 *CLP* 150, 154.

> In the space of just five years the attitude of the courts to the administration turned dramatically. Power conferred broadly was no longer read as necessarily conferring unfettered discretion. In *Padfield* it was even said that unfettered discretion is not recognised in law. There were of course cases the other way. Where national security was involved, the courts would tend to defer to the executive, but the position had been reached where virtually no state power was unreviewable. And the courts were increasingly ready to extend their categories of review.[23]

Two closely linked aspects of Lord Reid's trend-setting reasoning in *Padfield*, based on flexible purposive principles of statutory interpretation, foreshadowed this rapid expansion. First, he had asserted, quite contrary to the ruling in *Liversidge v Anderson*, that ministerial failure to give reasons was not without consequences – the court was entitled to draw its own inferences from an absence of evidence to support the decision-maker's conclusions; secondly, that the court could make its own evaluation of the weight of evidence before the decision-maker to a degree ostensibly precluded by the *Wednesbury* principle. These are points of great significance. In contrast to EU law, which imposes a positive duty for all its institutions to give reasoned decisions,[24] English law imposes no *overall* duty to give reasons[25] and, although in later chapters we shall see our courts inch towards a requirement of reasons, they have never yet gone so far as to impose a general duty.[26] Yet Shapiro talks of reasons, which permit courts properly to assess the administrative reasoning process, as the basis of all rational judicial review. It is also, Shapiro argues, a tool for expansion: 'hard look' scrutiny of reasons enables courts 'to run through, replay or reconstruct the decision-making process'[27] while remaining ostensibly on the legitimate judicial terrain of procedure. This mirrors Lord Diplock's approach in the notorious *Bromley* case.[28]

The Labour majority on the GLC had promised before election to reduce

[23] J. Jowell, 'Administrative law' in V. Bogdanor (ed.), *The British Constitution in the Twentieth Century* (Oxford University Press, 2004), p. 387.

[24] TEC Art. 253 establishing a duty for all EC institutions to give reasons for their acts and decisions: see P. Craig, *EU Administrative Law* (Oxford University Press, 2006), pp. 360–72.

[25] A start was made with the Tribunals and Inquiries Act 1958, which provided that, if a request is made at or before the time of judgment, the tribunal must give reasons for its decision. The provision is consolidated by s. 10 of the Tribunals and Inquiries Act 1992: and see n. 26 below).

[26] S. A. de Smith Lord Woolf and J. Jowell, *Judicial Review of Administrative Action*, 6th edn (Sweet & Maxwell, 2007), 7-087–108; and see G. Richardson, 'The duty to give reasons: Potential and practice' [1986] *PL* 437; P. Craig, 'The common law, reasons and administrative justice' (1994) 53 *CLJ* 282; P. Neill, 'The duty to give reasons: The openness of decision-making' in Forsyth and Hare (eds.), *The Golden Metwand and the Crooked Cord* (Oxford University Press, 1998).

[27] M. Shapiro, 'The giving reasons requirement' (1992) *University of Chicago Legal Forum* 179, 183, 206. American courts are, however, as inconsistent as their British counterparts: see J. Beermann, 'Common law and statute law in US federal administrative law', in Pearson, Harlow and Taggart (eds.), *Law in a Changing State* (Hart Publishing, 2008).

[28] *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768.

bus and tube fares by 25 per cent. This was done by a grant to the London Transport Executive enabling it to budget for a deficit. The funds were provided a 'precept' or levy on the London boroughs, falling on the ratepayers (those who paid local taxes) of all boroughs. Bromley, a borough controlled by Conservatives, challenged the legality of the scheme. Dividing those affected by the policy of fares subsidy into passengers, residents, ratepayers and electors, Lord Diplock drew on the equitable principle of 'fiduciary duty' to prioritise the interests of ratepayers:

> *Lord Diplock:* My Lords, the conflicting interests which the GLC had to balance in deciding whether or not to go ahead with the 25 per cent reduction in fares, notwithstanding the loss of grant from central government funds that this would entail, were those of passengers and the ratepayers. It is well established that a local authority owes a fiduciary duty to the ratepayers from whom it obtains moneys needed to carry out its statutory functions, and that this includes a duty not to expend those moneys thriftlessly but to deploy the full financial resources available to it to the best advantage; the financial resources of the GLC that are relevant to the present appeals being the rate fund obtained by issuing precepts and the grants from central government respectively. The existence of this duty throws light upon the true construction of the much-debated phrase in section 1(1) [of the Transport (London) Act 1969] 'integrated, efficient and economic transport facilities and services'. 'Economic' in this context must I think mean in the economic interests of passengers and the ratepayers looked at together, i.e. keeping to a minimum the total financial burden that the persons in these two categories have to share between them for the provision by the LTE in conjunction with the railways board and the bus company of an integrated and efficient public transport system for Greater London . . . I think that the GLC had a discretion as to the proportions in which that total financial burden should be allocated between passengers and the ratepayers. What are the limits of that discretion . . . does not, in my view, arise, because the GLC's decision was not simply about allocating a total financial burden between passengers and the ratepayers, it was also a decision to increase that total burden so as nearly to double it and to place the whole of the increase on the ratepayers. For, as the GLC well knew when it took the decision to reduce the fares, it would entail a loss of rate grant from central government funds amounting to some 50 million, which would have to be made good by the ratepayers as a result of the GLC's decision. So the total financial burden to be shared by passengers and the ratepayers for the provision of an integrated and efficient public passenger transport system was to be increased by an improvement in the efficiency of the system, and the whole of the extra 50 million was to be recovered from the ratepayers. That would, in my view, clearly be a thriftless use of moneys obtained by the GLC from ratepayers and a deliberate failure to deploy to the best advantage the full financial resources available to it by avoiding any action that would involve forfeiting grants from central government funds. It was thus a breach of the fiduciary duty owed by the GLC to the ratepayers. I accordingly agree with your Lordships that the precept issued pursuant to the decision was ultra vires and therefore void.

Here Lord Diplock uses the 'wide' ultra vires principle in two distinct ways. First, he re-formulates Lord Greene's doctrine of *Wednesbury* unreasonableness in

a way that anticipates his speech in the *GCHQ* case (p. 107 below), using it to structure administrative discretion as a model of reasoned decision-making. Secondly, a supposed general principle of administrative law (fiduciary duty)[29] is introduced as a 'relevant consideration' in the light of which the statutory duty *must* be interpreted. Invoking the first limb of the *Wednesbury* principle, Lord Diplock had actually turned it on its head. This striking example of judicial creativity caused public uproar, provoking accusations from politicians that the judges were 'arrogating to themselves political decisions', and academic criticism of the 'insular and pedantic reasoning' on which the decision was based. The more pragmatic response of the GLC was to double fares. Later they introduced new proposals (the 'Balanced Plan') in an effort to conform to the judgment while maintaining their policy of fares subsidy. A second challenge to the legality of the Balanced Plan was rejected by the High Court.[30]

4. Rationality

Herbert Simon based his model of 'bounded rationality', in which information-gathering is a prerequisite of rational decision-making, on the maxim 'No conclusions without premises.' If they are not to act arbitrarily and capriciously in taking decisions, decision-makers need to narrow down their choices: to find a way, as Simon put it, of 'avoiding distraction (or at least too much distraction) and focusing on the things that need attention at a given time'.[31] Rational choice is the process of 'selecting alternatives which are conducive to the achievement of previously selected goals' or 'the selection of the alternative which will maximise the decision-maker's values, the selection being made following a comprehensive analysis of alternatives and their consequences'. Rationality does not dictate goals but acts as a pathway to a goal: 'all reason can do is help us reach agreed-on goals more efficiently'. Inside public administration, we have seen that rationality underlies the audit methodology of NPM described in Chapter 2; it is also the rationale of both regulatory theory and risk regulation described in Chapter 6. To one experienced judge, administrative and judicial rationality are linked: 'The model of bounded rationality has in common with administrative law a focus on process and procedure; there is, at least on the

[29] The idea of fiduciary duty can be traced to *Roberts v Hopwood* [1925] AC 578, where the House of Lords supported a district auditor's surcharge on councillors for paying to men and women a standard minimum wage above the national average. Lord Atkinson described the council as standing 'somewhat in the position of trustees or managers of the property of others'.

[30] HC Deb., vol. 12, col. 418 (Mr Lyon). See J. Griffith, 'The Law Lords and the GLC', *Marxism Today* (Feb 1982) 29. See also D. Pannick, 'The Law Lords and the needs of contemporary society' (1982) 53 *Pol. Q* 318. And see *R v London Transport Executive, ex p. Greater London Council* [1983] 2 WLR 702.

[31] H. Simon, *Reason in Human Affairs* (Blackwell, 1983), pp. 2, 5, 77, 106.

surface, a good fit with the terminology of rational decision-making.'[32] Thus the first limb of the *Wednesbury* test directs the decision-maker to accumulate his evidence, taking into account all relevant and excluding all irrelevant material but – at least as applied by Lord Greene – does not question the decision-maker's objectives. *Padfield* adds a secondary dimension: reasons render the decision-maker's reasoning transparent, opening it up to external scrutiny.

But as judicial review increasingly impinged on discretionary decision-making, the contrast between the standards required of administrators and those of judicial decision-making, which remained inherently discretionary, began to stand out. To be rational, judicial review too should be reasoned: it 'makes sense only if the judge is in a position to enunciate or explain the rule on which his decision is based'.[33] And there was a further reason why judicial review needed to be presented as rational. The malleable nature of its general principles opened the judges to the complaints of 'playing politics' made after the *Bromley* case. Green light theorist John Griffith was not afraid to label the judiciary's decisions 'political':

> In our system for two principal reasons, the judiciary have a wide scope for the making of political decisions. First, statute law does not seek with any precision to indicate where, between Ministers and judges, final decision making should lie. Secondly, judges themselves, in the common law tradition of judicial creativity, frequently invent or re-discover rules of law which enable them to intervene and to exercise political judgment in areas that hitherto had been understood to be outside their province. In the event, for these two reasons, legislators and Ministers and public authorities are continuously being surprised to discover that, in the view of the judges, they do not have the powers they thought they had.[34]

By encouraging a more logical and coherent approach, proponents of judicial review felt this type of argument could be refuted. Decision-making seems more objective if presented as rational and scientific. (Consider, for example, the use made by Lord Diplock of the fiduciary principle to neutralise the hotly political *Bromley* decision.) Jowell and Lester attacked the loose texture of *Wednesbury* unreasonableness for conferring subjective or 'strong' discretion on the judiciary, arguing that 'intellectual honesty requires a further and better explanation as to why the act is unreasonable'.[35] A change in terminology from

[32] See J. Laws, 'Wednesbury' in Forsyth and Hare (eds.), *The Golden Metwand and the Crooked Cord*.

[33] J. Kahn, 'Discretionary power and the administrative judge' (1980) 29 *ICLQ* 521, 525. See now D. Dyzenhas and M. Taggart, 'Reasoned decisions and legal theory' in Edlin (ed.), *Common Law Theory* (Cambridge University Press, 2007).

[34] J. Griffith, 'Constitutional and administrative law', in Archer and Martin (eds.), *More Law Reform Now!* (Barry Rose, 1983), p. 55; and see J. Griffith, *The Politics of the Judiciary* (Fontana, 1977).

[35] J. Jowell and A. Lester, 'Beyond *Wednesbury*: Substantive principles of administrative law' [1987] *PL* 368, 371.

'reasonableness' to 'rationality' seemed to point in the desired direction. In the highly charged *GCHQ* case[36] where the change was made, it was especially important for judicial review to appear scientific, objective and apolitical. The case was fought by the civil-service unions, which had members working in the general communications headquarters of the security services (GCHQ) when the Foreign Secretary suddenly announced to the House of Commons that GCHQ employees would no longer be allowed to join a trade union. The unions argued that they had not been consulted. The minister stood on the prerogative powers, arguing that they were non-justiciable. The House of Lords ruled (i) that the prerogative powers were in general justiciable (see p. 10 above); and (ii) that the unions had a 'legitimate expectation' of being consulted before the change was made. However, the House found for the Government on the ground (iii) that security and the defence of the realm were involved.

Usually cited as the basis of the modern doctrine of judicial review, Lord Diplock's three principles still conform largely to the classical grounds as they had evolved over the centuries, though he left room for the development of new principles. But scrutinise Lord Diplock's account of the *Wednesbury* principle carefully. Has he conflated two separate principles: rationality and a subsidiary category of '*Wednesbury* unreasonableness'? Boundaries are also set by Lord Diplock's reference to 'decisions of a kind that generally involve the application of government policy'. Here, he suggests, judicial process is not adapted to provide the right answer, because the decisions involve 'competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another: a balancing exercise which judges by their upbringing and experience are ill-qualified to perform'. Later in the chapter we shall see this limitation evolve into the 'deference' principle increasingly used in human rights cases:

> *Lord Diplock:* Judicial review has I think developed to a stage today when . . . one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community . . .
>
> By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is *par excellence* a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

[36] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

> By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system . . .
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice . . .
>
> While I see no a priori reason to rule out 'irrationality' as a ground for judicial review of a ministerial decision taken in the exercise of 'prerogative' powers, I find it difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision-making power a decision of a kind that would be open to attack through the judicial process upon this ground. Such decisions will generally involve the application of government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another: a balancing exercise which judges by their upbringing and experience are ill-qualified to perform. So I leave this as an open question to be dealt with on a case to case basis . . .

Paul Craig, who describes himself as a 'liberal interpretivist' sympathetic to the concept of a principled and orderly legal universe infused by liberal values,[37] sees the new judicial review as a spectrum, with the classical, limited *Wednesbury* test of reasonableness lying at one end and 'judicial substitution of judgment, whereby the court imposes what it believes to be the correct meaning of the term or issue in question' at the other. 'The theme that runs throughout this area is therefore the desire to fashion a criterion that will allow judicial control, without thereby leading to substitution of judgment or too great an intrusion on the merits'.[38] With this in mind, an enthusiastic and critical academic literature with great faith in rationality has stimulated the evolution of new principles which are perceived or can be presented as evaluative in character – including the proportionality principle mentioned by Lord Diplock and imposed by the ECtHR in human rights cases (below). Both the rationality and proportionality tests act as constraints on the decision-maker but also

[37] P. Craig, 'Theory and values in public law: A response' in Craig and Rawlings (eds.), *Law and Administration in Europe* (Oxford University Press, 2003) and 'Theory, "pure theory" and values in public law' [2005] *PL* 429.

[38] P. Craig, *Administrative Law*, 6th edn (Sweet and Maxwell, 2008), p. 615.

on the adjudicator, prompting them to articulate the reasoning on which their decisions are based. This point is illustrated in the *Miss Behavin'* case, below.

5. Rights-based review

According to Dworkin's 'principle of political integrity', law must be *morally* principled and both adjudicators and lawmakers are duty bound 'to make the total set of laws *morally* coherent'.[39] Dworkin famously distinguished 'principle' from 'policy', severing the legal universe of rules and principles from the world of policy and politics. 'Policy' relates to the general or public interest; is characteristically concerned with economic or social priorities; and is not required, according to Dworkin, to be consistent. 'Principles' are concerned with justice and fairness and are governed by values of integrity and consistency. MacCormick exposes the fallacy:

> Even if it be the case . . . that moral values and principles have some objective truth and universal validity, it remains also the case that people inveterately disagree about them . . . Political principles are . . . also subjects of inveterate disagreement. Legal systems result from a patchwork of historical assertions of contentious and changing political principles, political compromises and mere political muddles. That from which laws emerge is controversial, even if some or all of the controversies concern moral issues on which there may in principle be a single right answer.[40]

Dworkin's work, with its hint of a 'single right answer',[41] has profoundly influenced the debate over law and values. It has helped, as Allan explains, to set the scene for a 'principled' judicial review based on the concept of rights:

> Dworkin's account of the distinction between principle and policy makes a helpful contribution to the task of defining the nature and limits of public law. Questions of principle are those which concern the scope and content of individual rights, as opposed to the general welfare or the public interest. Matters of public interest or public policy should be determined by the political branches of the government – executive or legislature. Questions of right, by contrast, are peculiarly the province of the courts. As counter-majoritarian entitlements or 'trumps' over general utility or the public interest, the relative insulation of the judges from the ordinary political process ought to be specially conducive to their protection and enforcement . . . [A]dministrative law may be helpfully interpreted as a system of public law rights and the legitimate boundaries of judicial review may be found in the process of defining and enforcing those rights.[42]

[39] R. Dworkin, *Law's Empire* (Fontana, 1986), Ch. 6.

[40] N. MacCormick, *HLA Hart* (Stanford University Press, 1981), p. 30. See also J. Waldron, *Law and Disagreement* (Harvard University Press, 1999).

[41] R. Dworkin, 'No right answer?' in Hacker and Raz (eds.), *Law, Morality and Society* (Oxford University Press, 1977) but see M. Weaver, 'Herbert, Hercules and the plural society: A "knot" in the social bond' (1978) 41 *MLR* 660.

[42] Allan, *Law, Liberty and Justice: The legal foundations of British constitutionalism*, p. 7.

This highly artificial distinction is naturally hard to apply, if only because so many of the disputes on which courts are called to adjudicate concern a conflict between individual and collective interests. Arguably, rights-based theories of law create an automatic bias towards individualism. This is accentuated by the classical view of English administrative law as concerned in essence with 'individual versus state' disputes.[43] As we saw in Chapter 2, however, the natural bias came to seem justifiable in light of the increased powers and interventionist character of the regulatory state.

Allan leaves open the question whether 'rights' have a moral content, though elsewhere he suggests that the common law embodies 'albeit imperfectly, a set of constitutional values transcending the ordinarily more transient, and particular, rules enacted by the legislature'.[44] Sir John Laws, who also sees values as 'immanent in the common law', more openly expresses his view that 'constitutional rights' are 'higher-order law':

> The democratic credentials of an elected government cannot justify its enjoyment of a right to abolish fundamental freedoms. If its power in the state is in the last resort absolute, such fundamental rights as free expression are only privileges; no less so if the absolute power rests in an elected body. The byword of every tyrant is 'My word is law'; a democratic assembly having sovereign power beyond the reach of curtailment or review may make just such an assertion, and its elective base cannot immunise it from playing the tyrant's role . . .
>
> A people's aspiration to democracy and the imperative of individual freedoms go hand in hand. Without democracy the government is by definition autocratic; though it may set just laws in place, and even elaborate a constitution providing for fundamental rights, there is no sanction for their preservation save revolution . . . the need for higher-order law is dictated by the logic of the very notion of government under law.[45]

We have now reached the point of concluding that a democratic constitution must be preserved against incursions on its core values, even if this entails some limitations on the powers of government and Parliament. But the view that the 'good constitution' must recognise and entrench 'a bedrock of rights' as 'higher-order law' to which 'even Parliament is subject' challenges our accepted constitutional order; Griffith has indeed called the position 'unbalanced' and 'tenable only on a misreading of constitutional history'.[46]

[43] P. McAuslan, 'Administrative law, collective consumption and judicial policy' (1983) 46 *MLR* 1.

[44] T. Allan, 'Fairness, equality, rationality: Constitutional theory and constitutionalism' in Forsyth and Hare, *The Golden Metwand*, p. 17.

[45] J. Laws, 'Is the High Court the guardian of fundamental constitutional rights?' [1993] *PL* 59, 61; 'Law and democracy' [1995] *PL* 72, 84 and 'The constitution: Morals and rights' [1996] *PL* 622.

[46] J. Griffith, 'Judges and the constitution' in Rawlings (ed.), *Law, Society and Economy* (Oxford University Press, 1997) and 'The brave new world of Sir John Laws' (2000) 63 *MLR* 159. Support for this view comes from J. Goldsworthy, *The Sovereignty of Parliament: History and philosophy* (Oxford University Press, 1999). P. Craig, 'Constitutional foundations, the rule of law and supremacy' [2003] *PL* 92 seeks to align the rival positions, arguing that parliamentary sovereignty was never as absolute as modern interpretations of Dicey pretend.

An unwritten constitution without a bill of rights in which parliamentary sovereignty is the dominant constitutional norm sits uncomfortably with the concept of a 'higher-order law' logically prior to the democratic system with the judiciary as custodian. Poole calls the proposition 'nothing less than the reconfiguration of public law as a species of constitutional politics centred on the common law court. The court, acting as primary guardian of a society's fundamental values and rights, assumes, on this account, a pivotal role within the polity.'[47] An added problem with the idea is that judges are unelected and, we might add, that Britain has no 'Big-C' Constitutional Court.[48]

'Higher-order law' must logically precede the democratic system as it operates for the time being. It cannot therefore depend, as the *ultra vires* principle supposedly does, on the 'will' or 'intent' of Parliament; its general principles must be embedded in the common law and form the context in which statute is interpreted.[49] To underpin this point a giant stride was necessary: 'to dismiss rival conceptions – in particular those that take legislative sovereignty as their starting point or otherwise underestimate the normative potential of the common law – as being anomalous within British constitutional history.'[50] We are moving close to the doctrine of 'common law constitutionalism' by which parliamentary sovereignty was to be reconfigured. Lord Woolf in a public lecture treated the rule of law as a *grundnorm* or primary rule that neither Parliament nor the courts could repudiate:

> If Parliament did the unthinkable, then . . . the courts would also be required to act in a manner which would be without precedent. Some judges might choose to do so by saying that it was an irrebuttable presumption that Parliament could never intend such a result. I myself would consider there were advantages in making it clear that ultimately there are even limits on the supremacy of Parliament.[51]

Lord Woolf chose not to expand on what the unthinkable might be. Would it, for example, cover David Blunkett's planned ouster clause that we met in Chapter 1?

It was left to Lord Steyn in *Jackson* to hypothesise circumstances in which the courts might take action. The issue was whether the Hunting Act 2004, passed without the consent of the House of Lords in terms of the Parliament

[47] T. Poole, 'Back to the future? Unearthing the theory of common law constitutionalism' (2003) 23 *OJLS* 435, 449 and 'Questioning common law constitutionalism' (2005) 25 *Legal Studies* 142. See similarly D. Feldman, 'Public law values in the House of Lords' (1990) 106 *LQR* 246.

[48] See on the constitutional relationship between the three branches of government subsequent to the Constitutional Reform Act 2005, House of Lords Constitution Committee, *Relationships between the executive, the judiciary and Parliamen*t, HL 151 (2006/7). And see R. Bellamy, *Political Constitutionalism* (Cambridge University Press, 2007).

[49] D. Oliver, 'Is ultra vires the basis of judicial review?' [1987] *PL* 543; P. Craig, 'Competing models of judicial review' [1999] *PL* 428; C. Forsyth and M. Elliott, 'The legitimacy of judicial review' [2003] *PL* 286.

[50] Poole, 'Back to the Future', pp. 439–40.

[51] H. Woolf, 'Droit public - English style' [1995] *PL* 57, 68–9.

Acts 1911 and 1949, was valid. In the course of argument, the Attorney-General had asserted that no exceptions other than that contained in the 1911 Act of legislation to extend the life of Parliament are placed on the use of the Parliament Acts. Clearly uncomfortable with an interpretation that would extend to constitutional change as fundamental as abolition of the House of Lords or monarchy without further safeguards, the Court of Appeal had proposed reading in a limitation to except 'fundamental constitutional change' from the purview of the Acts. Some of the Law Lords also hinted at possible constitutional limitations; Lord Steyn was the most forthright. The Acts could theoretically be used to introduce 'oppressive and wholly undemocratic legislation' or:

> to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens. This is where we may have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts . . . The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.[52]

Any such power (on which the Law Lords reserved their position) could only be a 'nuclear deterrent'; otherwise it would be a wholly undemocratic remedy for an undemocratic malady.

More moderately, Goldsworthy argues that it is not for the judges *alone* to revoke (implicitly or otherwise) the doctrine of parliamentary sovereignty. The doctrine is not, as it is sometimes said to be, judge-made and judges have no authority unilaterally to change or reject it. The unwritten constitution depends on a measure of consensus, implicit in the way Dicey hives off legal from political sovereignty. Change, which has to start somewhere, can be initiated either by Parliament or by the courts; but it has to be ratified by an 'official consensus'.[53] Governments recognise this when they seek approval of constitutional change in a referendum, as was done before

[52] *Jackson v Attorney General* [2005] EWCA Civ 126; [2005] QB 579 (CA); [2005] UKHL 56, [2005] 3 WLR 733 (HL) [102]. The other Law Lord to express similar views was Lord Hope [103] and, more tentatively, Baroness Hale [159] and Lord Carswell [194].

[53] Goldsworthy, *The Sovereignty of Parliament*, pp. 244–5.

devolution. Judges recognise it by drawing back from cases that involve 'political questions', as they did when asked to derail ratification of the Maastricht Treaty.[54]

To read an exception for 'fundamental constitutional change' into the Parliament Acts, as the Court of Appeal did in *Jackson*, would not shake the constitution. Courts can, as Goldsworthy said, legitimately institute change, affording an opportunity of parliamentary reconsideration and public debate. But notice the language used by the judges: 'fundamental constitutional change'; 'in exceptional circumstances' (Lord Steyn); 'if Parliament did the unthinkable' (Lord Woolf). The Parliament Acts might require re-thinking in the light of the Attorney-General's claims. There might – or might not – be support for the position that they should not be used for purposes of 'fundamental constitutional change'. But to have ruled that the Parliament Acts should not be used to pass the Hunting Bill would almost certainly have been unwise. Hotly contested though it was, the Bill was not generally regarded as involving fundamental constitutional change. This was indeed later confirmed by the Law Lords, when the Hunting Act survived the test of proportionality, used by the House to measure compatibility with the European Convention.[55] There was wide popular support from around 50 per cent of the population for anti-hunting measures, promised and put to the people in the Labour Party's election manifesto. Thus the unelected House of Lords could be seen as overstepping its powers; as Baroness Hale put the position, 'The party with the permanent majority in the unelected House of Lords could forever thwart the will of the elected House of Commons no matter how clearly that will had been endorsed by the electorate.' [56] To invalidate the Act might therefore have provoked the 'unthinkable'.

6. The shadow of the Convention

In Chapter 1 we quoted Lord Bingham to the effect that the rule of law demands (i) adequate protection of human rights plus (ii) compliance with the state's international law obligations. This 'thickened' conception of the rule of law justifies judges, as self-styled guardians of the rule of law, in turning to human rights law and precepts of international law as a source of values and principles. Before 1998, successive governments had left the judiciary in an awkward dilemma. They had ratified the European Convention (1951) and agreed the right of individual petition (1966). Yet they had several times expressly declined to incorporate the ECHR into English law. In *ex p. Brind*,[57]

[54] *R v Foreign Secretary, ex p. Rees-Mogg* [1994] 1 All ER 457. And see R. Rawlings, 'Legal politics: The United Kingdom and ratification of the treaty on European Union (Part two)' [1994] *PL* 367, 369–75.

[55] *R (Countryside Alliance) v Attorney-General* [2007] UKHL 52.

[56] *Jackson v Attorney General* [156–7].

[57] *R v Home Secretary, ex p. Brind* [1991] 1 AC 696.

the House of Lords confirmed our 'dualist' legal tradition, which does not automatically incorporate international conventions into domestic law. They held indirect 'judicial incorporation' impossible; only the legislature could take such a radical step. In construing any ambiguous provision in domestic legislation, the courts would presume that Parliament intended to legislate in conformity with the ECHR; but it did not form part of UK law and was not directly enforceable in a British court.

Although *Brind* closed the door to judicial incorporation, it could not close the door on the ECHR; it only fuelled the argument for legislative incorporation. By the 1990s, the UK was a constant defendant in the Court of Human Rights at Strasbourg (ECtHR). Rights-conscious litigants and determined pressure groups versed in the techniques of the international human rights movement were pushing hard for the Convention to be applied at domestic level. Extrajudicially, leading members of the judiciary called for incorporation.[58] In their judicial capacity, judges often treated the ECHR as 'persuasive', reading it 'as a series of propositions, [which] largely represent legal norms or values which are either already inherent in our law, or, so far as they are not, may be integrated into it by the judges'.[59] A new rights-base for judicial review seemed to be under construction. In a highly significant test case brought on behalf of immigrants, the Court of Appeal demanded legislative authorisation for a government policy introduced by regulation that amounted in their view to 'inhumane treatment'.[60] A right of access to the court began to be seen as constitutional in character.[61] In *Wheeler v Leicester Corporation*,[62] Browne-Wilkinson LJ drew on the traditional common law freedom to 'do anything not expressly proscribed by law' to protect freedom of speech and conscience. The movement, in which Laws J participated, can clearly be linked to his interest in 'higher-order law'.

The position fell to be tested in *ex p. Smith*, a case brought by Stonewall, a campaigning group, on behalf of five claimants administratively discharged from the armed forces for homosexual tendencies in accordance with an MOD policy document issued in 1994. All had exemplary service records. They sought judicial review on the basis: (i) of a breach of the ECHR and (ii) that on any test of reasonableness the policy was irrational. Sir Thomas Bingham MR explained:

[58] T. Bingham, 'The European Convention on Human Rights: Time to incorporate' (1993) 109 *LQR* 390; N. Browne-Wilkinson, 'The infiltration of a Bill of Rights' [1992] *PL* 397.

[59] T. Poole, 'Legitimacy, rights and judicial review ' (2005) 25 *OJLS* 697.

[60] *R v Social Security Secretary, ex p. JC WI* [1996] 4 All ER 385 (p. XXX below).

[61] *R v Lord Chancellor, ex p. Witham* [1997] 2 All ER 779; and see *Simms* and *Daly* (p. 118 below).

[62] *Wheeler v Leicester Corporation* [1985] 2 All ER 151 (CA); [1985] AC 1054 (HL) noted in A. Hutchinson and M. Jones, 'Wheeler-dealing: An essay on law, politics and speech' (1988) 15 *JLS* 263. See similarly Lord Steyn in *Simms* (see p. 118 below); *Anderson v UK* (1997) 25 EHRR 172; and compare Mason CJ in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

> [T]he court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above . . .
>
> It was argued for the ministry . . . that a test more exacting than *Wednesbury* was appropriate in this case . . . The Divisional Court rejected this argument and so do I. The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue, even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations.
>
> The present cases do not cover the lives or liberty of those involved . . . [but] the appellants' rights as human beings are very much in issue. It is now accepted that this issue is justiciable. This does not of course mean that the court is thrust into the position of primary decision-maker. It is not the constitutional role of the court to regulate the conditions of service in the armed forces of the Crown, nor has it the expertise to do so. But it has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty 'to do right to all manner of people'.[63]

A wide range of options was open to the Court of Appeal in *Smith*. It might have ruled:

(i) that the issue fell within the area of prerogative defence powers and was non-justiciable (see Lord Diplock in the *GCHQ* case)

(ii) applying the rules of natural justice, that no one should be dismissed without a fair hearing (*Ridge v Baldwin*, see Chapter 14)

(iii) that the policy was valid if it was not 'so unreasonable that no reasonable defence minister would adopt such a policy' (standard *Wednesbury* review)

(iv) that the policy was so unreasonable that Parliament must be invited to endorse it in statute (the *JCWI case*, see p. 114 above) – this option was complicated by the fact that a parliamentary committee had recently confirmed the impugned policy[64]

[63] *R v Ministry of Defence, ex p. Smith and Grady* [1996] 1 All ER 257. A third claim that the EU equality directives had been breached is not dealt with here.

[64] In *Nottinghamshire County Council v Environment Secretary* [1986] AC 240 and *R v Environment Secretary, ex p. Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 the Law Lords had hesitated to scrutinise policy decisions in matters recently considered by Parliament.

(v) that in cases involving apparent violations of an ECHR right, the proportionality test should be applied (but see *Brind*).

What the Court of Appeal did was to refine option (iii) by recognising three broad categories of *Wednesbury* unreasonableness, applicable to different types of case:

(a) 'extreme deference', as in security cases, the so-called 'super-*Wednesbury* test'
(b) standard *Wednesbury* unreasonableness, generally applicable[65]
(c) 'anxious scrutiny', available where an important interest is at stake and particularly in human rights cases, a position already adopted by the House of Lords in *Bugdacay*.[66]

This simple analysis is intended to demonstrate how broad the discretion of the judiciary actually is. Several forms of 'judgment discretion' are illustrated: first, the choice involved in classification – into which of categories (i) to (v) to fit the case; secondly, the discretion latent in the standard of review is revealed in (a) to (c) and (v) as flexible and shifting; thirdly, the flexibility of the general principles, demonstrated earlier in respect of the *Wednesbury* principle. The three-tier structure of (a) to (c) brings additional flexibility, allowing judges an escape route from the already flexible standard of *Wednesbury* review. Each choice on the scale is a step to greater intensity.

Believing that the previous case law rendered success unlikely and that domestic remedies would be viewed by the ECtHR as effectively exhausted, the applicants took the road to Strasbourg. In *Lustig-Prean and Beckett,* the ECtHR unanimously found a violation of Art. 8, which protects private and family life, home and correspondence; in *Smith and Grady*, delivered on the same day, the Court found a violation of Art. 8 together with a violation of ECHR Art. 13 (right to an effective remedy):

> *Article 8:* The Court considered the investigations, and in particular the interviews of the applicants, to have been exceptionally intrusive, it noted that the administrative discharges had a profound effect on the applicants' careers and prospects and considered the absolute and general character of the policy, which admitted of no exception, to be striking. It therefore considered that the investigations conducted into the applicants' sexual orientation together with their discharge from the armed forces constituted especially grave interferences with their private lives.
>
> As to whether the Government had demonstrated 'particularly convincing and weighty reasons' to justify those interferences, the Court noted that the Government's core

[65] See A. Le Sueur, 'The rise and ruin of unreasonableness?' (2005) 10 *Judicial Review* 32; T. Hickman, 'The reasonableness principle: Reassessing its place in the public sphere' (2004) 63 *CLJ* 166.

[66] *Bugdacay v Home Secretary* [1987] AC 514. See also *R (Thangarasa and Yogathas) v Home Secretary* [2002] UKHL 36. And see N. Blake, 'Judicial review of expulsion decisions' in Dyzenhaus (ed), *The Unity of Public Law* (Hart Publishing, 2004), p. 242.

argument was that the presence of homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. The Government relied, in this respect, on the Report of the Homosexual Policy Assessment Team (HPAT) published in February 1996. The Court found that, insofar as the views of armed forces' personnel outlined in the HPAT Report could be considered representative, those views were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. It was noted that the Ministry of Defence policy was not based on a particular moral standpoint and the physical capability, courage, dependability and skills of homosexual personnel were not in question. Insofar as those negative views represented a predisposed bias on the part of heterosexuals, the Court considered that those negative attitudes could not, of themselves, justify the interferences in question any more than similar negative attitudes towards those of a different race, origin or colour.

Article 13:

The sole issue before the domestic courts in the context of the judicial review proceedings was whether the policy was irrational and that the test of irrationality was that expounded by Sir Thomas Bingham MR in the Court of Appeal. According to that test, a court was not entitled to interfere with the exercise of an administrative discretion on substantive grounds save where that court was satisfied that the decision was unreasonable, in the sense that it was beyond the range of responses open to a reasonable decision-maker. In judging whether the decision-maker had exceeded this margin of appreciation, the human rights context was important, so that the more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was reasonable.

The Court also noted that Sir Thomas Bingham MR emphasised that the threshold beyond which a decision would be considered irrational was a high one and it considered that this was confirmed by the judgments of the High Court and of the Court of Appeal. Both of those courts had commented very favourably on the applicants' submissions challenging the Government's justification of the policy and both courts considered that there was an argument to be made that the policy was in breach of the United Kingdom's Convention obligations. The Court observed that, nevertheless, those domestic courts were bound to conclude, given the test of irrationality applicable, that the Ministry of Defence policy could not be said to be irrational.

The Court therefore found that the threshold at which the domestic courts could find the policy of the Ministry of Defence irrational had been placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' private lives had answered a pressing social need or was proportionate to the national security and public order aims pursued by the Government, principles which lie at the heart of the Court's analysis under Article 8.

The Court concluded, accordingly, that the applicants did not have an effective domestic remedy in relation to the violation of their right to respect for their private lives.[67]

[67] *Lustig-Prean and Beckett v UK* (1999) 29 EHRR 493; *Smith and Grady v UK* (1999) 29 EHRR 548.

Smith and Grady was one of a number of judgments in which the ECtHR hinted that judicial review was an inadequate vehicle for the protection of human rights. This jurisprudence embarrassed the British judiciary, making them:

> more sensitive to the fault-line in the British legal system that had resulted in repeated failures to give sufficient legal protection to individual rights. It caused our senior judges to take European Convention law more seriously than had been the case in the 1970s and 1980s; and, eventually, to support moves to make Convention rights directly enforceable in British courts.[68]

Reluctance of successive governments to 'bring the Convention home', coupled with the unwillingness of the judges to do the work of the legislature, had left the national judges in a very exposed position.

Two transitional cases, decided on facts occurring before the HRA came into force, confirmed the new judicial power base in human rights. In *Simms*,[69] the prison authorities sought to bar interviews with journalists seeking to investigate the possibility of wrongful conviction by banning them from making professional use of material obtained during prison visits. The restriction was contained in rule 37 of the Prison Rules, subordinate legislation made under authority of s. 47(1) of the Prison Act 1952. Lord Steyn affirmed the status of freedom of expression as the 'primary democratic right, without which the rule of law is impossible' and the House, confirming that it could be defeated by 'only a pressing social need', refused to allow 'the safety valve of effective investigative journalism' to be outlawed.

In *Daly*, where the practice of reading prisoners' correspondence with legal advisers during cell searches was challenged successfully, the House moved towards a convergence of common law and Convention rights, in readiness for the implementation of the HRA 1998, about to come into force. Concluding that the prison security manual was ultra vires, Lord Bingham added significantly:

> I have reached the conclusions so far expressed on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review. But the same result is achieved by reliance on the European Convention. Article 8.1 gives Mr Daly a right to respect for his correspondence. While interference with that right by a public authority may be permitted if in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others, the policy interferes with Mr Daly's exercise of his right under article 8.1 to an extent much greater than

[68] A. Lester, 'Human rights and the British Constitution', in Jowell and Oliver (eds.), *The Changing Constitution*, 5th edn (Clarendon Press, 2005), p. 69.

[69] *R v Home Secretary, ex p. Simms* [2000] 2 AC 115.

> necessity requires. In this instance, therefore, the common law and the convention yield the same result. But this need not always be so. In *Smith and Grady* [see p. 116 above], the European Court held that the orthodox domestic approach of the English courts had not given the applicants an effective remedy for the breach of their rights under article 8 of the convention because the threshold of review had been set too high. Now, following the incorporation of the Convention by the Human Rights Act 1998 and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether a Convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy.[70]

A widely quoted passage from Lord Hoffmann in *Simms* confirmed that the HRA would not unravel the traditional relationship between Parliament and the courts. It would, however, strengthen and intensify the courts' interpretative powers:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.
>
> The Human Rights Act 1998 will make three changes to this scheme of things. First, the principles of fundamental human rights which exist at common law will be supplemented by a specific text, namely the European Convention. But much of the Convention reflects the common law . . . [s]o the adoption of the text as part of domestic law is unlikely to involve radical change in our notions of fundamental human rights. Secondly, the principle of legality will be expressly enacted as a rule of construction in section 3 and will gain further support from the obligation of the Minister in charge of a Bill to make a statement of compatibility under section 19. Thirdly, in those unusual cases in which the legislative infringement of fundamental human rights is so clearly expressed as not to yield to the principle of legality, the courts will be able to draw this to the attention of Parliament by making a declaration of incompatibility. It will then be for the sovereign Parliament to decide whether or not to remove the incompatibility.[71]

[70] *R (Daly) v Home Secretary* [2001] UKHL 26 [23] quoting the ECtHR cases of *Golder v UK* (1975) 1 EHRR 524; *Silver v UK* (1983) 5 EHRR 347; *Campbell and Fell v UK* (1984) 7 EHRR 137.

[71] See for further exposition of the principle of legality *R v Shayler* [2002] UKHL 11 [56] (Lord Hope).

7. Rights, unreasonableness and proportionality

For Lord Steyn in *Daly*, the time had come to acknowledge that neither the standard *Wednesbury* test nor the stiffer test of 'anxious scrutiny' was 'necessarily appropriate to the protection of human rights'. Citing the three-stage *de Freitas* test of proportionality, he observed that it was 'more precise and more sophisticated than the traditional grounds of review'. Review for proportionality was not merits review and most cases would be decided in the same way whichever approach was adopted but the *intensity* of review was somewhat greater under the proportionality approach. There were two main differences:[72]

(i) Proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.

(ii) The proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

Lord Cooke went rather further, labelling *Wednesbury*:

> an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.[73]

Let us look at this more closely. The *Wednesbury* test (p. 42 above) starts from the premise that the administration possesses a virtually unfettered power of policy- and decision-making, provided only:

- that the official can point to the source of his powers
- that the official has taken into account only relevant considerations and
- that the action taken does not seem to a judge to be wholly unreasonable.[74]

A proportionality test, on the other hand, forces the official to take as his starting-point the interests of the individual, limiting the *scope* of the decision as well as the way in which it is taken. In its current judicial formulation,[75] the *de Freitas* test requires the administrator to ask:

[72] [2001] UKHL 26 [27]

[73] [2001] UKHL 26 [32].

[74] See Taggart, 'Reinventing administrative law'. And see A. Le Sueur, 'The rise and ruin of unreasonableness?' [2005] *Judicial Review* 32; D. Thomas, 'How irrational does irrational have to be?: *Wednesbury* in public interest, non-human rights cases' [2008] *Judicial Review* 258.

[75] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80; *Huang and Kashmiri v Home Secretary* [2007] UKHL 11 [19] (Lord Bingham). The formulae used in EU and ECHR law vary quite considerably: see E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999).

- whether the legislative objective is sufficiently important to justify limiting a fundamental right
- whether the measures designed to meet the legislative objective are rationally connected to it
- whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

This three-limbed test is, however, subject to a rider added in *Huang* by Lord Bingham of an 'overriding requirement of fair balance': i.e., that the interests of society must be weighed against those of groups and individuals.

In the *Denbigh High School* case, a school dress code was contested as a violation of the religious freedom of a strict Muslim student (ECHR Art. 9(1)). In the Court of Appeal, Brooke LJ used the proportionality principle to impose a rigorous evaluative process on the governors, listing six crucial questions that the governors should have asked:

1. Has the claimant established that she has a relevant Convention right which qualifies for protection under Art. 9(1)?
2. Subject to any justification that is established under Art. 9(2), has that Convention right been violated?
3. Was the interference with her Convention right prescribed by law in the Convention sense of that expression?
4. Did the interference have a legitimate aim?
5. What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim?
6. Was the interference justified under Art. 9(2)?[76]

The governors had approached the issues from an 'entirely wrong direction'. Their starting point – compatible with *Wednesbury* – had been that the school uniform policy 'was there to be obeyed: if the claimant did not like it, she could go to a different school'. They should have started from the premise that 'the claimant had a right which is recognised by English law, and that the onus lay on the School to justify its interference with that right'.

In the House of Lords, it was the Court of Appeal's turn to be derided for setting the governors an 'examination paper' that the Court of Appeal would have failed. According to Lord Hoffmann:

> The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done. Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows. The most that can be said is that the way in which the

[76] *R(SB) v Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199 [75].

> school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law.[77]

Here the decision-making function is squarely allocated to the administrative authority, which is free to go about its business in its own way provided that the outcome is justifiable and proportionate. *Judges* apply the proportionality questions to decide whether this is so.

But is there a missing dimension here? Whatever the language used, the governors were surely required to address 'the gist' of questions 1 and 2 above: namely, whether the uniform policy impinged disproportionately on the schoolgirl's personal religious beliefs? The proportionality test is designed to ensure on the one hand that they do so and on the other that the judges can see that they have done so. This second point emerges more clearly from the *Miss Behavin'* case involving a licence to open a sex shop in Belfast. The City Council applied their minds to the statutory criteria, taking into account 'the character of [the] locality, including the type of retail premises located therein, the proximity of public buildings such as the Belfast Public Library, the presence of a number of shops which would be of particular attraction to families and children and the proximity of a number of places of worship'. They refused a licence. Sharply critical of the judicial tendency to focus on procedural failings rather than outcome, Lord Hoffmann asked:

> What was the Council supposed to have said? 'We have thought very seriously about your Convention rights but we think that the appropriate number of sex shops in the locality is nil.' Or: 'Taking into account article 10 and article 1 of the First Protocol and doing the best we can, we think that the appropriate number is nil.' Would it have been sufficient to say that they had taken Convention rights into account, or would they have had to specify the right ones? A construction of the Human Rights Act which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous. Either the refusal infringed the respondent's Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of article 10 or the First Protocol.[78]

But if the City Council failed entirely (as it apparently did) to *consider* the issue of free speech and opinion, was it perhaps acting, in *Wednesbury* terms, both irrationally and unreasonably? Lord Hoffmann leaves the judges in the

[77] *Begum v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 [68]. And see R. Gordon, 'Structures or mantras? Some new puzzles in HRA decision-making' [2006] *Judicial Review* 136; T. Poole, 'Of headscarves and heresies: The *Denbigh High School* case and public authority decision-making under the Human Rights Act' [2005] *PL* 685; N. Gibson, 'Faith in the courts: Religious dress and human rights' (2007) 66 *CLJ* 657.

[78] *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, Lord Hoffmann at [13], Baroness Hale at [37]. And see C. Knight, 'Proportionality, the decision-maker and the House of Lords' [2007] *Judicial Review* 221.

unfortunate position of effectively making a discretionary decision on the merits without any guidance from the true decision-makers. Baroness Hale's approach was more nuanced. Acknowledging that the local authority was 'much better placed than the court to decide whether the right of sex shop owners to sell pornographic literature and images should be restricted', she thought its views were:

> bound to carry less weight where the local authority has made no attempt to address that question. Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be.

In the difficult *Herceptin* case,[79] rationality and not proportionality was in issue. The Swindon primary healthcare trust (PCT) was responsible for treatment and funding, subject to mandatory *directions* from the Minister of Health and ministerial *guidance* to which trusts must 'have regard'. The only ministerial statement was a press release, apparently intended for circulation through the NHS, in which the minister expressed her wish to see Herceptin used more widely but saw it as 'an issue for individual clinicians'. She added, 'I want to make it clear that PCTs should not refuse to fund Herceptin solely on the grounds of its cost.'

In establishing policy, the PCT looked to two further sources of guidance: NICE, the NHS agency which has overall responsibility for approving drugs for use in the NHS, which had not yet reported on Herceptin; and a 'stakeholders' advisory forum'. In 2005, the PCT set out its policy on 'off-licence drugs' in 'Clinical Priorities Policy for Commissioning Selected Services'. This weighty document was rather more complex than Brooke LJ's six questions; it committed the PCT to: take into account and weigh all the relevant evidence; give proper consideration to the views of the patient or group of patients involved, and accord proper weight to their needs against other groups competing for scarce resources; take into account only material factors; act in the utmost good faith; and make a decision that is in every sense reasonable. In addition, an 'ethical framework' had been developed to enable the PCT 'to make fair and consistent decisions that treat patients equally'. In principle the PCT did not commission drugs unlicensed for use in the UK but there was a policy and procedure for considering 'exceptional' cases on their merits where the PCT did not have a policy in place. Not every PCT took this line; a 'post-code lottery' was happening.

[79] *R (Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392 reversing Bean J [2006] EWHC 171 Admin.

R, who was in the early stages of breast cancer, asked to be treated with Herceptin, which was refused. After an exhaustive consideration of the situation, Swindon refused to make any exception to its general policy; it was not licensed or approved by NICE and it would be wrong to 'introduce a dangerous precedent of disregarding the contribution made by the licensing and appraisal process'. Funding was not a factor; R's was not an exceptional case.

In an application for judicial review, Bean J exhaustively reviewed the decision-making process, finding that the PCT policy was neither irrational nor did it breach the applicant's right to life. The Court of Appeal overruled his finding. Although Sir Anthony Clarke MR conceded that the court could not hold the policy arbitrary solely because it referred to unidentified exceptional circumstances, he invoked a 'general principle of consistency' to hold that it was irrational, without clinical evidence of exceptional circumstances, to treat one patient but not another:

> The essential question is whether the policy was rational; and, in deciding whether it is rational or not, the court must consider whether there are any relevant exceptional circumstances which could justify the PCT refusing treatment to one woman within the eligible group but granting it to another. And to anticipate, the difficulty that the PCT encounters in the present case is that while the policy is stated to be one of exceptionality, no persuasive grounds can be identified, at least in clinical terms, for treating one patient who fulfils the clinical requirements for Herceptin treatment differently from others in that cohort.
>
> The PCT has not put any clinical or medical evidence before the court to suggest any such clinical distinction could be made. In these circumstances there is no rational basis for distinguishing between patients within the eligible group on the basis of exceptional clinical circumstances any more than on the basis of personal, let alone social, circumstances . . . Here the evidence does not establish the possibility of there being relevant clinical circumstances relating to one patient and not another and, in the case of personal characteristics, there is no rational basis for preferring one patient to another.[80]

Crawling over the decision-making process, the Court of Appeal had taken every opportunity (in Shapiro's words) 'to run through and reconstruct' it and, by obliging the PCT to 'replay' it, they had made an answer favourable to the appellant virtually inevitable. Some months after *Rogers*, NICE ruled that the NHS must fund Herceptin, though it warned that long-term risks and even benefits of the drug were still unknown. Was this decision influenced by the fear of further litigation? Decision-making is not necessarily more rational for taking place in the shadow of litigation.

We have set out the decision-making processes in the *Herceptin* case in some detail because they are illustrative of the way administrative decisions are actually arrived at. Decision-making can be seen as a chain made up of links contributed by a 'network' of different actors. The minister supplies (or

[80] [2006] EWCA Civ 392 [63] [82].

ought to supply) general 'guidance', which is not to be read as binding. NICE is responsible for ensuring the safety of drugs and giving guidance on their appropriate uses, which may, in the state of scientific evidence, be contestable. The primary decision-maker is the PCT, which has used a consultation process to feed in the views of patients. What, in this process, is the role of courts?

One approach to this question would look to Ganz's view of the allocation of functions (p. 40 above). Parliament has allocated decisions in this area to the PCT, which is composed of experts. Courts are peripheral to the main decision-making process and should confine themselves to a restricted reading of the *Wednesbury* test. This means that a court should intervene only where there is a clear failure to examine relevant evidence, obvious resort to irrelevant factors or a clear breach of human rights. This is in essence the view of decision-making expressed by Lord Hoffmann in *Denbigh High School* and *Miss Behavin'*. A second way to approach the problem is through the concept of 'polycentric' decisions as expounded by the jurist Lon Fuller. A polycentric decision is one that affects third parties not before the court or, as we should probably say today, a decision with 'spin off'. Fuller argued in a famous and judicious essay that polycentric decisions were unsuited to the adjudicative process and ought not to be justiciable.[81] Thus whether or not the PCT explicitly took resources into account in their policy, in the background the issue was unavoidable. Indeed, even Sir Anthony Clarke suggested that the *Herceptin* case might have gone very differently:

> if the PCT had decided that as a matter of policy it would adopt the Secretary of State's guidance that applications should not be refused solely on the grounds of cost but that, as a hard-pressed authority with many competing demands on its budget, it could not disregard its financial restraints and that it would have regard both to those restraints and to the particular circumstances of the individual patient in deciding whether or not to fund Herceptin treatment in a particular case. In such a case it would be very difficult, if not impossible, to say that such a policy was arbitrary or irrational.

Here Sir Anthony seems to be admitting that the decision not to fund Herceptin was within the PCT's powers. So surely it was precisely the type of decision where judges should show 'deference' to professionals, subject only to the 'last resort limb' of the *Wednesbury* test that the outcome of the decision-making process is not wholly unreasonable? Resources for health are finite and have to be rationed; many patients suffer from the lack of facilities that are simply not available. According to the *Annals of Oncology*,[82] increasing the availability of Herceptin would put great pressure on the NHS budget and lead to cuts in services for less high-profile diseases and conditions. £109 million

[81] L. Fuller, 'The forms and limits of adjudication' (1978) 92 *Harv. LR* 353; J. Allison, 'Fuller's analysis of polycentric disputes and the limits of adjudication' (1994) 53 *CLJ* 367.

[82] M. Neyer *et al.*, 'An economic evaluation of Herceptin' (2006) 17 *Annals of Oncology* 381.

would be needed to give Herceptin to the 5,000 women diagnosed each year with early-stage breast cancer. No extra funding was available. One NHS trust needed £1.9 million annually to pay for Herceptin for seventy-five patients; it could find this only if it did not treat 355 patients with other cancers, sixteen of whom might otherwise be cured. In the past, courts have wisely fought shy of decisions involving resource allocation, knowing they lack adequate experience and expertise (see Chapter 15). Nor did they have access to relevant statistical evidence and, if they had, would not necessarily have known how it should be interpreted.

Much time has, in the authors' view, been wasted in disputing the when and where of proportionality and the pros and cons of proportionality and reasonableness. Applying the tests to the cases we have cited will show that in most cases – as Lord Steyn made clear in *Daly* – the outcome will be the same whichever test is applied. Proportionality rules out outcomes unnecessary or disproportionate to the ends to be achieved; so too the rationality limb of the *Wednesbury* test can be used (as Lord Diplock used it in *Bromley*) to rule out disproportionate outcomes. But although the proportionality test is perceived as more intensive, irrational outcomes are not always disproportionate, as the *Herceptin* case suggests. Both tests are in reality flexible and plastic; both can act as 'tin-openers' for intensive forms of judicial review. Whenever they wish to, the judges are well able to move the goal posts. What is really in issue is *intensity*.[83] A prime virtue of proportionality from the standpoint of the judges, and the nub of Lord Hoffmann's objection in *Miss Behavin'*, is that the principle allows them to disguise just how close they have moved to review on the merits.

8. The Human Rights Act and after

According to the New Labour Government which fashioned it, the purpose of the HRA was not to create new rights. Its primary purpose was 'to bring rights home' and, by so doing, to spare litigants the long and expensive 'trek to Strasbourg'.[84] The HRA is not a 'Bill of Rights'; all that it does is to annex Convention Articles, making it unlawful for a public authority to act in such a way as to contravene them. Nor does it confer on British courts a power of 'constitutional review' in the full sense of that term. The HRA was intentionally designed to be compatible with the doctrine of parliamentary sovereignty and also to resolve issues of judicial and executive boundaries. Statute law is not to be overridden, annulled or otherwise invalidated; it is not, as under EU

[83] See M. Elliott, 'The Human Rights Act 1998 and the standard of substantive review on rationality and proportionality (2001) 60 *CLJ* 301; R. Clayton and K. Ghaly, 'Shifting standards of review' [2007] *Judicial Review* 210.

[84] See *Rights Brought Home: The Human Rights Bill,* Cm. 3782 (1997). And see J. Jowell, J. Cooper and A. Owers (eds.), *Understanding Human Rights Principles* (Hart Publications, 2001); J. Jowell and J. Cooper (eds.), *Delivering Rights: How the Human Rights Act is working* (Hart Publishing, 2003).

law, to be set aside or 'disapplied'. Section 4 of the HRA allows a superior court to issue a 'declaration of incompatibility' stating that an Act of Parliament is incompatible with the ECHR; secondary legislation may be struck down, unless the terms of the parent statute make this impossible. Before this drastic step can be taken, however, the court must 'so far as it is possible to do so' make every effort to read and give effect to primary and subordinate legislation 'in a way which is compatible with the Convention rights' (s. 3).[85] Thus the Act places a duty on courts not to be lavish with the new 'declarations of incompatibility' authorised by s. 4; they must turn first to s. 3. Exactly how courts should balance these two provisions is a matter of some controversy. While some feel that declarations of incompatibility should be treated as 'routine and unproblematic',[86] the courts have in practice taken a 'prudential' approach, interpreting the s. 3 interpretative duty quite broadly. In eight years, since the Act came into force in 2000, twenty-five declarations of incompatibility were made, of which eight were overturned on appeal.

That no direct clash with Parliament or the executive has occurred so far is largely due to the prudence of the judges, who have not by and large used their new powers to push their tanks far onto governmental turf. They have, for example, been noticeably unwilling to create economic and social rights to housing, social security etc., preferring to leave questions of resource allocation to government. In *Spink*, for example, where ECHR Art. 8 was invoked to persuade a court to interpret a statutory duty so as to impose financial obligations towards children on local authorities, the attempt foundered, just as a pre-Act case had done.[87] In *N v Home Secretary*,[88] the sad case of a claimant raped by armed forces in Uganda who had contracted AIDS, N contested deportation on the ground that her treatment would be terminated. Lord Nicholls explained why hers was not an 'exceptional case' and why the prospect of serious or fatal relapse on expulsion could not make expulsion into inhuman treatment for the purposes of ECHR Art. 3: 'It would be strange if the humane treatment of a would-be immigrant while his immigration application is being considered were to place him in a better position for the purposes of Article 3 than a person who never reached this country at all.' Courts, which can afford to be more generous when the affirmation of rights costs the taxpayer little or nothing, are wise to recognise that judgments occasioning substantial redistribution of resources will raise cries of 'government by judges'.[89]

[85] On 'reading down' under s. 3 and principles of interpretation generally, see A. Lester and D. Pannick (eds.), *Human Rights Law and Practice*, 2nd edn (Butterworths, 2004).

[86] T. Campbell, 'Incorporation through interpretation' in Campbell *et al.* (eds.), *Sceptical Essays in Human Rights* (Oxford University Press, 2001); D. Nicol, 'Law and politics after the Human Rights Act' [2006] *PL* 722. And see T. Hickman, 'The courts and politics after the Human Rights Act: A comment' [2008] *PL* 84.

[87] *R (Spink) v Wandsworth LBC* [2005] EWCA Civ 302, citing the ECtHR case of *KA v Finland*, [2003] 1 FLR 201; *R (G) v Barnet LBC* [2003] 3 WLR 1194. Compare *ex p. Tandy* (p. 720).

[88] *N v Home Secretary* [2005] 2 AC 296.

[89] See T. Macklem, 'Entrenching Bills of Rights' (2006) 26 *OJLS* 107.

9. Rhetoric meets reality

An era that had commenced with the wartime detention case of *Liversidge v Anderson* ended with the terrorist attack of 9/11 and a subsequent 'war on terror' that made order and security the overriding priority. This was a testing context for the courts, shown in earlier chapters to be given to bold words and cautious action in reviewing executive action taken in defence of the realm. Yet Austin calls this 'the litmus test of the new constitutional order. Only if the courts are willing to protect the basic values of the rule of law, democracy and fundamental human rights in the face of emergency measures, will the new constitutionalism be seen as having real substance.'[90]

The Terrorism Act 2000 consolidated and expanded temporary legislation, originally enacted in 1974 in response to the IRA terrorist campaign, which included wide stop-and-search powers in designated areas. Detention without trial, first reinstated during the Northern Ireland conflict, resurfaced in the Anti-Terrorism, Crime and Security Act 2001 in respect of non-UK nationals. The Act also expanded the period of detention of terrorist suspects, strengthening the special procedures before the Special Immigrations Appeals Commission (SIAC). The Prevention of Terrorism Act 2005, passed in response to the decision in *A (No. 1)* (below), introduced control orders. The Terrorism Act 2006 extended pre-trial detention in terrorist cases to twenty-eight days, hotly contested in Parliament as too high. Almost immediately the Government proposed raising the limit to forty-two days with a new Counter-Terrorism Bill, meeting sufficient outcry to withdraw the proposal.[91] The Counter-Terrorism Act 2008 substituted post-charge questioning of terrorist suspects with judicial authorisation for renewable periods of 48 hours. The increasingly authoritarian style of a government apparently unconcerned about serious inroads on civil liberties was undoubtedly putting pressure on a judiciary charged with protecting human rights. Ought the judicial tanks to be more strongly deployed on the executive lawn?

In the justly famous case of *A (No. 1)*[92] the appellants had been certified and detained under ss. 21 and 23 of the 2001 Act, which provided for detention without trial of foreign nationals suspected of terrorist activity, the only right of appeal being to SIAC, where neither the allegations nor the evidence on which they were based were fully available to detainees. Detainees were also debarred from choosing their own counsel, instead having allocated to them SIAC-appointed, security-cleared 'special advocates' – a procedure subsequently challenged as a breach of ECHR Article 6(1). Before introducing the 2001 Act, the Government had invoked ECHR Art. 15, which

[90] R. Austin, 'The New Constitutionalism, Terrorism and Torture' (2007) 60 *CLP* 79, 97.

[91] See JCHR, *Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies*, HC 635 (2007/8); House of Lords Constitution Committee, *Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, HL 167 (2007/8).

[92] *A and Others v Home Secretary* [2005] 2 AC 68.

permits derogation in emergency situations, to derogate from ECHR Art. 5, concerned with unlawful arrest and detention. The case of *A* and others now challenged the Act as incompatible with ECHR Art. 5 and as discriminatory in terms of ECHR Art. 14.

By a majority of eight to one (Lord Walker dissenting), the House issued a declaration of incompatibility on the grounds of violations of Arts. 5 and 14; the provisions interfered disproportionately with the applicants' right of personal freedom and were also discriminatory in their application to foreign nationals alone. A greater intensity of review was said by Lord Bingham to be required in determining questions of proportionality, while the duty of the courts to protect Convention rights would be emasculated if either the SIAC judgment were held 'conclusively to preclude any further review' or, in a field involving indefinite detention without charge or trial, there were excessive deference to ministerial decision. But no such hard look was applied to the question of derogation, which the House ruled (Lord Hoffmann vigorously dissenting) fell outside the competence of the domestic courts.[93] Here Lord Bingham, considering the issue of derogation, looks back to the classical Anglo-American doctrine of 'political question', ruling that the Home Secretary could not be challenged:

> *Lord Bingham*: I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did . . . It would have been irresponsible not to err, if at all, on the side of safety. As will become apparent, I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or . . . 'relative institutional competence'. The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum . . . The appellants recognised this by acknowledging that the Home Secretary's decision on the present question was less readily open to challenge than his decision (as they argued) on some other questions. This

[93] The House of Lords brushed aside warnings from the UN Human Rights Committee, Newton Committee of Privy Councillors and Joint Committee on Human Rights (JCHR) that the derogation was questionable: see JCHR, *Review of Counter-Terrorism Powers*, HC 173 (2003/4). The majority position was later confirmed by the ECtHR in *A and Others v UK*, Application No. 34455/05 (19 February 2009).

> reflects the unintrusive approach of the European Court to such a question. I conclude that the appellants have shown no ground strong enough to warrant displacing the Secretary of State's decision on this important threshold question.

Lord Hoffmann's approach was very different. Holding that the situation had been insufficient to permit derogation from the ECHR, Lord Hoffmann saw the government's duty to protect the lives and property of its citizens as a duty that is 'owed all the time and which it must discharge without destroying our constitutional freedoms'. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom than a power to detain people indefinitely without charge or trial:

> I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law.
>
> The exceptional power to derogate from those rights also reflected British constitutional history. There have been times of great national emergency in which habeas corpus has been suspended and powers to detain on suspicion conferred on the government. It happened during the Napoleonic Wars and during both World Wars in the twentieth century. These powers were conferred with great misgiving and, in the sober light of retrospect after the emergency had passed, were often found to have been cruelly and unnecessarily exercised. But the necessity of draconian powers in moments of national crisis is recognised in our constitutional history. Article 15 of the Convention, when it speaks of 'war or other public emergency threatening the life of the nation', accurately states the conditions in which such legislation has previously been thought necessary . . .
>
> What is meant by 'threatening the life of the nation'? . . . I think that it was reasonable to say that terrorism in Northern Ireland threatened the life of that part of the nation and the territorial integrity of the United Kingdom as a whole. In a community riven by sectarian passions, such a campaign of violence threatened the fabric of organised society. The question is whether the threat of terrorism from Muslim extremists similarly threatens the life of the British nation . . . Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community. For these reasons I think that the Special Immigration Appeals Commission made an error of law and that the appeal ought to be allowed.

The divergent approaches surfaced again in *A (No.* 2),[94] where the issue was the admissibility in SIAC hearings of evidence possibly obtained by torture

[94] *A and Others v Home Secretary* [2006] 2 AC 221, overruling the shameful Court of Appeal decision to hold the evidence admissible: see [2005] 1 WLR 414 (Laws and Pill LJJ, Neuberger LJ dissenting). See on burden of proof *Saadi v Italy* [2008] ECHR 179 [129–133].

overseas. The House of Lords ruled such evidence inadmissible if it could be established on a balance of probabilities that torture had been involved. A minority (Lords Nicholls, Bingham and Hoffmann) refused to place the onerous burden of proof on the applicant: it was for SIAC 'to initiate or direct such inquiry as is necessary to enable it to form a fair judgment whether the evidence has, or whether there is a real risk that it may have been, obtained by torture or not'. The Court of Appeal followed this lead in the later case of *Othman*, where the issue was the possible use by courts in Jordan of evidence obtained by torture, ruling that, where the applicant raised a plausible reason for thinking that a statement might have been procured by torture, it was for SIAC proactively to institute enquiries. The decision to return the applicant to Jordan was annulled but overturned on appeal. The House of Lords ruled that SIAC procedures did not violate ECHR Art. 6(1). SIAC was entitled to make decisions based on 'closed evidence', reviewable only on questions of law. The House also legitimated the government practice of taking 'assurances' from foreign governments that deportees would not be subjected to torture and would receive a trial compatible with the requirements of Art.6. [95]

In *A* (*No. 2*), Lord Bingham's scholarly opinion had ranged exhaustively over international law, the UN Convention on Torture and the ECHR, by which he thought SIAC should 'throughout be guided'; Lord Hoffmann saw the issue as falling firmly within the parameters of the common law; the rejection of torture had a constitutional resonance for the English people which could not be overestimated. This attempt to re-root the international law of human rights in the traditional constitutional ground of civil liberties does not merit Dyzenhaus's charge of 'Anglo-Saxon parochialism'.[96] Rather, the strategy anticipates arguments that the measure of legislation is 'Convention-compliance', thus avoiding the 'ceiling' and the 'mirror image' fallacies discussed later in the chapter. It stands as a useful reminder too that human rights did not spring fully fledged from twentieth-century international law texts but grew painfully within communities and national legal orders so that all who live in the society, and not only judges and other national political actors, retain responsibility for the propriety of the rules and practice. This is what is meant – or ought to be meant – by 'rights-consciousness' or 'a culture of human rights awareness'.

The tanks were not yet far enough onto the lawn for the government to resent the intrusion; there were no acid ministerial statements. On the other hand, the government was not minded to concede its rightful policy-making function. The declaration of incompatibility made in *A* (*No. 1*) had placed it in a predicament; the jurisprudence of the ECtHR meant that suspects could

[95] *Othman (Jordan) v Home Secretary* [2008] EWCA Civ 290 appealed in *RB (Algeria) and OO (Jordan) v Home Secretary* [2009] UKHL 10.

[96] D. Dyzenhaus, 'An unfortunate outburst of Anglo-Saxon parochialism' (2005) 68 *MLR* 673, 674. See also T. Poole, 'Harnessing the power of the past? Lord Hoffmann and the *Belmarsh Detainees* case' (2005) 32 *JLS* 534.

not be deported to places where there was a real risk of ill treatment;[97] now it was questionable how they could be lawfully detained. Legislation was clearly needed. But the position was complicated by the absence of all-party agreement, doubt whether the proposed bill would pass the Lords and the imminence of an election. A compromise was reached with the Prevention of Terrorism Act 2005, which, in line with the House of Lords ruling on discrimination in *A* (*No. 1*), applied also to British nationals. The Act introduced 'control orders' of two types: 'non-derogating control orders' made by the Home Secretary but subject to review by a High Court judge; and 'derogating control orders', which required a derogation from the ECHR made by ministerial order followed by application for a judicial order, allowing the merits of the proposed order to be scrutinised. This hairline distinction did not recommend itself to the Joint Committee on Human Rights (JCHR), which described the control orders as 'falling not very far short of house arrest' and thought the regime likely to infringe several ECHR articles, in addition to being incompatible with 'the most basic principles of a fair hearing and due process long recognised as fundamental by English common law'.[98]

The matter was soon to be tested. The 'Belmarsh detainees', still in custody and about to be made subject to non-derogating control orders, went back to court. In a two-part judgment, Sullivan J ruled that the attenuated procedures used in review, including the refusal to release evidence to the accused or his counsel and the deplorably low standard of proof in a case akin to criminal proceedings, violated the requirement of a fair trial before an independent and impartial tribunal. Maintaining the control order in force, he granted a declaration of incompatibility with ECHR Art. 6(1). On appeal, a specially constituted court found it possible, taking a purposive, common-law approach, to 'read down' the relevant statutory provisions so as to hold the procedures compatible with Art. 6(1). The case was remitted for reconsideration on the new criteria set out by the Court of Appeal, including a finding that proceedings concluding in a control order were not, for Convention purposes, 'criminal' in character.[99] With further decisions from the lower courts that more restrictive control orders, amounting effectively to house arrest for 18 hours each day, fell outside the scope of a non-derogating control order, this finding reached the House of Lords, where the disparate rulings revealed a serious divergence of opinion.

The House of Lords divided first on whether control orders amounted to

[97] *Chahal v United Kingdom* (1996) 23 EHRR 413. *Chahal* was later upheld in *Saadi v Italy* (ECtHR, Grand Chamber, Application no. 37201/06, 28 Feb. 2008), a test case in which the UK intervened unsuccessfully to argue that the protection of national security could be weighed against the risk of inhuman treatment.

[98] See *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*, HC 915 (2005/6) with special reference to Arts. 6(1)–(3) and 5(4); J. Hiebert 'Parliamentary review of terrorism measures' (2005) 68 *MLR* 676.

[99] *Re MB* [2006] EWHC Admin 1000; *SSHD v MB, E and JJ* [2006] EWCA Civ 1141.

a deprivation of liberty under ECHR Art. 5, which Lord Bingham and Lady Hale saw as a question of fact and circumstance, while Lords Hoffmann and Carswell thought that Art. 5 covered only 'literal physical restraint'.[100] Again, the House was ambiguous over the time for which curfews could be imposed: there was unanimity that a twelve-hour period was lawful but also a suggested maximum of sixteen hours from Lord Brown.[101] Finally, only Lord Hoffmann squarely endorsed the 'special advocate' procedure before SIAC as Convention-compliant. Lord Bingham thought the use of 'closed material' would always be non-compliant while the majority, hedging their bets, felt that it could be made to work fairly and compatibly in many cases but a result might be produced on occasion that would not be compatible with Convention rights.[102] Some very mixed messages were being sent. So opaque was the reasoning of the House of Lords on these various issues that the rulings proved almost impossible to apply. After grappling conscientiously and at some length with possible interpretations, the Court of Appeal sent the issue back to the House for resolution.[103]

A (*No. 1*), first of the *Belmarsh Detainees* cases, has been called 'one of the most constitutionally significant ever decided by the House of Lords' yet in terms of immediate outcome the significance was largely symbolic.[104] In other areas the HRA had produced some tangible results, as, for example, in *Al-Skeini*, where the House of Lords asserted the rule of human rights law overseas in time of war in respect of a prisoner who had died of his injuries while in the custody of British troops[105] and the JCHR followed on swiftly with searching questions over assurances it had received concerning the use of illegal interrogation techniques by the British army in Iraq.[106] The case of terrorism was very different. Four years after *A* (*No. 1*), with the detention and deportation sagas not finally ended and many of the detainees still

[100] *Home Secretary v JJ* [2007] UKHL 45.

[101] *Home Secretary v JJ*, *Home Secretary v E* [2007] UKHL 47; *Home Secretary v MB and Others* [2007] UKHL 46.

[102] *Home Secretary v MB and Others* [2007] UKHL 46. But see now the judgement of the Grand Chamber in *A and Others v United Kingdom*, Application No. 3455/05 (19 February 2009).

[103] *SSHD v AF, AM and AN* [2008] EWCA Civ 1148 (Sir Anthony Clarke MR and Waller LJ, Sedley LJ dissenting).

[104] By February 2009, of 38 individuals subject to control order, 23 had been released, of whom 6 had been deported. 1 order was revoked and 2 not renewed: see Third and Fourth Reports of the Independent Reviewer pursuant to s. 14(3) of the Prevention of Terrorism Act 2005 (18 February 2008, 3 February 2009).

[105] *Al-Skeini v Defence Secretary* [2007] UKHL 26. One claimant, Baha Mousa, succeeded. Five who lost on the ground that they were not in the control of the British army have applied to the ECtHR for redress. The Ministry of Defence immediately responded with an admission that human rights had been violated and a settlement of £2.83 million.

[106] See JCHR, *UN Convention Against Torture: Discrepancies in evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq*, HC 527 (2007/8). The allegation was that evidence given to the JCHR for its report *The UN Convention Against Torture (UNCAT),* HC 701 (2005/6) that the judgment in *Ireland v UK* [1978] 2 EHRR 25, dealing with interrogation techniques used in Northern Ireland, had been properly implemented in Iraq, was false.

under control orders, the House of Lords, though free with rhetoric, had not on close examination moved far from its repressive pre-HRA decision in *Rehman*.[107] There it had declined to review a deportation order made by the Home Secretary on the ground that he was 'undoubtedly in the best position to judge what national security requires even if his decision is open to review'. Ewing and Tham feel driven to conclude that, after the excitement that followed the landmark case of *A (No. 1)*, 'normal service appears to have been resumed, in terms of the approach of the courts'. Even parliamentary committees appear unhappy with the depth of the deference shown by the courts towards the legislature and their respect for parliamentary sovereignty.[108]

It was not, as it happens, the *Belmarsh Detainees* cases but a ruling from Sullivan J, involving Afghan asylum seekers who had hijacked an aeroplane in Afghanistan and landed at Stansted, which provoked the political storm.[109] The procedure adopted by the Home Office was undoubtedly questionable, since the minister had delayed a decision on the Afghans' application for asylum until such time as internal guidance on humanitarian protection could be amended and the policy applied retrospectively to their case. Nonetheless, the Prime Minister, Tony Blair, publicly labelled the judge's ruling 'an abuse of common sense'. He called on his Home Secretary to change the law 'to ensure the law-abiding majority can live without fear' and asked for a 'profound re-balancing' of the debate on civil liberties, adding for good measure that amendments to the HRA might be necessary to require judges to balance the rights of the individual with public safety, which they 'do not always do'. Ex-Home Secretary David Blunkett fuelled the fire by branding the HRA 'the worst mistake of Labour's first term', while David Cameron for the Opposition poured oil on the promising flames by calling for a 'British Bill of Rights' to enshrine and protect fundamental British liberties (such as jury trial, equality under the law and civil rights) and to protect ECHR rights 'in clearer and more precise terms'. The Home Office and DCA responded that the HRA had *not* seriously impeded the Government's objectives on crime, terrorism and immigration; rather, it had been used in a number of high-profile cases as 'a convenient scapegoat for unrelated administrative failings within Government.'[110] A measured intervention from the JCHR blamed the Government for failing to tackle 'far-fetched stories' about the HRA and to put the case for the important rights it enshrined. The Act had:

[107] *SSHD v Rehman* [2001] UKHL 47.

[108] K. Ewing and J.-C. Tham, 'The Continuing Futility of the Human Rights Act' [2008] *PL* 668. And see E. Bates, 'Anti-terrorism control orders: liberty and security still in the balance' (2009) 29 *Legal Studies* 99.

[109] *R (S,M, S and Others) v SSHD* [2006] EWHC 1111 (Admin). Sullivan J quashed the ministerial order refusing exceptional leave to remain.

[110] DCA, *Review of the Implementation of the Human Rights Act* (25 July 2006); JCHR, *The Human Rights Act: The DCA and Home Office reviews*, HC 1716 (2005/6) [40].

created no new rights. In fact, it enabled rights the UK had signed up to in the European Convention on Human Rights (ECHR) in 1950 (which UK lawyers had played a major part in drafting and which in large part they based on the common law) to be enforced in the UK courts. None of the rights in the Convention – such as the right to life or the right to a fair trial – are, in themselves, remotely controversial. Their application in specific cases may involve striking a difficult balance between competing rights, or accepting the implications of absolute rights, such as the right to life or the right not to be tortured. The universality of human rights – their application to everyone in the UK, including criminals and foreign nationals – can also prove challenging for some.

The universality of human rights can, and should, be a major force for good, especially in the way public services are delivered – including to many vulnerable groups in our society. Human rights are the basic set of rights that we all enjoy by virtue of being human. The Human Rights Act obliges public authorities, including Government departments, to act in accordance with that basic set of rights. They must act proactively to enhance the human rights of the people with whom they deal. The Human Rights Act could and should act as a lever to improve the way in which services are delivered to the public, underpinning good practice with an enforceable legal obligation.[111]

Gratefully accepting this escape route, the Government confirmed commitment to its Human Rights Act.[112] But warning shots had been fired.

10. Lions, mice or bulldogs?

In this chapter we have tried to show how, from the baseline of 'abdication and error' deplored by Schwarz and Wade, the role of the judges in judicial review has been steadily enlarged. During the 1980s, judicial review was rebuilt and greatly strengthened by what would become in time the Administrative Court. We moved from a position where King (p. 96 above) saw the judiciary as 'inclined to defer to the executive' to something in the nature of a separation-of-powers constitution. The new model was concreted in by the Constitutional Reform Act 2005, which created a newly autonomous Supreme Court. Emphasising continuity, the Act confirms 'the existing constitutional principle of the rule of law' and requires the Lord Chancellor to 'uphold the continued independence of the judiciary'.[113]

Meanwhile, judicial review has assumed a central position in the rule-based, evaluative processes that characterise present-day public administration and has itself been reconstructed in the image of a more principled, more rational,

[111] JCHR, *The Work of the Committee in 2007 and the State of Human Rights in the UK*, HC 270 (2007/8) [5–6].

[112] Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework*, Cm 7577 (2009).

[113] There is no space here to deal in detail with the Constitutional Reform Act 2005 but see the Special Issue devoted to the topic at (2004) 24 *Legal Studies* 1–293. And see House of Lords Constitution Committee, *Relations between the executive, the judiciary and Parliament: Follow-up Report*, HC 177 (2007/8).

system. The common law, according to a senior Lord Justice of Appeal, 'is growing incrementally as human rights principles, regarded as commonplace overseas, have been invading the nooks and crevices'.[114] Conscious that the eyes of the outside world would be on them, he concludes, the judges have taken their role as guardian of human rights very seriously. But they have shown no immediate inclination to indulge in extrajudicial sharpshooting or test the boundaries of their new powers and, despite occasional judicial overreaching, have not yet gone so far as to imperil their legitimacy.

To a limited extent, the national courts are offered an escape route by the Court of Human Rights at Strasbourg. The relationship between national courts and Strasbourg under the HRA is very different to that with the Court of Justice at Luxembourg. In arriving at its conclusion, a court or tribunal determining a question that has arisen in connection with a Convention right must 'take into account' any judgment, decision, declaration or advisory opinion of the ECtHR (s. 2(1)); it is not *bound* by that Court's jurisprudence. Space is left by the HRA for British courts to exercise their 'margin of appreciation' by departing from the ECtHR's jurisprudence, even if, for reasons of comity and expedience, they prefer 'in the absence of special circumstances' to follow 'clear and constant' leads from Strasbourg.[115]

Lord Bingham has suggested, however, that the human rights function of a British judge is to act as a 'mirror', positioned to reflect the jurisprudence of the Strasbourg Court. Our courts are reduced 'to keep[ing] pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[116] If so, the readiness of the 'modest underworkers' of classical administrative law to transfer their services to a new master in Strasbourg would be worrying. If national courts were to *lower* the platform of rights protected by Strasbourg, the UK would be placed in breach of its international commitments; if the domestic court were to feel inhibited from moving the platform *up*, the position would be less satisfactory still. In *Re P*, however, Lord Hoffman expressly departed from the 'mirror principle', saying:

> I . . . do not think that your Lordships should be inhibited . . . by the thought that you might be going further than the Strasbourg court. But what if you were? Say the Strasbourg court were to . . . say that these are delicate questions, capable of arousing religious sensibilities in many Member States, and should therefore be left to the national 'margin of appreciation'?
>
> My Lords, in my view this should make no difference . . . 'Convention rights' within the

[114] H. Brooke, 'Human rights beyond the hostile headlines: New developments in practice' (2007) 4 *Justice Journal* 8.

[115] R. Masterman, 'Taking Strasbourg jurisprudence into account; Developing a 'municipal law of human rights' under the Human Rights Act' (2005) 54 *ICLQ* 907; M. Amos, 'The impact of the Human Rights Act on the United Kingdom's performance before the European Court of Human Rights' [2007] *PL* 655.

[116] *R (Ullah) v Special Adjudicator* [2004] UKHL 26 [20].

> meaning of the 1998 Act are domestic and not international rights. They are applicable in the domestic law of the United Kingdom and it is the duty of the courts to interpret them like any other statute . . . In the interpretation of these domestic rights, the courts must 'take into account' the decisions of the Strasbourg court. This language makes it clear that the United Kingdom courts are not bound by such decisions; their first duty is to give effect to the domestic statute according to what they consider to be its proper meaning, even if its provisions are in the same language as the international instrument which is interpreted in Strasbourg. [117]

This certainly accords with Parliament's intention. The HRA contains no 'ceiling' on human rights and does not act as 'mirror' for the Strasbourg jurisprudence; as the Lord Chancellor said during debate on the bill, 'our courts must be free to try to give a lead to Europe as well as to be led'.[118] It was not the intention of Parliament to reduce our judges to 'mice under the Strasbourg throne'.

There is a certain irony in the fact that a judiciary empowered to check the executive in an unprecedented fashion seems *largely* content (we emphasise the word 'largely') to operate inside a classical framework of procedural judicial review, modelling the clay of new principles closely to the shape of the old moulds. It has been said, for example, that the approach of British courts to proportionality 'is orientated towards the limiting of other state organs and already builds itself into a theory of legitimacy: "rights" are for courts, "policy" is for legislatures and executives . . . Questions of "sufficiently important public objective" and "essential core" are for the judiciary.' [119] Are these not the very questions discussed by Dworkin so many years ago?

Although the rhetoric of constitutionalism has not gone away, the tone of the debate has moderated. The vigorous language of 'higher-order law', 'the imperative of individual freedoms' and 'quintessentially British liberty' is gently dissolving into a language of 'deference'. Questions of 'deference' arise according to Lord Hope when, in the context and circumstances of a case, it seems appropriate for the courts to recognise an area of judgment 'within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention'.[120] What these areas might be is a matter of precedent and judicial discretion. For Lord Steyn, deference is a question of 'institutional competence' in the sense both of legitimacy and expertise. There are no longer any 'no-go areas' but a court may, after scrutiny, 'recognise that in a particular case and in respect of a particular dispute, Parliament or the

[117] [2008] UKHL 38 [29–30] [33-–34].
[118] HL Deb., vol. 583, col. 514; and see J. Lewis, 'The European ceiling on human rights' [2007] *PL* 720.
[119] J. Rivers, 'Proportionality and variable intensity of review' (2006) 65 *CLJ* 174, 180.
[120] *R v DPP, ex p. Kebilene* [2000] AC 326, 381 (Lord Hope).

executive may be better placed to decide certain questions'.[121] Laws LJ has tried to construct a spectrum, ranging from the nearly absolute case of state security (a paradigm of special executive responsibility) to the case of criminal justice, a paradigm of judicial responsibility, where it might 'barely exist at all'.[122] So, is this new language a reintroduction, albeit 'in pastel colours',[123] of the supposedly discredited notion of justiciability? Does the 'spectrum theory of deference' differ greatly from the three-stepped *Wednesbury* reasonableness test (p. 42 above)?

The HRA did not, as we have been at pains to emphasise, create a power of constitutional review. It called for 'structured dialogue' between judges and lawmakers about the nature and extent of human rights. The HRA empowered not only the judiciary but also Parliament. Government took on board the principle of 'mainstreaming' or consistently measuring the impact of policy development on human rights. This new practice has, in Gearty's view, contributed more than any other measure to 'the infiltration of human rights considerations deep into Whitehall'.[124] Parliament has responded to its role with new committees, such as the JCHR which, as we shall see in the next chapter, has begun to provide a distinctive and independent voice. This understated 'dialogue model', which 'requires us to talk, to persuade, to argue, to fight the political fight, and not to rely on judicial guardians to protect us from the crowd' is properly, in Gearty's words, 'the human rights mask that the United Kingdom has chosen to wear'.[125] The JCHR, which believes a 'Bill of Rights and Freedoms' to be desirable 'in order to provide necessary protection to all, and to marginalised and vulnerable people in particular', takes a similar view of the appropriate balance of power:

> Adopting a Bill of Rights provides a moment when society can define itself. We recommend that a Bill of Rights and Freedoms should set out a shared vision of a desirable future society: it should be aspirational in nature as well as protecting those human rights which already exist. We suggest that a Bill of Rights and Freedoms should give lasting effect to values shared by the people of the United Kingdom: we include liberty, democracy, fairness, civic duty, and the rule of law.
>
> Adopting a Bill of Rights and Freedoms is a constitutional landmark, and could have a far-reaching impact on the relationship between Parliament, the executive and the courts. We recommend that the Bill of Rights and Freedoms should build on our tradition

[121] J. Steyn, 'Deference: A tangled story' [2005] *PL* 346, 351; J. Jowell, 'Judicial Deference and human rights: A question of competence' in Craig and Rawlings (eds), *Law and Administration in Europe*; R. Clayton, 'Principles for judicial deference' [2006] *Judicial Review* 109.

[122] *International Transport Roth GmbH v Home Secretary* [2003] QB 728. It should be noted that the 'spectrum theory' has not found favour with the judiciary generally.

[123] T. Allan, 'Human rights and judicial review: A critique of "due deference"' (2006) 65 *CLJ* 671, 682.

[124] C. Gearty, *Principles of Human Rights Adjudication* (Oxford University Press, 2004), p. 211.

[125] C. Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006), p. 97.

> of parliamentary democracy, and we do not believe that courts should have the power to strike down legislation. A UK Bill of Rights and Freedoms should, as with the Human Rights Act, apply to legislation whenever enacted, unless Parliament decides to pass incompatible legislation, and makes clear its intention to do so.[126]

[126] JCHR, *A Bill of Rights for the United Kingdom*, HC 150-I (2007/8); *Government Response*, HC 145 (2008/9). And see Justice, *A Bill of Rights for Britain?* (2007); F. Klug, 'A Bill of Rights: Do we need one or do we already have one?' [2007] *PL* 701; Ministry of Justice, *Rights and Responsibilities*.