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IRRATIONALITY, THE HUMAN RIGHTS ACT AND THE LIMITS OF MERITS-REVIEW

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INTRODUCTION

Traditional principles of judicial review dictate that the courts are concerned with assessing only the lawfulness of administrative decision-making rather than its merits.¹ For example, Lord Irvine, a previous Lord Chancellor, has justified this on the basis of three arguments. First, ‘a constitutional imperative’: public authorities should exercise discretionary powers that have been entrusted to them by Parliament. Every authority has within its influence a level of knowledge and experience which justifies the decision of Parliament to entrust that authority with decision-making power. Second, ‘lack of judicial expertise’: it follows that the courts are ill-equipped to take decisions in place of the designated authority. Third, ‘the democratic imperative’: it has long been recognised that elected public authorities, and particularly local authorities, derive their authority in part from their electoral mandate.² These three imperatives are grounded, of course, in the constitutional principle of the separation of powers between the organs of the state.³ Though this ideal has never been strictly adhered to in the UK, it is still accepted as an important principle of constitutional law.⁴ Indeed, it has been strengthened in recent years with the coming into force of the Human Rights Act 1998 (HRA), incorporating certain Articles of

the European Convention on Human Rights (ECHR) into UK Law,⁵ such as Article 6, the right to a fair trial by an independent and unbiased court or tribunal, and the Constitutional Reform Act 2005 (CRA),⁶ section 3 of which upholds the independence of the judiciary.⁷

Nevertheless, is this theory that the courts' supervisory role in reviewing only the legality of executive action respected by the judiciary in practice? If not, what are the implications of this for administrative law doctrine in the 21st Century? Is the judicial review of merits a usurpation of the power of the executive by the courts? Or is it something more benign? A matter of evolution, a natural repositioning of the judiciary within the normal jockeying for power that exists amongst the institutions of the state? Or is it something more systematic? If some administrative power has been ceded to the courts in, for example, the pursuit of furthering human rights' protection, perhaps with Parliament's approval, we are arguably witnessing a legitimate shift in the constitutional balance between the courts and the executive. But what now are the boundaries of this increased power of the judiciary?

This article is the third piece of work on the *Wednesbury*/irrationality ground of judicial review.⁸ In the first article of this study the author attempted to address the question whether the courts were in practice respecting the constitutional principle that they should not be engaging in a review of merits when assessing the exercise of administrative action.⁹ He analysed several cases where the courts had ruled that the executive body in question had acted irrationally and questioned whether the facts in some of these cases could be categorised as unreasonable in a public law sense. That is, by reference to the standard of review implied by Lord Diplock's definition of irrationality in the *GCHQ* case, were the decisions of the executive "so outrageous

in [their] defiance of logic and accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at [them]”?¹⁰ In finding that the case facts in some of these cases arguably did not support judicial intervention, the author concluded that low standards of irrationality had been adopted, thus causing the judges to review the merits of the decisions under consideration.¹¹ Having found that the courts were employing low standards of judicial intervention, the author sought in the second article of this study to question whether these reviews of merits he had identified previously were in fact legitimate.¹² There it was concluded that these low standards were constitutionally justified: either because, for example, the “proportionality” test¹³ had been employed instead of irrationality or the courts had exercised an “anxious scrutiny”¹⁴ approach to breaches of fundamental rights. For reasons of word length the author was unable to assess, to any great degree, the effects the HRA had on the legitimacy of these merits-review cases. This is one of the aims of this third article since arguably this statute now renders the applicability of the “anxious scrutiny” approach redundant. The author finds here that the constitutionality of these low standards of judicial intervention identified previously has been significantly widened since the coming into force of the HRA in 2000. However, the principle of the separation of powers, although not strictly enforced in the UK, must still oppose a merger of the judicial and executive functions. To this end, in reassessing here the legitimacy of the courts’ review of the merits of administrative action post the enactment of the HRA, this article also proposes to establish the limits of this increase in judicial power, that is, a zone of executive decision-making, for reasons of democracy, where the courts are clearly excluded.

THE HUMAN RIGHTS ACT 1998 (HRA) AND
THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

The HRA allows individuals to enforce ‘Convention rights’ in domestic courts. It incorporated some of the Articles of the ECHR¹⁵ into domestic law principally through section 3(1): “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” In interpreting primary and secondary legislation, the courts according to section 2 are under a duty to take into account the case law of the European Court of Human Rights (ECtHR). If a court cannot interpret a statute “so far as it is possible to do so” section 4(2) of the HRA provides for a “legislative review”:¹⁶ “If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of incompatibility.” A declaration of incompatibility is not an order invalidating an Act of Parliament on the basis that it infringes a Convention right. Amending offending primary legislation to make it Convention compatible is the preserve of the executive through a fast track procedure under section 10 of the HRA.¹⁷ However, the judicial review of secondary legislation because of an infringement of a Convention right is not excluded: the HRA creates a free-standing statutory head of review on the grounds of illegality. Section 6(1) – “applied review”¹⁸ – states: “It is unlawful for a public authority to act in a way which is incompatible with a Convention right.” Nevertheless, despite applicants now being able to enforce ‘Convention rights’ in UK law by virtue of the HRA, this does not preclude the availability of traditional irrationality review, and its “anxious scrutiny” avenue,¹⁹ since the procedural rules for the two approaches do differ.²⁰

The legitimacy of low standards of intervention and “qualified” Convention rights

In determining breaches of the ECHR the ECtHR applies the test of proportionality to “qualified rights”, Articles 8-11. Once a reviewing court has been convinced by the legitimacy of the aim identified by the state for infringing, for example, a fundamental right of the applicant, and there was a reasonable nexus between the means to achieve the aim and the aim itself, such as national security or the protection of the rights and freedoms of others, it must then consider whether there was a pressing social need for the infringement of the right. In asking itself the latter question, the reviewing court is determining whether the means are proportionate to the legitimate aim being pursued. The case of *Regina (Daly) v Secretary of State for the Home Department*²¹ in the House of Lords establishes that the test must be applied by the UK courts when considering breaches of qualified rights under the ECHR.

In *Daly* the court held that the blanket policy of the Secretary of State – the requirement that a prisoner be absent during cell searches whenever privileged legal correspondence held by them was examined but not read – was unlawful. Although the state had identified a legitimate aim under Article 8(2) of the ECHR for the policy – the prevention of crime – Lord Bingham said: “The infringement of prisoners’ rights to maintain the confidentiality of their privileged legal correspondence is greater than is shown to be necessary to serve the legitimate public objectives already identified”.²²

The courts could not conceivably employ such a process of review, where they are comparing the weight to be attached to the private right of the applicant which has been infringed with the

competing public interest justification for infringing that right, without being involved in some adjudication of the merits of the state's action. The proportionality test is, therefore, a more searching method of review than the irrationality test, the latter simply requiring the executive decision-maker to remain within an area of rational responses.

The most famous application of the proportionality test to date by the House of Lords was probably in *Regina (A) v Secretary of State for the Home Department*,²³ which Feldman has described as “perhaps the most powerful judicial defence of liberty since [1772]”.²⁴ By a majority of 8-1 an unprecedented panel of nine Law Lords quashed the derogation order issued by the UK government under Article 15 of the ECHR,²⁵ in relation to the Part IV provisions of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), the indefinite detention of foreign individuals suspected of international terrorism. The court held that the provisions were disproportionate to the existing terrorist threat as they were not strictly required by the exigencies of the situation as required by Article 15,²⁶ thus exposing ATCSA to a declaration of incompatibility with Article 5 of the ECHR, the right to liberty and security of the person. Lord Hoffmann said: “The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these”.²⁷ His Lordship even went as far as stating that there was no war or public emergency threatening the life of the nation which justified the derogation under Article 15.²⁸

Clearly, therefore, a review of merits by domestic courts is justified where they employ the proportionality test to certain breaches of ‘Convention’ rights. However, in the international sphere the ECtHR has adopted the “margin of appreciation” principle. This reflects a degree of

latitude to be shown by the court to the signatory states of the ECHR (the Council of Europe) on account of the social and cultural differences which exist between them. This margin of appreciation is not necessarily evident in the various Articles of the ECHR under consideration but often the context in which an Article arises such as economic factors (the raising of taxes and the allocation of national resources) or public morality.

In *Handyside v United Kingdom*,²⁹ for example, the ECtHR ruled that the decision of the UK to prosecute the distributor of the Little Red Schoolbook under the Obscene Publications Act 1959 for the purpose of protecting public morals was lawful. Yes, the court applied the proportionality test – a proportionate balance had been struck by the state between the private right of the applicant to freedom of expression under Article 10(1) and the public interest to protect the morals of children and young people under Article 10(2)³⁰ – but it is submitted that the court did not do so to any great degree. The margin of appreciation shown by the court in *Handyside*, notwithstanding that the book was freely available in other European countries, signifies a willingness not to engage in a *significant* review of the merits of the UK's activities in curtailing the book's distribution. Herein lies a contradiction. The author asserts at the beginning of this article that questions about the legality of administrative decision-making do not involve a reviewing court in a consideration of merits. However, at this point it is implied that high standards of proportionality are lawful, though the very nature of the test does entertain the notion of balance.

In assessing in this third article the constitutionality of low standards of judicial intervention since the coming into force of the HRA, there is a need to explore more fully the meaning of

merits-review which has not been required in this study hitherto. The traditional view of judicial review is that the courts are concerned only with the lawfulness of an administrative decision rather than its merits. This is perhaps reflected in traditional definitions of unreasonableness. In the *GCHQ* case, it will be recalled, Lord Diplock's described an irrational decision as being "so outrageous in its defiance of logic and accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".³¹ However, even when employing orthodox standards of irrationality there must still be some reviewing of the merits of a decision; traditional conceptions of legality must still require a consideration of competing factors supporting or not supporting a particular course of administrative action. With irrationality the measure of discretion is clearly in the executive's favour but determining whether a decision was "outrageous in its defiance of logic" must still require some assessment of merits, albeit not to any great degree. For the purposes of this article, therefore, where standards of judicial intervention are examined, and some of these standards are found to be particularly intensive, strictly speaking, low thresholds involve the courts in a *greater* consideration of merits than would otherwise categorise a customary application for judicial review.

Despite the margin of appreciation principle being applicable in a supra-national context there may a margin of appreciation of sorts – either "a discretionary area of judgment", "a margin of discretion" or "judicial deference"³² – adopted by the UK courts when considering infringements of the ECHR under the HRA. In this regard, it is unlikely that a significant examination of the merits of suspected breaches of Convention rights will take place in domestic law where a balance is to be struck between private and state interests such as public morality. To support this

submission there is the ruling of the House of Lords in *Belfast City Council v Miss Behavin' Limited*.³³ Here a decision by Belfast City Council not to grant licenses to sex shops in a specific area of Belfast was not unlawful, the courts held. The House of Lords ruled that that this was an interference with Article 10(1) of the ECHR, the right to freedom of expression, but was a proportionate response to a legitimate aim identified in Article 10(2), the protection of public morals. For example, Lord Hoffmann said:

The right to vend pornography is not the most important right of free expression in a democratic society...This is an area of social control in which the Strasbourg court has always accorded a wide margin of appreciation to member States, which in terms of the domestic constitution translates into the broad power of judgment entrusted to local authorities by the legislature. If the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights. That was not the case here.³⁴

The courts' employment of the proportionality test here arguably did not involve it in examining the merits of the council's decision with any great intensity. The public interest of the state so obviously outweighed the private right of the applicant to such a degree that the standard of proportionality adopted by the House of Lords was a high one. To this end, compelling the council to give a *strong* justification for infringing freedom of expression, where the court was satisfied that a reasonable nexus has been shown to arise between the infringement of the right

and the objective of protecting the public morals of individuals living in Belfast, would therefore not have been a legitimate judicial exercise.

In summary, the courts are justified in adopting low standards of intervention when assessing, for example, the engagement of qualified rights of the ECHR, since to do so necessitates the employment of the proportionality approach. However, it has also been shown that contextual factors such as the protection of public morals do limit the degree to which the courts should adopt the intensity of proportionality. In this respect, there are boundaries to a *greater* judicial review of the merits of executive decisions affecting qualified rights. In ECHR law some rights do not employ a proportionality type of review. For example, there are rights which are categorised as “absolute”. Do these rights justify low standards of judicial intervention?

The legitimacy of low standards of intervention and “absolute” Convention rights

Article 2 of the ECHR, the right to life, Article 3 of the ECHR, the prohibition on torture or inhuman or degrading treatment or punishment, Article 4(1) of the ECHR, the prohibition on slavery and forced labour, and Article 7(1) of the ECHR, the prohibition on punishment without law, are unique in Convention law in that they are absolute. That is, there are no qualifications such as the objective of either protecting national security or preventing disorder or crime justifying their infringement. Moreover, Article 15(1) of the ECHR – the right to derogate from some Articles of the Convention in times of war or public emergency threatening the life of the nation – does not apply to them.³⁵

Since these rights are unqualified, they exclude the employment of the proportionality test.³⁶ This may explain why Howell *et al* argue that the courts are unlikely to defer to the opinion of a public body where the right involved is absolute.³⁷ Indeed, in the House of Lords in *Regina v DPP, Ex parte Kebilene*³⁸ Lord Hope said: “It will be...much less [easier for an area of judgment to be recognised where the Convention right itself]...is stated in terms which are unqualified”.³⁹ As a practical example of the legitimate low standards exercised by the courts where absolute Convention rights are at issue, there is the ruling of the Administrative Court in *Regina (Bennett) v Inner South London Coroner*,⁴⁰ which involved the fatal shooting by police of Derek Bennett. It was stated above that the proportionality test is excluded from reviews of absolute rights. However, Article 2(2) of the ECHR permits agents of the state to exercise lethal force where it is “absolutely necessary” and for a legitimate aim, such as the protection of individuals from unlawful violence. This is certainly a balancing exercise – but one in which the balance falls very firmly in favour of the person whose life has been denied. In *McCann v United Kingdom*⁴¹ the ECtHR said:

The use of the term “*absolutely necessary*” in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraph 2 of Articles 8 to 11 of the Convention. In particular, *the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.*⁴²

Specifically, the court in *Bennett* was assessing two issues: first, the reasonableness of the

coroner's decision not to leave open to the inquest jury a possible verdict of unlawful killing by the police; and secondly, the compatibility of the defence of self defence in UK criminal law with Article 2.⁴³ However, in so doing, the court did recognise the applicability of the *McCann* principles to domestic law. That is, where the right to life is at issue, and indeed in situations where a person has been fatally shot, the court will examine very closely the justifications given by the police for the "absolute need" to kill someone.

In illustrating further the legitimacy of low standards of review when considering breaches of absolute rights of the ECHR, specifically Article 3, the ruling of the House of Lords in *Regina (Limbuela) v Secretary of State for the Home Department*⁴⁴ can also be identified. Here the court had to consider the lawfulness of refusing three asylum seekers state support, since they had failed to make a claim for asylum as soon as reasonably practicable after arriving in the United Kingdom under section 55(1) of the Nationality, Immigration and Asylum Act 2002. (Of the three claimants the longest delay in making an application for asylum was one day. Two of the claimants were forced to sleep rough and the third claimant was on the verge of doing so. All the claimants suffered a deterioration in health.) Although, Lord Bingham said that the threshold was high in a context such as this where the case did not involve the deliberate infliction of pain or suffering,⁴⁵ he did state, importantly, that the threshold did not have to be crossed before there was an infringement of Article 3. It would occur "when it appears that on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life".⁴⁶ Therefore, subject to what the judge said about the high threshold to be overcome in circumstances such as these, in rejecting the "wait and see"

argument of the Secretary of State he was, arguably, confirming an exacting nature to Article 3. Indeed, if this finding is incorrect, the judge was obviously implying that the threshold was low where the state had deliberately inflicted pain or suffering against an individual.

However, notwithstanding the conclusions drawn about the justifiability of the courts conducting a greater review of the merits of suspected breaches of unqualified rights than perhaps other rights protected by the ECHR, others commentators, such as Clayton⁴⁷ and Havers and English,⁴⁸ have taken a different view concerning the intensity with which judges examine infringements of absolute rights. Clayton refers to the ruling of the Court of Appeal in *R (Bloggs 61) v Secretary of State for the Home Department*.⁴⁹ Here the claimant prisoner contended that, having informed on a well known drugs trafficker, he was entitled to be detained in a protected witness unit and that removal from the unit would place his life at risk. His application was rejected. Although Auld LJ said that any potential interference with the right to life required the most anxious scrutiny by the court,⁵⁰ it was still appropriate to show some deference to the special competence of the Prison Service.⁵¹

In further reference to the right to life, and the possible high standards of review exercised by the courts, there is the recent ruling of the House in Lords in *Van Colle v Chief Constable of the Hertfordshire Police*.⁵² Here the deceased, Giles Van Colle, had been shot dead by a former employee, Daniel Brougham, just days before he was due to give evidence for the prosecution at Brougham's trial for theft.

Article 2(1) of the ECHR imposes a positive or substantive obligation on the state to protect life: “Everyone’s right to life shall be protected by law”. The House of Lords ruled that the Hertfordshire police had not acted unlawfully in failing to protect the life of Giles. It reached its conclusion by reference to the earlier ruling of the ECtHR in *Osman v United Kingdom*.⁵³ In *Osman* the ECtHR had said:

For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.⁵⁴

Although the author stated above that proportionality review is excluded from considerations of Article 2, the positive obligation under Article 2(1), following *Osman*, does require the courts to entertain the notion of balance: even if there is an identifiable risk to the life of a person, this will not engage the positive obligation to protect life if it imposes a disproportionate burden on state authorities. To this end, a reviewing court is obliged to weigh up a risk to life with the potential financial resources needed to prevent it. In confirming that this balance favours the state, Lord Brown in *Van Colle* said:

The test set by the European Court of Human Rights in *Osman* and repeatedly since applied for establishing a violation of the positive obligation arising under Article 2 to protect someone...is clearly a stringent one which will not be easily satisfied...It is indeed some indication of the stringency of the test that even on the comparatively extreme facts of *Osman* itself...the Strasbourg court found it not to be satisfied.⁵⁵

The same conclusion about the potential high standard of intervention employed in *Van Colle* can be drawn about cases involving Article 3. In *N v Secretary of State for the Home Department*⁵⁶ the government sought to deport an illegal immigrant back to Uganda. The applicant had been receiving treatment for an AIDS related illness in the UK. Uganda could not provide equivalent medical treatment to that which she was receiving in this country. She alleged that if she continued to have access to drugs and medical facilities available here, she should remain well for decades. But without the drugs she would die within a year. Lord Hope said that aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state. For an exception to be made where expulsion is resisted on medical grounds the circumstances must be exceptional.⁵⁷ The fact, therefore, that the applicant's deportation to Uganda would result in her death within a year clearly illustrated the court setting a high threshold for Article 3 here.

The courts do afford the executive a little discretion when assessing infringements of absolute rights, as fatal shootings by the police illustrate. However, notwithstanding this finding, low standards of intervention are not always constitutionally justifiable: contextual matters such as the financial costs involved arguably affected the rulings of the judges in *Van Colle* and *N*. In the case of the latter, for example, the resource implications of allowing the applicant to stay in the UK were not lost on Lord Hope. He said:

It must be borne in mind...that the effect of any extension...would...afford all those in the appellant's condition a right of asylum in this country until such time as the standard of medical facilities available in their home countries for the treatment of HIV/AIDS had reached that which is available in Europe. It would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country. This would result in a very great and no doubt unquantifiable commitment of resources which it is, to say the least, highly questionable the states parties to the Convention would ever have agreed to.⁵⁸

Continuing the theme of this article, what is the legitimate standard of merits-review adopted by the courts if they are examining breaches of other Articles of the ECHR, which, like absolute rights, do not permit the courts to employ a proportionality type of approach? There are, of course "special" rights, meaning that they can be restricted in the public interest but only to the extent provided by the ECHR.

The legitimacy of low standards of intervention and “special” Convention rights

Klug states that Article 5, the right to liberty and security of the person, and Article 6, the right to a fair trial by an independent and impartial tribunal, have given rise to the least judicial deference.⁵⁹ Following the ruling of the House of Lords in *A* (see above) the government allowed ATCSA to lapse in March 2005 (the legislation had a ‘sunset clause’, requiring it to be renewed, otherwise it would cease). It replaced ATCSA with the Prevention of Terrorism Act 2005 (PTA), introducing ‘control orders’ for all terror suspects whether they were British or foreign. The PTA allows the state to impose ‘non-derogating control orders’ on individuals which include electronic tagging, curfews, restrictions on visitors and meeting others, a ban on the use of the internet and limits on phone communication. According to section 2 the Home Secretary can apply ‘non-derogating control orders’ to persons whom he reasonably suspects of involvement in terrorism and that the order is necessary to protect the public. Section 3 says that the reasonable suspicion must be approved by the High Court after the period of seven days. The PTA also allows for the provision of ‘derogating control orders’ (from Article 5 of the ECHR, for example), which amount to house arrest. These orders can be issued only by the High Court under section 4 and the rules for their issue are stricter than those for ‘non-derogating control orders’. Within hours of the passing of the PTA the Home Secretary applied ‘non-derogating control orders’ to ten men previously certified under ATCSA as terrorism suspects, some of whom had been detained without trial since December 2001.

The issuing of some ‘non-derogating control orders’ under 2 section of the PTA is now unlawful as being contrary to Article 5 of the ECHR, the House of Lords has held: *Secretary of State for the Home Department v JJ*.⁶⁰ Here the conditions depriving the liberty of the six applicants included: residency at a one bedroom flat, away from one’s normal home, for 18 hours every day (1600 to 1000); electronic tagging; compulsory attendance at a police station twice a day; visitors to have been approved by the Home Office; limited use of the telephone; and a ban on the use of the internet. In holding that the conditions were unlawful, Lord Bingham likened the conditions to prison but without the benefit of association with others.⁶¹ Lord Brown said: “Article 5 represents a fundamental value and is absolute in its terms. Liberty is too precious a right to be discarded except in times of genuine national emergency. None is suggested here”.⁶²

On average there are only about 15 individuals subject to ‘non-derogating control orders’ at any one time. This very small number suggests that these orders are reserved only for those terrorist suspects who pose a critical threat to national security. To this end, the House of Lords could very easily have upheld the existing conditions attached to the orders, deferring to the executive’s duty to protect the community from acts of terrorism. However, in relaxing the deprivations of liberty conferred on the suspects by the state, the court chose to subject the orders to particular scrutiny, it is submitted.

The issue of the admissibility of evidence against suspected terrorists held under the PTA, for example, where it is possibly gained through torture (thus arguably compromising Article 6 of the ECHR) was addressed by the House of Lords in *A v Secretary of State for the Home*

Department (No.2).⁶³ Here the court held that evidence procured by torture, whether of a suspect or witness, was not admissible against a party to proceedings in a British court, irrespective of where, by whom or on whose authority the torture had been inflicted.⁶⁴ In so doing, the House of Lords reversed the ruling of the Court of Appeal⁶⁵ which had said that evidence obtained under torture in third countries could be used in special terrorism cases, provided that the British government had neither procured it nor connived at it. This was because it was unrealistic to expect the Home Secretary to investigate each statement with a view to deciding whether the circumstances in which it was obtained involved a breach of the ECHR.⁶⁶ The fact that the House of Lords rejected this approach by the Court of Appeal suggests that a low standard of review was adopted.

More recently, in *Regina v Davis*⁶⁷ the House of Lords had to assess the fairness of the defendant's trial for murder in the context of Article 6 of the ECHR and the common law. Seven witnesses had claimed to be in fear for their lives if it became known that they had given evidence against the defendant. Among them were three witnesses, the only witnesses in the case who were able to identify the defendant as the killer. These claims about risks to personal safety were investigated and accepted as genuine by the trial judge and the Court of Appeal. To induce the witnesses to give evidence, the trial judge ordered that: 1) they were each to give evidence under a pseudonym 2) their addresses and personal details were to be withheld from the defendant and his legal advisers 3) defence counsel was not permitted to ask any questions which might enable any of the three witnesses to be identified 4) they were to give evidence behind screens so that they could be seen by the judge and the jury but not by the defendant and 5) their natural voices were to be heard only by the judge and the jury.⁶⁸ The House of Lords held that no

conviction should be based solely or to a decisive extent upon the statements or testimony of anonymous witnesses. The reason was that such a conviction results from a trial which could not be regarded as fair.⁶⁹

The author believes here that the House of Lords in these three cases, *JJ, A (No.2)*, and *Davis*, signified a willingness to adopt an intensive standard of intervention – even to the point in allowing the possible collapse of a murder trial (in *Davis*), notwithstanding the fact that the defendant was a dangerous individual who had been identified by three witnesses as a killer. A greater judicial review of the merits of administrative decisions where special rights of the ECHR are at issue is therefore arguably legitimate.

However, as regards Article 6 of the ECHR, for example, the degree of deference accorded to the executive is sometimes high: *Regina (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*.⁷⁰ Here the House of Lords was assessing the legality of the ‘calling-in’ procedure exercised by the Secretary of State under section 77 of the Town and Country Planning Act 1990. The court said that although the Secretary of State was not independent and impartial, decisions taken by him were not incompatible with Article 6(1), provided they were subject to review by an independent and impartial tribunal which had full jurisdiction to deal with the case as the nature of the decision required. Furthermore, when the decision under consideration was one of administrative policy, the reviewing body was not required to have full power to redetermine the merits of the decision and any review by a court of the merits of such a policy decision taken by a minister answerable to Parliament and ultimately to the electorate would be profoundly undemocratic.

In a similar context – the possible lack of independence and impartiality of a local authority officer reviewing a decision to house a homeless person in a location which the applicant had considered unsuitable for her and her family – Lord Bingham in the House of Lords in *Runa Begum v Tower Hamlets London Borough Council*⁷¹ also said

I can see no warrant for applying in this context notions of ‘anxious scrutiny’...I would also demur at the suggestion of Laws LJ in the Court of Appeal in the present case...that the judge may subject the decision to ‘a close and rigorous analysis’ if by that is meant an analysis closer or more rigorous than would ordinarily and properly be conducted by a careful and competent judge determining the application for judicial review.⁷²

The courts are arguably justified in a greater review of the merits of administrative decisions affecting special rights of the ECHR but, similar to the findings above in relation to qualified rights and absolute rights, the employment of low standards of intervention are not unfettered. Some contextual factors such as the availability of traditional irrationality review as a fail safe against the unlawful exercise of statutory powers of Ministers in planning law, for example, ought to limit the courts’ discretion to assess special rights with any great intensity.

Questions about the degree to which the courts legitimately review the merits of Articles of the ECHR under the HRA do not stop there: what would be the legitimate standard of intervention if a court was not necessarily assessing the lawfulness of executive action by reference to a

particular Article of the ECHR under section 6(1) of the HRA but was exercising its obligation to interpret statutes in line with Convention rights under section 3(1) of the HRA, or was considering a declaration of incompatibility under section 4(2) of the HRA? These questions are addressed in the next two sections.

The legitimacy of low standards of intervention and section 3(1) of the HRA

It will be recalled that section 3(1) of the HRA is an interpretative obligation. It requires the courts in any proceedings, whether they be civil or criminal, private or public, to interpret primary and secondary legislation “so far as it is possible to do so” in line with Convention rights. In *Regina v Lambert*⁷³ Lord Woolf observed:

It is...important to have in mind that legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention.⁷⁴

This quote by Lord Woolf is a reminder to the judiciary of the respect that should be owed by them to Parliament when they are interpreting primary legislation in line with a convention right under section 3(1) of the HRA (or issuing a declaration of incompatibility under section 4(2) of the HRA – see below).

There has been much debate about the exact meaning of section 3(1) of the HRA. Does the obligation give the court the power to interpret a statute in such a way that its meaning is contrary to the will of Parliament? Remember, the words “so far as possible to do so” mean that the obligation is not absolute: if a court cannot interpret the statute “so far as possible” it may issue a declaration of incompatibility under section 4(2). However in *Regina v A (No.2)*⁷⁵ the House of Lords significantly altered the effects of section 41 of the Youth Justice and Criminal Evidence Act 1999 – the general prohibition on the cross examination of a complainant in a rape case about their previous sexual history – to achieve compatibility with Article 6 of the ECHR, the right to a fair trial by an independent and impartial tribunal. Lord Steyn said: “[It] will sometimes be necessary to adopt an interpretation which linguistically may appear strained”.⁷⁶ Nicol has described this as “...[straying] far from the wording of the provision and Parliament’s clear intention in introducing it” and “[t]his clarity of parliamentary purpose in no way inhibited the House of Lords. Nor did the fact that the words of the statute were as plain as day”.⁷⁷

The courts seemed to retreat from this approach – even Lord Steyn – in *Regina (Anderson) v Secretary of State for the Home Department*.⁷⁸ In this later case Lord Steyn said: “...section 3(1) is not available where the suggested interpretation is contrary to express statutory words or by implication necessarily contradicted by the statute”.⁷⁹ In the light of this, and other speeches in the House of Lords such as those in *Re S*⁸⁰ and *Bellinger v Bellinger*,⁸¹ Nicol has therefore argued that the House of Lords is less inclined to find a Convention compliant interpretation of the statute (and more inclined to declare an Act of Parliament incompatible under s.4(2) of the HRA – see below).⁸² This has been criticised by Kavangh who persuasively argues that the

context and individual circumstances are more likely to explain judicial approaches to s.3(1), rather than any fundamental change of mind about the section.⁸³ For example, she refers to the potential for legal reform as a factor in the courts deciding whether to exercise their powers under s.3(1) or s.4(2). In *Bellinger* the House of Lords declined to interpret “male” and “female” in s.11(c) of the Matrimonial Causes Act 1973 to include a transsexual female under s.3(1) of the HRA for the purposes of marriage. Rather than arguing that this signaled a judicial retreat from s.3(1), which was Nicol’s argument, Kavanagh said one of the justifications for the courts issuing a declaration of incompatibility was because the particular change in the law was inappropriate for the judiciary: it required extensive inquiry and the widest public consultation and discussion, so was more suitable for Parliamentary reform.⁸⁴

The interplay between sections 3(1) and 4(2) of the HRA seems to have been settled for the foreseeable future by the House of Lords in *Ghaidan v Godin-Mendoza*.⁸⁵ When amending provisions of the Rent Act 1977 to make them comply with Articles 8 and 14 of the ECHR, thus allowing a surviving gay partner to inherit his deceased lover’s tenancy, Lord Nicholls said:

[The] intention of Parliament in enacting section 3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning, and hence the effect, of primary and secondary legislation. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation.⁸⁶

The courts are therefore prepared to assess the merits of legislation to some degree to make it interpretively Convention compatible. However, it will be recalled that this obligation under s.3(1) of the HRA is not absolute: it is qualified by the phrase “as far as possible to do so”. To this end, there should still be judicial restraint into the merits of a statute’s compliance where an interpretation would clearly contradict the ethos of the legislation.

The legitimacy of low standards of intervention and section 4(2) of the HRA

Section 3(1) of the HRA is not unqualified. Where a Convention compliant interpretation of a statute is not possible a court may issue a declaration of incompatibility under s.4(2) of the HRA. Some guidance as to the exercise of this judicial power has recently been given by the House of Lords in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*.⁸⁷ Here the court was considering whether the ban on political advertising on television and radio in sections 319 and 321 of the Communications Act 2003 was incompatible with Article 10(1) of the ECHR. Despite Lord Bingham saying: “the importance of free expression is such that the standard of justification required of member states is high and their margin of appreciation correspondingly small, particularly where political speech is in issue”,⁸⁸ the court still held that the ban was not unlawful. In determining that ultimately the balance favoured the state here, Lord Bingham observed:

The weight to be accorded to the judgment of Parliament depends on the circumstances and the subject matter. In the present context it should in my opinion be given great weight, for

three main reasons. First, it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so. Secondly, Parliament has resolved, uniquely since the 1998 Act came into force in October 2000, that the prohibition of political advertising on television and radio may possibly, although improbably, infringe article 10 but has nonetheless resolved to proceed...The judgment of Parliament on such an issue should not be lightly overridden. Thirdly, legislation cannot be framed so as to address particular cases. It must lay down general rules...A general rule means that a line must be drawn, and it is for Parliament to decide where...⁸⁹

Arguably, therefore, a particularly wide area of discretion was seemingly afforded to the statute by the House of Lords.⁹⁰ Lord Bingham had said that this depended on the circumstances and subject matter of the case. As a general rule what might these be? The earlier case of *International Transport Roth v Secretary of State for the Home Department*⁹¹ offers some explanation. Here the Immigration and Asylum Act 1999 had imposed penalties on those who allowed illegal entrants into the UK. The usual penalty was £2000 per entrant payable within 60 days, subject to some exceptions such as the defence of duress, which the carrier had to prove. The burden of proof was therefore reversed, that is, it was the responsibility of the defence, the carrier, to prove innocence rather than the prosecution to prove guilt. Furthermore, the carrier could be detained until the fine had been paid, and no compensation would be paid to an innocent carrier who had been detained because of an unreasonable penalty notice.

The Court of Appeal ruled that the reversal of the burden of proof, coupled with the further sanctions, was unfair and incompatible with Article 6 of the ECHR, the right to a fair trial by an independent and impartial court or tribunal.⁹² In so doing, Laws LJ argued that a greater degree of deference should be accorded to Acts of Parliament than to subordinate legislation or a decision of the executive.⁹³ Of course, other issues pertaining to the circumstances and the subject matter of the case (to use the words of Lord Bingham in *Animal Defenders International*) may outweigh the respect shown by the judiciary to the legislation at issue. To this end, Laws LJ identified other factors which were relevant to the degree of deference shown by the courts. Judges were more likely to interfere where the right under consideration was an absolute right such as the right to life rather than a qualified right such as freedom of expression;⁹⁴ and the subject matter was more within the competence of Parliament than the judiciary, such as the defence of the realm.⁹⁵ Although this was a dissenting judgment by Laws LJ, it has received much attention and seems to be an accepted view that a degree of deference should be shown by the courts to statutes when issuing a declaration of incompatibility under s.4(2) of the HRA.⁹⁶ Is an intensive process of merits-review here therefore justified?

Degrees of deference shown by judges when assessing infringements of the ECHR and sections 3(1) and 4(2) of the HRA, illustrating the intensity with which the courts review merits, inevitably differ depending upon which Article is under consideration, and the context in which it arises. Indeed, standards differ between judges in the same case⁹⁷ and between judges more generally.⁹⁸ Such an argument leads one to question when the courts are, categorically, acting unconstitutionally in reviewing the merits of executive action? This is maybe an impossible question to answer. For example, Allan has argued:

The boundaries [of executive]...autonomy...cannot be settled independently of all the circumstances of the particular case; for only the facts of the particular case can reveal the extent to which any individual right is implicated and degree to which relevant public interests may justify the right's curtailment or qualification...There is...no means of defining the scope of judicial powers, or prescribing the limits of official discretion, as regards the details of any particular case, without examination of the specific legal issues arising in all the circumstances.⁹⁹

However, the author is uncomfortable with proceeding on this basis as it affords no certainty to the executive about the boundaries of its power. For constitutional reasons the executive must surely be permitted some latitude in its decision-making – whatever the context.

Substitution of judgment as a limit to the judicial review of merits

In arguing that English law should recognise the proportionality test as a stand alone ground of review, Craig does not go as far as advocating a standard of intervention equivalent to judicial substitution of judgment.¹⁰⁰ He defines this approach as the substitution of choice as to how the discretion ought to have been exercised for that of the administrative authority. The courts would in other words reassess the matter afresh and decide, for example, whether funds ought to be allocated in one way rather than another.¹⁰¹ There are other commentators such as Clayton who support the view that substitution of judgment is an absolute limit to the judicial review of merits¹⁰² - even when applying the proportionality test, which by its very nature increases the likelihood of a

reconsideration of the merits of an administrative decision. He argues that despite varying standards of the principle applied amongst Commonwealth jurisdictions, there is universal acknowledgment that the court is exercising a review function and is not substituting its own judgment for that of the original decision-maker.¹⁰³ From a domestic law perspective, Hickman, in an excellent assessment of the proportionality test, analyses the different approaches to the principle that the UK courts have employed. He finds that the test is still one of review.¹⁰⁴ Where the ECHR right is absolute and unqualified, meaning proportionality is generally excluded, Sayeed impliedly agrees about the minimum standard of judicial intervention to be employed: he states that the judiciary would never usurp the executive by substituting the latter's decision.¹⁰⁵

The courts are also unequivocal in their assertions that judicial review for suspected breaches of the ECHR does not involve them in substitution of judgment. For example, when discussing the adoption of the proportionality principle to breaches of qualified rights under the HRA, Lord Steyn in *Daly* said that intervention by the courts was still one of review rather than appeal: "The differences in approach between the traditional grounds of review and the proportionality approach may...sometimes yield different results...This does not mean that there has been a shift to merits-review".¹⁰⁶

In the context of this article where degrees of intervention on the merits are examined, the phrase "merits-review" used by Lord Steyn may not necessarily imply judicial substitution of judgment. The later ruling of the House of Lords in *Huang v Secretary of State for the Home Department*¹⁰⁷ clarifies what Lord Steyn was saying. Here the court had to decide on the intensity of the proportionality test to be employed by an immigration appeal adjudicator, meaning: the issue

which separated the applicants and the Secretary of State was whether or not the adjudicator should decide for himself, on the merits, whether the removal was proportionate or not. The Secretary of State had argued that the adjudicator's assessment of proportionality should be limited to a review of his decision, and only ask whether or not it was within the range of reasonable assessments of proportionality.¹⁰⁸ In rejecting the argument of the latter, Lord Bingham maintained:

[Lord Steyn's] statement has, it seems, given rise to some misunderstanding...The point which, as we understand, Lord Steyn wished to make was that, although the Convention calls for a more exacting standard of review, it remains the case that the judge is not the primary decision-maker.¹⁰⁹

The message is therefore clear: the judicial review of discretionary powers, whatever the circumstances, is still a supervisory function of the courts. Although a greater judicial consideration of the merits of administrative decisions affecting rights is permitted since the coming into force of the HRA, the executive reserves the right not to have their judgments substituted by the courts; this is the limit of judicial power.

CONCLUSION

Orthodox principles of public law prescribe that judicial review is not an appellate jurisdiction. The courts are merely supervising the lawfulness of administrative decision-making, that is, they are

ensuring that the executive is working within the implied boundaries of a discretionary power conferred on it by the Legislature. The administrative decision-maker has been granted a discretion as a constitutional recognition that s/he is in the best position to act in most circumstances. The irrationality ground of review is defined in a way that acknowledges this so (in theory) provides the executive with the latitude to decide upon several courses of action within a particular discretion. Intervention by a reviewing court under this head of challenge should therefore be undertaken only when a decision is not within a range of options available to a rational decision-maker.

However, the first article in this study found that the courts were in fact adopting low standards of irrationality and thus were reviewing the merits of administrative activity. Therefore, the second article in this study set out to examine the constitutionality of these low standards of judicial intervention. It concluded that some of these merits-reviews previously identified had in reality been legitimate by reference either to the actual test of review employed by the court (proportionality instead of irrationality, for example) or because the fundamental rights of the applicant had been unjustifiably infringed. With the advent of the HRA, this article has found that the constitutionality of the judicial review of the merits of discretionary powers has obviously widened: assessing the engagement of “qualified” rights of the ECHR demands a proportionality type of approach, for example. The very nature of this test is the notion of balance, a consideration of two competing interests: the private right of the applicant to privacy, expression, association etc and the public duty of the state to protect national security, prevent disorder and crime and so on.

Qualified rights are not the only rights which legitimately engage low standards of review: some absolute rights of the ECHR like Article 2, the right to life, also employ the proportionality test. In

cases of fatal shootings by the police, for example, Article 2(2) permits the intentional deprivation of life but only where the use of lethal force is for a legitimate object like prevention of unlawful violence and “absolutely necessary”. In assessing a potential unlawful breach of Article 2(2), a reviewing court must adopt a strict proportionality approach, that is, the justifications by the state for the killing must be subjected to particular scrutiny. A low standard of judicial intervention in this context is therefore justifiable. However, the adoption of proportionality review does not necessarily engage a significant review of the merits of executive action. For instance, where certain justifiable state aims like public morality are being pursued, the intensity with which the courts review merits should be smaller. Furthermore, in other situations the courts should also adopt a degree of restraint over the control of executive powers: exercising their interpretive obligation under s.3(1) of the HRA and issuing a declaration of incompatibility under s.4(2) of the HRA being obvious examples.

The legitimate standards of judicial intervention under the HRA do therefore differ depending on the Article of the ECHR under assessment, the context in which the Article arises and even the nature of the remedy claimed. This is arguably unsatisfactory from the executive’s perspective: there must still be a region of administrative decision-making from which the courts are excluded. In this regard, a secondary purpose of this third article in the study of irrationality has been to evaluate this constitutional repositioning of the judiciary, with a view to establishing where this new ‘fault line’ lies between it and the executive. The growth in the power of the courts at the expense of the executive, especially since the coming into force of the HRA in 2000, has made substantial inroads into the merits of administrative decision-making, to the point where substitution of judgment is now the absolute limit of the courts’ power. In a subsequent article the author will question whether this boundary of judicial decision-making affords the executive an appropriate degree of

latitude to undertake its governmental duties. The author suspects that this smaller zone of lawful administrative activity is too narrow. To this end, for reasons of democracy, it will be argued that legitimate standards of judicial intervention on the grounds of irrationality should therefore be raised so that the executive is permitted a sufficient measure of discretion from which to exercise fully the responsibilities conferred on it by the Legislature.

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¹ S. De Smith, H. Woolf and J. Jowell, *Principles of Judicial Review*. (Sweet and Maxwell, 1999), p.20.

² Lord Irvine, “Judges and Decision-Makers: the Theory and Practice of *Wednesbury* Review” [1996] PL 59, pp.60-61. An inference that Lord Irvine objects to the judicial review of merits in every situation should not be drawn, however. He rejected the review of merits where the courts were employing principles of the common law (such as irrationality), but later accepted it when they were applying the proportionality test to certain breaches of the European Convention on Human Rights (ECHR) – see, for example: Lord Irvine, “The Development of Human Rights in Britain” [1998] PL 221, p.229; and Lord Irvine, “The Impact of the Human Rights Act: Parliament, the Courts and the Executive” [2003] PL 308, p.313.

³ C. Montesquieu, *De l’Esprit des Lois*, 1748, Chapter XI, pp.3-6 famously said where the legislative and executive powers were united in the same person or body there could be no liberty. Again, there was no liberty if the judicial power was not separated from the legislative and executive. There would be an end of everything if the same person or body were to exercise all three powers.

⁴ See, for example, E. Barendt, “Separation of Powers and Constitutional Government” [1995] PL 599; and N. Barber, “Prelude to the Separation of Powers” (2001) 60 CLJ 59.

⁵ Section 1 of the Human Rights Act 1998 (HRA) labels Articles 2 – 12 and 14 of the European Convention on Human Rights (ECHR), Articles 1-3 of the 1st Protocol of the ECHR and Protocol 13 of the ECHR as “Convention rights”. Reference to several of these Articles of the ECHR which have been incorporated into UK Law is made in the main text of this article.

⁶ Parts II, III and IV of this legislation reform the Office of the Lord Chancellor (by, for example, removing the automatic right to act as the Speaker of the House of Lords), create a Supreme Court for the UK to replace the Appellate Committee of the House of Lords and introduce an independent Judicial Appointments Commission, creating a more transparent system of appointing senior judges.

⁷ Indeed, the HRA, in strengthening the separation principle in UK law, is in part responsible for the enactment of the Constitutional Reform Act 2005; see, for example, R. Masterman, “Determinative in the Abstract? Article 6(1) and the Separation of Powers” [2005] EHRLR 628.

⁸ Referring to the judgment of Lord Greene in the Court of Appeal in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, Lord Diplock in *Council of Civil Service Unions and Others v Minister for the Civil Service* (the ‘GCHQ’ case) [1985] AC 374 said that irrationality could now be succinctly referred to as “*Wednesbury* unreasonableness” (p.410). Thus in this article the terms irrationality and *Wednesbury* unreasonableness are used interchangeably to denote the same ground of review.

⁹ I. Turner, “Judicial Review, Irrationality and the Review of Merits” (2006) 15(2) Nott LJ 37.

¹⁰ *Council of Civil Service Unions and Others v Minister for the Civil Service* (the ‘GCHQ’ case) [1985] AC 374, p.410.

¹¹ The author analysed the rulings of the House of Lords in *Wheeler and Others v Leicester City Council* [1985] AC 1054, the Court of Appeal in *West Glamorgan County Council v Rafferty and Others* [1987] 1 WLR 457, the Court of Appeal in *Regina v Secretary of State for Trade and Industry, Ex parte Lonrho PLC* *The Times*, 18 January 1989 and the Court of Appeal in *Regina v Cornwall County Council, Ex parte Cornwall and Isles of Scilly Guardians Ad Litem and Reporting Panel* [1992] 1 WLR 427.

¹² I. Turner, “Judicial Review, Irrationality and the Legitimacy of Merits-Review” (2008) 29(3) LLRev 309.

¹³ The author justified this by reference to the writings of several academic commentators: Paul Craig (eg. P. Craig, “The Impact of Community Law on Domestic Public Law”, in P. Leyland and T. Woods (eds.), *Administrative Law Facing the Future: Old Constraints and New Horizons*. (Blackstone Press, 1997) pp.271-296); Jeffrey Jowell (eg. J. Jowell, “Is Proportionality an Alien Concept?” (1996) 2 EPL 401; J. Jowell and A. Lester, “Proportionality: Neither Novel Nor Dangerous”, in J. Jowell and D. Oliver (eds.), *New Directions in Judicial Review*. (Stevens, 1988) pp.51-72; and J. Jowell and A. Lester, “Beyond *Wednesbury*: Substantive Principles of Administrative Law” [1987] PL 368); Garreth Wong (eg. G. Wong, “Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality” [2000] PL 92); Mark Elliott (eg. M. Elliott, “Scrutiny of Executive Decisions Under the Human Rights Act 1998: Exactly How ‘Anxious’?” [2001] JR 166); Michael Fordham (eg. M. Fordham, “Common Law Proportionality” [2002] JR 110); and Tom Hickman (eg. T. Hickman, “Proportionality: Comparative Law Lessons” [2007] JR 31).

¹⁴ This was developed first by the House of Lords in *R v Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] AC 514. There Lord Bridge said: “When an

administrative decision...is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny." (p.531)

¹⁵ See footnote 5 for a description of the Articles of the ECHR – 'Convention rights' – incorporated into UK law.

¹⁶ D. O'Brien, "Judicial Review Under the Human Rights Act 1998: Legislative or Applied Review?" [2007] EHRLR 550.

¹⁷ In fact practice has shown that the executive is more likely to address the incompatibility of legislation by replacing it with another Act that is compatible rather than invoking this "Henry VIII" clause in the HRA.

¹⁸ D. O'Brien, *op.cit.*

¹⁹ See footnote 14 for a description of the "anxious scrutiny" approach.

²⁰ Procedurally, there are different rules for conventional judicial review and judicial review under the HRA. This means that, notwithstanding the coming into force of the HRA, infringements of fundamental rights must still be pursued through the traditional *Wednesbury* irrationality test. See, for example: J. Miles, "Standing Under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication" (2000) 59 CLJ 133; and D. Squires, "Judicial Review of the Prerogative after the Human Rights Act" (2000) 116 LQR 572.

²¹ [2001] UKHL 26, [2001] 2 AC 532.

²² *Ibid.*, p.544.

²³ [2004] UKHL 56, [2005] 2 AC 68.

²⁴ D. Feldman, "Proportionality and Discrimination in Anti-Terrorism Legislation" (2005) 64 CLJ 271, p.273. Hickman – T. Hickman, "Between Human Rights and the Rule of Law:

Indefinite Detention and the Derogation Model of Constitutionalism” (2005) 68 MLR 655 – also states: “Both the constitutional significance and impact of the decision are...of the highest order.” (p.668).

²⁵ Article 15(1) of the ECHR states: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

²⁶ Because, for example, the legislation targeted only foreigners suspected of terrorism, not British suspects; and the detainees could be released if they left the UK (so in theory could continue their terrorist activity abroad). In this regard the ruling was perhaps unsurprising, as Starmer – K. Starmer, “Setting the Record Straight: Human Rights in an Era of International Terrorism” [2007] EHRLR 123 – argues: “Against this background it can hardly be suggested that their Lordships were mischievously dismantling the Government’s anti-terrorism strategy. They were simply pointing that the Government’s approach was discriminatory, irrational and, worst of all, ineffective.” (p.124)

²⁷ [2004] UKHL 56, [2005] 2 AC 68, at para 97.

²⁸ *Ibid.*, at para 96. Lord Hoffmann was the only judge to believe this. It has, therefore, been argued that the majority of the House of Lords retained its deference with regard to the initial question of the existence of a public emergency threatening the life of the nation: M. Cohn, “Judicial Activism in the House of Lords: a Composite Constitutionalist Approach” [2007] PL 95, p.103.

²⁹ (1976) 1 EHRR 737.

³⁰ *Ibid.*, at para 48.

³¹ *Council of Civil Service Unions and Others v Minister for the Civil Service* (the ‘GCHQ’ case) [1985] AC 374, p.410.

³² Lord Hoffmann in the House of Lords in *Regina (Pro-Life Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 said that use of the word “deference” was inappropriate because of its “overtones of servility, or perhaps gratuitous concession” (at para 75). Furthermore, in the later ruling of the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11 Lord Bingham stated: “The giving of weight to factors...is not, in our opinion, aptly described as deference: it is a performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed.” (at para 16)

³³ [2007] UKHL 19, [2007] 1 WLR 1420.

³⁴ *Ibid.*, at para 16.

³⁵ Article 15(2). Article 15 is stated at footnote 28. In reference to Article 2, the right to life, however, Article 15(2) does permit some derogation: those deaths resulting from lawful acts of war.

³⁶ This is not strictly correct as references in the main text to the positive obligation imposed on a state by Article 2(1) of the ECHR and the state’s justification in using lethal force against a person under Article 2(2) illustrate.

³⁷ J. Howell and D. Elvin, “Introduction to the Convention” in R. Drabble *et al* (eds), *Local Authorities and Human Rights*. (Oxford University Press, 2004), pp.21-63, p.30.

³⁸ [2000] 2 AC 326.

³⁹ *Ibid.*, p.381.

⁴⁰ [2006] EWHC 196 (Admin).

⁴¹ (1995) 21 EHRR 97.

⁴² *Ibid.*, at para 149.

⁴³ This case was subject to an appeal – [2007] EWCA Civ 617 – but the issue relevant to this article was not pursued.

⁴⁴ [2005] UKHL 66, [2006] 1 AC 396.

⁴⁵ *Ibid.*, at para 7.

⁴⁶ *Ibid.*, at para 8.

⁴⁷ R. Clayton *et al*, “Key Human Rights Act Cases in the Last 12 Months” [2004] EHRLR 614, p.621; and R. Clayton, “Judicial Deference and ‘Democratic Dialogue’: The Legitimacy of Judicial Intervention Under the Human Rights Act 1998” [2004] PL 33, p.34.

⁴⁸ P. Havers and R. English, “Human Rights: A Review of the Year” [2003] EHRLR 587, p.592.

⁴⁹ [2003] EWCA Civ 686, [2003] 1 WLR 2724.

⁵⁰ *Ibid.*, at para 62.

⁵¹ *Ibid.*, at para 64.

⁵² [2008] UKHL 50, [2008] 3 WLR 593.

⁵³ (2000) 29 EHRR 245.

⁵⁴ *Ibid.*, at para 116.

⁵⁵ [2008] UKHL 50, [2008] 3 WLR 593, at para 115. In *Osman* the police had allegedly failed to protect Ahmet Osman and his father from being shot by Paul Paget-Lewis, Ahmet’s former school teacher. Paget-Lewis had formed an obsessive, non-sexual attachment to Ahmet, one of his pupils. 18 months or so later he went to Ahmet’s home, shot him and shot and killed his father.

⁵⁶ [2005] UKHL 31, [2005] 2 AC 296.

⁵⁷ *Ibid.*, at para 48. The ruling of the ECtHR in *N* (*N v United Kingdom* (Application Number 26565/05)) has since been published: the court, like the House of Lords, held that *N* did not infringe Article 3 of the ECHR because the circumstances were not exceptional.

⁵⁸ [2005] UKHL 31, [2005] 2 AC 296, at para 53.

⁵⁹ F. Klug, “Judicial Deference Under the Human Rights Act 1998” [2003] EHRLR 125, p.129. However, this is not to be taken as Klug’s opinion – it is more of a summary of what is happening in practice since she believes if the scheme of the HRA under ss.3 and 4 is correctly applied, there is no need for a further doctrine of judicial deference by the courts.

⁶⁰ [2007] UKHL 45, [2008] 1 AC 385. Less onerous conditions are lawful, however: *Secretary of State for the Home Department v AF* [2007] UKHL 46, [2008] 1 AC 440 and *Secretary of State for the Home Department v E* [2007] UKHL 47, [2008] 1 AC 499.

⁶¹ *Ibid.*, at para 24.

⁶² *Ibid.*, at para 107.

⁶³ [2005] UKHL 71, [2006] 2 AC 221.

⁶⁴ The House of Lords ruled that once the appellant had argued a tenable reason why evidence might have been procured by torture, the burden of proof was on the Special Immigration Appeals Commission (SIAC): it was obliged to establish the fact by means of such diligent inquiries into the sources that it was practicable to carry out. As for the standard of proof, SIAC should refuse to admit evidence if, on a balance of probabilities, the evidence relied on by the Secretary of State had been obtained through torture. If SIAC were left in doubt, they should admit it and bear their doubt in mind when evaluating it. There is concern about this test for excluding evidence adopted by the majority of judges in this case – see, for example, N. Grief,

“The Exclusion of Foreign Torture Evidence: A Qualified Victory for the Rule of Law” [2006] EHRLR 201. Does this therefore signify an interest more beneficial to the state rather than the individual?

⁶⁵ [2004] EWCA Civ 1123, [2005] 1 WLR 414.

⁶⁶ *Ibid.*, at para 129.

⁶⁷ [2008] UKHL 36, [2008] 3 WLR 125.

⁶⁸ *Ibid.*, at para 3.

⁶⁹ *Ibid.*, at para 25.

⁷⁰ [2001] UKHL 21, [2003] 2 AC 295, at para 54.

⁷¹ [2003] UKHL 5, [2003] 2 AC 430.

⁷² *Ibid.*, at para 7.

⁷³ [2002] QB 1112.

⁷⁴ *Ibid.*, p.1120.

⁷⁵ [2001] UKHL 25, [2002] 1 AC 45.

⁷⁶ *Ibid.*, at para 63..

⁷⁷ D. Nicol, “Statutory Interpretation and Human Rights After Anderson” [2004] PL 274, p.276 and p.275. However, Kavanagh says – A. Kavanagh, “Unlocking the Human Rights Act: The “Radical” Approach to Section 3(1) Revisted” [2005] EHRLR 259 – that Lord Steyn did not say that such a construction will always be necessary or possible – simply that it would sometimes be so (p.266).

⁷⁸ [2002] UKHL 46, [2003] 1 AC 837.

⁷⁹ *Ibid.*, at para 22..

⁸⁰ [2002] UKHL 10, [2002] 2 AC 291.

⁸¹ [2003] UKHL 21, [2003] 2 AC 467.

⁸² D. Nicol, *op.cit.*

⁸³ A. Kavanagh, “Statutory Interpretation and Human Rights After Anderson: A More Contextual Approach” [2004] PL 537. She argues: “[The] fact whether an interpretation under s.3(1) HRA is “possible” will depend in part on contextual factors, such as (crucially) the terms of the legislation under scrutiny, as well as the impact and consequences of the proposed interpretation.” (p.539)

⁸⁴ *Ibid*, p.541. Kavanagh also justifies the courts’ preference for a declaration of incompatibility in *Bellinger* by reference to the ruling of the ECtHR in *Goodwin v United Kingdom* (2002) 35 EHRR 447, which had found the lack of legal protection of transsexual people in the UK to contravene Articles 8 and 12 of the ECHR. Since this ruling by the ECtHR, Kavanagh said, the government had signalled its intention to reform the law so there was little need for the House of Lords in *Bellinger* to find a Convention compliant interpretation under s.3(1). (The discriminatory provisions of the legislation have now been addressed by the Gender Recognition Act 2004.)

⁸⁵ [2004] UKHL 30, [2004] 2 AC 557.

⁸⁶ *Ibid.*, at para 33.

⁸⁷ [2008] UKHL 15, [2008] 2 WLR 781.

⁸⁸ *Ibid.*, at para 26.

⁸⁹ *Ibid.*, at para 33.

⁹⁰ The ruling of the House of Lords in *Ghaidan v Godin-Mendoza* has caused one commentator to note that the courts might be falling into a ‘deference trap’ by deferring twice over – A. Young, “*Ghaidan v Godin-Mendoza*: Avoiding the Deference Trap” [2005] PL 23: “[Once] at

the rights stage, when interpreting the scope of the Convention right, and again at the interpretation stage, when ascertaining whether a Convention-compatible interpretation is possible.” (p.28) Perhaps this was the approach of the House of Lords in *Animal Defenders International*? In holding that the ban on political advertising did not infringe Article 10(1) of the ECHR no more than was absolutely necessary, Lord Bingham, of course, recognised the competence of Parliament in this area. However, he also said that a wide margin of appreciation is accorded to states by the ECtHR in assessing breaches of this nature under Article 10(1) (at para 33), implying deference was shown twice.

⁹¹ [2002] EWCA Civ 158, [2003] QB 728.

⁹² The offending legislation was later amended by s.125 of the Nationality, Immigration and Asylum Act 2002.

⁹³ [2002] EWCA Civ 158, [2003] QB 728, at para 83.

⁹⁴ *Ibid.*, at para 84.

⁹⁵ *Ibid.*, at para 85. For an important critique of the deference approach employed by Laws LJ in this case see: M. Hunt, “Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of ‘Due Deference’” in N. Bamforth and P. Leyland P. Leyland (eds), *Public Law in a Multi-Layered Constitution*. (Hart Publishing, 2004), pp.337-370. Hunt says: “Laws LJ’s approach leads him to a conclusion which is striking in its submissiveness to Parliament.” (p.358) Dyson LJ also is critical of the approach adopted by Laws LJ here (but is perhaps more forgiving in the context of his whole article) – Lord Justice Dyson, “Some Thoughts on Judicial Deference” [2006] JR 103: “It may be said that all matters on which Parliament legislates and on which the executive makes decisions fall within [the judiciary’s] constitutional responsibility.” (p.104).

⁹⁶ Clayton – *op.cit.* (2004a) – has argued generally that the doctrine of deference is overstated (p.620). He justifies this by stating that the HRA has been drafted to ensure Parliamentary sovereignty trumps the judicial interpretation of human rights, thus allowing the legislature or the executive a second bite of the cherry. Clayton explains in greater detail why the principle is overstated elsewhere: *op.cit.* (2004b) p.40.

⁹⁷ eg. Jowell – J. Jowell, “Judicial Deference: Servility, Civility or Institutional Capacity?” [2003] PL 592 – and MacDonald – A. MacDonald, “Political Speech and the Standard of Review” [2003] EHRLR 651 – draw attention to the varying standards of review adopted by judges in the same case: the ruling of the House of Lords in *Regina (Pro-Life Alliance) v BBC* [2003] UKHL 23.

⁹⁸ Lester – A. Lester, “The Human Rights Act 1998 – Five Years On” [2004] EHRLR 258 – has gone as far as comparing the degree of deference accorded to the executive and legislative branches of the state by some of the Lords of Appeal in Ordinary in different cases. He says that Lord Hoffmann has tended to be more deferential than Lords Bingham and Steyn (p.266). The latter two judges have been described by Dickson – B. Dickson, “Safe in Their Hands? Britain’s Law Lords and Human Rights” (2006) 26 LS 329 – as “consistently [being] the Law Lords in favour of a rights-based solution to the cases at hand” (p.343). (In the case of the former judge Dickson says that he appears “to blow hot and cold on rights issues”. (p.344)) Dickson’s statement about Lord Steyn is not altogether surprising as the judge’s participation in *Regina (A) v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 was challenged because of his stated opposition to the indefinite detention provisions under ATCSA 2001 (see: Lord Steyn, “Human Rights: The Legacy of Mrs Roosevelt” [2002] PL 473) and (possibly) America’s detention of Al-Qaeda suspects at Guantanamo Bay, Cuba (see: Lord Steyn,

“Guantanamo Bay: The Legal Black Hole” (2004) 53 ICLQ 1). Lord Steyn has articulated similar thoughts about Guantanamo Bay in Lord Steyn, “Our Government and the International Rule of Law Since 9/11” [2007] EHRLR 1.

⁹⁹ T. Allan, “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 CLJ 671, p.676.

¹⁰⁰ P. Craig, *Administrative Law*. 6th ed. (Sweet and Maxwell, 2008), p.614.

¹⁰¹ *Ibid.*, p.609. Craig has described substitution of judgment as “extreme merits” – P. Craig, “Unreasonableness and Proportionality in UK Law” A paper presented at a conference at the Institute of European Law, The University of Birmingham on 20th March 1998. (The substance of Craig’s conference paper is published in P. Craig, “Unreasonableness and Proportionality in UK Law”, in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*. (Hart Publishing, 1999) pp.85-106.) Substitution of judgment has also been described as “primary-facts review of executive action” – F. Klug and C. O’Brien, “The First Two Years of the Human Rights Act” [2002] PL 649, p.659; and “pure appeal” – M. Beloff, “The Concept of ‘Due Deference’ in Public Law” [2006] JR 213, p.216.

¹⁰² However, there are instances where the courts do substitute their judgments for those of the executive but these pertain generally to factual issues rather than a reconsideration of administrative powers. For example, Craig says – *ibid.*: “It is clear that the courts do substitute judgment on certain issues under the HRA. This is so in relation to the meaning of many of the Convention terms that arise before the courts pursuant to the HRA. Thus the courts decide for themselves what constitutes speech, an assembly or one of the plethora of other interpretive issues that arise under the legislation.” (p.592) Furthermore, Fordham – M. Fordham, “Judicial Review Cheat Sheet” [2003] JR 131 – states: “A claim based on procedural fairness/impartiality

[will result in judges substituting] their view as to whether the process was fair...[though] this will constrain only the process not the substantive action.” (p.134)

¹⁰³ R. Clayton, “Regaining a Sense of Proportion: the Human Rights Act and the Proportionality Principle” [2002] EHRLR 504, p.512.

¹⁰⁴ T. Hickman, “The Substance and Structure of Proportionality” [2008] PL 694. However, Hickman does talk in less optimistic terms: first, he does recognise the limited applicability of substitution of judgment (pp.696-700) (see more on this in footnote 102 above); secondly, he states that the domestic approaches to the proportionality test oblige positive actions by the courts to “prevent [a] collapse into ‘full’ merits review.” (p.700) He ultimately concludes that a clear and principled approach to proportionality is required (p.715).

¹⁰⁵ S. Sayeed, “Beyond the Language of ‘Deference’” [2005] JR 111, p.111.

¹⁰⁶ [2001] UKHL 26, [2001] 2 AC 532, at para 28.

¹⁰⁷ [2007] UKHL 11, [2007] 2 AC 167.

¹⁰⁸ M. Amos, “Separating Human Rights Adjudication from Judicial Review” [2007] EHRLR 679, p.680.

¹⁰⁹ [2007] UKHL 11, [2007] 2 AC 167, at para 13.