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JUDICIAL REVIEW, IRRATIONALITY AND THE REVIEW OF MERITS

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INTRODUCTION

There are a cluster of issues which could be addressed under the broad theme indicated by the title of this article. These include: the question of how has the irrationality of administrative action and decision-making become variously defined and interpreted by the British judiciary within the last two decades? If it is possible to identify a coherent legal definition of irrationality, have the judges acted in a reasonably consistent manner when applying this ‘definition’; that is, is it necessary to compare the standards supposedly applicable with the actual practice of judicial decision-making in this area, identifying areas of discrepancy within the case-law? If we can identify such areas of clear discrepancies between principle and judicial practice, what questions arise from such discrepancies relating to the legitimacy and constitutionality of this judicial review of merits, or the meaning, scope and implications of judicial decision-making in relation to the role of the executive?

Insofar as issues of legitimacy and constitutionality can be raised, should we be suspicious of academic analysis which deploys such ostensibly objective

conceptions as a possible ‘cover’ for the expression of subjective dislike of an interventionist welfare state, and related, if concealed, ideological commitments to classic liberal interests?¹ Furthermore, is it now time to abandon the traditional doctrinal fixation upon the abstract semantics of formal legal definition in favour of a broader concern with the policy grounds for mapping particular ‘standards’ of appropriate judicial intervention?

In addition, which, if any, contextual factors must be taken into account when interpreting the new standards? Having identified such contextual factors are we able to classify these according to a single context of application, or is it necessary to refocus on multiple, not necessarily, compatible contexts?

Moreover, if substitution of judgment (in other words, the universally accepted limit on judicial intervention²) is able to provide a legitimate benchmark for the constitutional boundaries of the courts of review, then is it possible to support such claims by reference to clear case law establishing that this is the case? In both cases, is it possible to provide clear and compelling answers to these questions? If not, then does it follow that academic analysis should abandon traditional concerns for the unity of public law doctrine in favour of focusing upon the potentially overlapping contexts of application? Finally, is one of the implications of recent legal developments, including attempts to come to terms with the demands of the Human Rights Act 1998, the notion that academic analysis can no longer start from the premise of judicial independence. Instead, should we seriously consider recent academic claims for a ‘democratic dialogue’,³ ‘due deference’⁴ or ‘cultures of justification’⁵ for which the political

and executive role of the judges is arguably more transparent and institutionalised?

It is not, of course, possible for a single study to address all of these interrelated questions and issues in adequate depth. For pragmatic reasons, this article focuses upon defining ‘irrationality’ and analyses the standard of intervention this definition imposes. It then considers examples of the judicial deployment of the so-called ‘standard of irrationality’, questioning whether, in practice, there is a discrepancy in its application by the courts. The general conclusion to the present article calls for an evaluation of the legitimacy of such identified discrepancies. Such an evaluation must give particular attention to the manner of the review and the context of the administrative decision under examination since these may be factors that affect the adoption of different standards of intervention by the courts. Assessing the constitutionality of these discrepancies will be the purpose of a subsequent article in this wider research project.

THE PRINCIPLES OF JUDICIAL REVIEW

Judicial review has been variously described as the courts regulating governmental power, the courts protecting individual rights, the courts ensuring efficient administration and the courts enforcing governmental accountability.⁶ Nevertheless, whatever the purpose of judicial review is deemed to be, some propositions have become clear: orthodox principles of administrative law prescribe that courts engaged in review should not reconsider the merits of executive action

because they are not the recipients of the discretionary power.⁷ Judicial review is not an appellate procedure in which a judge reverses the substantive decision of an administrative body because of the sole ground that the merits are in the applicant's favour. Rather, it is a supervisory procedure whereby a judge rules only upon the lawfulness of an executive decision, or the manner in which one was reached. The question for review, therefore, is whether the decision was 'lawful or unlawful'; the question for appeal by contrast is whether the decision was 'right or wrong'.⁸

Craig has sought to justify this distinction between review and appeal by reference to the source of judicial powers: powers of review derive from the courts' inherent jurisdiction, whereas appeals do not – they are statutory.⁹ Others, however, have justified this distinction in less neutral terms. For instance, Lord Irvine, the previous Lord Chancellor, has argued that the courts should not review merits. His argument is that to do so violates the constitutional imperative of judicial self-restraint. Lord Irvine identifies at least three bases for this imperative. First, 'a constitutional imperative': public authorities should exercise discretionary powers that have been entrusted to them by Parliament.¹⁰ 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.¹¹ On this argument, these imperatives clearly show that the courts should not engage in a review of the merits

of administrative action and ought to be reluctant to exercise their powers of review for reasons of democracy and good government.¹²

This, at least, is the theory. However, Galligan submits that in practice there is no clear line between the merits of discretion and questions of lawfulness.¹³ Without explicit statutory guidance about the proper exercise of discretionary powers, the boundary between review and appeal is likely to become blurred. This, therefore, raises the question whether the courts are, to some extent, engaging covertly in a review of the substantial merits of executive decision-making when exercising their review powers. This question is addressed by reference to one ground of judicial review in particular, irrationality, since, by determining the legality of discretionary powers, it affords the greatest opportunity to review merits, the author believes.

Irrationality as a Ground of Judicial Review

The courts conduct the judicial review of administrative action on several grounds. In *Council of Civil Service Unions and Others v Minister for the Civil Service*¹⁴ (*GCHQ*), Lord Diplock classified these as ‘Illegality’, ‘Irrationality’ and ‘Procedural Impropriety’.¹⁵

‘Illegality’ prevents power from being exceeded: administrative bodies must act within the powers granted to them by Parliament.¹⁶ This head of judicial review includes examples where a decision-maker has acted for an improper purpose,¹⁷ or failed to take account of relevant considerations, or ignored relevant ones.¹⁸

‘Irrationality’ prevents power from being abused: it allows the court to interfere with an administrative decision that is not within a range of options open to a reasonable decision-maker.¹⁹ ‘Procedural Impropriety’ prevents a breach of natural justice: it imposes fair decision-making procedures including the recognition of a legitimate expectation,²⁰ the right to a hearing²¹ and a trial by an impartial judge;²² this head of review can also include the failure of an administrative body to observe a procedural rule specified by statute.²³

In *GCHQ* Lord Diplock described an irrational decision as a decision which was: “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”.²⁴ The courts use forceful language to define unreasonableness²⁵ as a way of showing that the standard of review is far higher than the standard applied in an appeal. Definitions of irrationality including the one given by Lord Diplock, and others such as “a pattern of perversity or absurdity of such proportions that the guidance could not have been framed by a *bona fide* exercise of political judgment on the part of the Secretary of State”,²⁶ emphasise the principle that a reviewing court’s ruling should not reflect what it would have done if it had been granted the power to take a decision. For example, Lord Lowry in the House of Lords in *Regina v Secretary of State for the Home Department, Ex parte Brind*²⁷ said:

The court’s duty is not to interfere with a discretion which Parliament has entrusted to a statutory body or an individual but to maintain a check on excesses in the exercise of discretion. That is why it is not been enough if a judge feels able to say, like a juror or like a dissenting member of the

Cabinet, 'I think that is unreasonable; that is not what I would have done.'

It also explains the emphatic language that the judiciary use in order to drive home the message and the necessity for the act to be so unreasonable that no reasonable minister would have done it.²⁸

This dictum clearly illustrates the principle that a reviewing court ought not to intervene if it thinks that an administrative decision was wrong; interference is only justified if a decision was outrageous in its defiance of logic and accepted moral standards.

Closely examining the strong language in Lord Diplock's definition, one would expect, therefore, an irrational decision to be a gross breach of discretion, possibly, on a par with the extreme facts of *Backhouse v Lambeth London Borough Council*.²⁹ Here, in its desire to avoid raising rents generally as required by the then section 62(1) of the Housing Finance Act 1972, the council increased the rent of one of its unoccupied houses from £8 to £18 000 a year. Though it had technically complied with its legal responsibility to increase its rents by the required rates, the council's action was found to be unlawful. The court ruled that it was unreasonable to levy the raise upon one house. If the decision examined by the court in *Lambeth London Borough Council* is a case in point, unreasonable acts of the executive are, therefore, likely to be infrequent in practice. Cane agrees. He states: "Applied literally, [this head of review] is so stringent that unreasonable decisions are likely to be a very rare occurrence in real life".³⁰

JUDICIAL REVIEW OF THE MERITS

Notwithstanding the seemingly unambiguous language describing the proper application of irrationality, judges, when employing this test, have engaged in a review of the merits, and it is the purpose of this article to identify examples of such judicial encroachments. Before doing so, however, the author wishes to clarify the meaning he attributes to merits review. There is obviously a critical difference between a judge thinking about the merits and a judge making a decision on the basis of merits. In order to apply even the irrationality test, a judge must inevitably consider the merits underlying an impugned decision. As Craig says: “All tests of substantive judicial review entail the judiciary in taking some view of the merits of the contested action”.³¹ The author therefore uses the phrase ‘merits-review’ to refer to a situation where a judge has more than thought about the merits: s/he has gone onto reaching a decision on the basis of merits. For the purposes of this article, this can be evidenced, the author believes, from examples where a judge has clearly employed a standard of unreasonableness that is lower than the standard implied by Lord Diplock’s definition of irrationality in *GCHQ*. Why? Taking literally the language of Lord Diplock’s test, a judge applying a lower standard would be required to undertake a balancing exercise of the pros and cons of the administrative decision originally taken, since the extreme nature of the decision would not speak for itself. *Backhouse* referred to above, which the author associates with Lord Diplock’s standard, is an example where a court’s ruling upon the merits of the case was not required, since the ‘result’ of the administrative decision – levying the rate rise on one property – was clearly in the extreme, and therefore irrational.

Jowell and Lester have argued that judges have reviewed decisions that are not unreasonable: “The courts are willing to impugn decisions that are far from absurd and are often coldly rational”.³² Following this, certain cases will be identified where a judge has ruled that the substance³³ of an administrative decision was irrational, but it will be submitted that s/he conducted review upon the merits, because facts surrounding the case do not support the court’s ruling that the decision-maker was acting outrageously in the defiance of logic.

The first case to be analysed where it is believed that a low standard of unreasonableness was employed is *Wheeler and Others v Leicester City Council*³⁴ in the House of Lords. Here, Leicester Rugby Club challenged the council’s decision preventing it from using a recreation ground for a year. The applicants argued that the council had withdrawn the use of the ground because it had not prevented four of its players from accompanying a rebel rugby tour to South Africa.³⁵ In ruling that the council’s action had been unreasonable, Lord Roskill stated (with whom Lords Bridge, Brightman, Templeman and Griffiths concurred): “In a field where other views can equally legitimately be held, persuasion, however powerful, must not be allowed to cross the line where it moved into the field of illegitimate pressure coupled with the threat of sanctions”.³⁶

Since the House of Lords in *Wheeler* published their speeches only about eight months after *GCHQ*, they ought to have been alive to the standard intended by Lord Diplock, especially as Lord Roskill specifically referred to it.³⁷ However, it is arguable that the court adopted a lower standard. If it had not done so, it would

have conceivably ruled that the council's decision was not irrational as the council had been complying with its statutory duty under the Race Relations Act 1976³⁸ to promote race relations. To further emphasise that the decision was not irrational because of the fact that there were divergent views on this matter, Peiris notes:

In the light of the statutory duty imposed on the local authority to do all in its power to promote racial harmony, the council may well be forgiven the cynical reflection that abstention from the course which they followed could have entailed equal, if not greater, vulnerability in terms of the... *Wednesbury* formula.³⁹

By withdrawing the use of the recreation ground from the rugby club, the council was making a public statement. It was severing links with the club and four of its players as a way of disassociating the City of Leicester (the council and its residents) from a tour that had endorsed the Government of South Africa's policy of apartheid. Given the importance of the club as a sporting ambassador for the city, could it be said that the council was acting unreasonably?⁴⁰

The decision of the Court of Appeal in *West Glamorgan County Council v Rafferty and Others*⁴¹ is another example where a judge, by finding an administrative decision to be irrational, was arguably employing a lower standard of unreasonableness than Lord Diplock in *GCHQ*. Here the court held that West Glamorgan County Council had acted unreasonably in seeking an order for possession of land occupied by 'gypsies' without providing the occupiers with alternative accommodation.⁴² Was the decision of the council really irrational?

First, the ‘gypsies’ were not being evicted from land that had been granted to them by the council – they were trespassers causing a nuisance. Second, although the Caravan Sites Act 1968, section 6, imposed a duty upon the council to provide land for the accommodation of travelling people, it did not oblige local councils to act in every case. Rather, the statute was only to apply ‘so far as may be necessary’.⁴³

In view of the two arguments above one is entitled to argue that the Court of Appeal reviewed the merits of the council’s decision. Indeed, this conclusion can be supported by reference to Bailey *et al*: “Given that there were ‘admissible factors on both sides of the question’ in *Rafferty*, can it be said that the council ‘must have taken leave of its senses’ in coming to its decision?”⁴⁴

In the Divisional Court in *Regina v Secretary of State for Trade and Industry, Ex parte Lonrho PLC*⁴⁵ Lonrho challenged two decisions of the Secretary of State. First, the Minister had withheld publication of the Director General of Fair Trading’s report into the takeover of House of Fraser by the Al Fayed brothers. Second, the Minister had not referred the takeover to the Monopolies and Mergers Commission (MMC). The court held that the Secretary of State had acted irrationally on both counts.

As regards Secretary of State’s second decision, it is arguable he gave a sensible explanation for not referring the takeover to the MMC. He was unwilling to make a referral as this would have involved divulging the contents of the Director General’s report. He did not wish to disclose the report’s contents (which was his first decision) because of the risk that a fraud investigation would have been

compromised. Knowing the Secretary of State's reasons for non-disclosure of the Report's contents, was it, therefore, irrational not to refer the takeover to the MMC? Borrie disagrees. He says: "The court's grant of mandatory relief amounted to a blatant usurpation of the Secretary of State's discretion".⁴⁶

In the Divisional Court in *Regina v Cornwall County Council, Ex parte Cornwall and Isles of Scilly Guardians Ad Litem and Reporting Panel*⁴⁷ Sir Stephen Brown P ruled that the respondent had acted unreasonably in quashing the decision of the Director of Social Services for Cornwall County Council.⁴⁸ The Director had declared that the Guardians Ad Litem (GALRO) should spend no more than sixty-five hours on each child's case and that no fees would be paid for time spent over that limit unless prior authorisation had been obtained.

For several reasons the Director of Social Services, it is contended, did not act irrationally. First, he had taken his decision in a climate where there was a need for reductions in public expenditure – advice from the Government had stated that panel committees and managers should ensure that expenses, fees and allowances claimed by guardians were proper and reasonable. Second, the costs of the GALRO scheme had increased by 100% in four years. Third, although the Director had reduced the average number of hours spent on each child's case from ninety-two to sixty-five, this lower figure (which he was prepared to exceed in exceptional circumstances) was still much higher than the average number of hours – forty-four – spent on a case in the neighbouring county of Dorset. In view of these circumstances it is arguable that the Divisional Court reviewed the merits of the Director's decision. Indeed, the author is not alone in reaching this conclusion.

Cane implies that the Divisional Court did so too. He argues, when referring to this case: “Even when a court purports to quash a decision because it is *Wednesbury* unreasonable, it may be applying a standard of unreasonableness less stringent than that specified by Lord [Diplock]”.⁴⁹

In the Divisional Court in *Regina v Cambridge District Health Authority, Ex parte B*⁵⁰ Laws J held that the decision of the Cambridge District Health Authority not to fund further medical treatment for a girl, B, aged ten with cancer had been unreasonable.⁵¹ In so doing, the judge cautioned the courts against second-guessing administrative decisions originally intended by the Legislature to be taken by the primary decision-maker (which in this case was the health authority). The judge stated:

It is, of course, no part of my evidence to make medical judgments: not only because I have not the competence, but because the judicial review court does not...re-decide the merits of administrative decisions, since to do so would be to usurp the role of the decision-maker which has been confided to him by or under an Act of Parliament.⁵²

Despite this warning by Laws J it is ironic that the standard he adopted may have caused him to conduct a review upon the merits. First, it is arguable that the health authority was not acting irrationally in a public law sense in refusing to offer the applicant the cancer treatment she required: it had a success rate of only between 10 and 20%; it was at variance with the majority of medical opinion; and it was experimental rather than standard therapy. Second, the opinions of the doctors who

had treated the child for much of her life are also of relevance. They thought that it would not be right to subject her to further suffering and trauma when the prospects for success were so slight, and carried a high risk of early morbidity. Third, B had already undergone a course of total body irradiation. According to accepted medical opinion, this was therapy which no one could undergo more than once. Finally, substantial expenditure on treatment with such a small prospect of success would arguably not have been an effective use of financial resources. With a limited budget, the authority, it is fair to say, had a responsibility to ensure that sufficient funds were available for the care of other patients.

Taking account of these many factors, it is submitted that the authority's decision to withhold further therapy from the child could not be categorised as irrational.⁵³ Indeed, Mullender can support this submission. He says:

[Laws J] departs from the long-understood purpose of judicial review which is merely to pass on a decision's lawfulness. He instead adjudicates on its merits, for example, from his refusal to accept the Health Authority's view that the remedial treatment at stake in the case could be characterised as experimental.⁵⁴

As a final example of merits review when employing irrationality there is the ruling of the Divisional Court in *Regina v Coventry City Council, Ex parte Phoenix Aviation*.⁵⁵ Here the court held that the council had acted unlawfully in restricting the flights of live animals from Coventry Airport, after breaches of airport security by public demonstrators opposed to the exports. Simon Brown LJ said: "The

council's resolution was wholly disproportionate to the security risk presented at the time".⁵⁶

Here, Warwickshire Police were worried about the penetration of the airport's perimeter fence by the demonstrators so wrote to the airport manager. Mr Brewer, the Assistant Chief Constable, expressed his concerns should the flights resume and urged him to undertake a comprehensive review of security (the police did not have a responsibility to protect the airport from trespass). In following the police's advice, the council explored the option of improving the strength of the airport's perimeter fence. This was rejected, however, because the likely time to complete the work – 2-3 months – was too long. (In any case, the estimated cost for the work was prohibitive: £400,000.) To deter further security breaches by the demonstrators the next course of action was to cease the live animal exports, which the council did. Was this not, therefore, an option addressing the unease of the police that was practical in the short term? If so, is it right to categorise the council's decision as unreasonable in a public law sense?

A LEGITIMATE REVIEW OF MERITS?

The previous section identified examples of the courts applying a low standard of irrationality, and therefore reviewing the merits of the particular administrative decision in question; this, the author established at the beginning of this article, is constitutionally improper. But are these low standards of irrationality in fact illegitimate? Perhaps the *true* manner in which the courts reviewed the merits of some of these decisions was not unconstitutional? For example, Jowell and

Lester have argued that the ruling by the House of Lords in *Wheeler*, which the present author has argued was not irrational, was an example where the courts possibly employed the proportionality test:

Lord Templeman considered [the council's decision] to be a misuse of power, 'punishing the club where it had done no wrong'. Lord Roskill considered the withdrawal of a licence to be an unfair means of pursuing the council's ends. Both speeches reflect the notion of proportionality, Lord Templeman concentrating on the lack of relation between the penalty and the wrong, Lord Roskill concentrating on the lack of relation between the penalty and the council's legitimate objectives.⁵⁷

The proportionality test, depending on whether a 'qualified right' is under consideration, is used, for example, in the jurisprudence of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Qualified rights are generally recognised as those which can be infringed by the state only where the infringement is prescribed by law, pursued for a legitimate aim, such as national security or the prevention of disorder or crime, and necessary in a democratic society.⁵⁸ That is, they require a reviewing court to ask itself whether there was a pressing social need for infringing the right, and if so, whether this was proportionate to the legitimate aim being pursued. This involves the court, therefore, in balancing the private interest of the applicant with the public interest of the administrative body. This is, without doubt, a more intensive method of review than what is required by a court when adopting the irrationality

test, where a review court is asking itself only whether a decision had fallen within the range of responses lawfully open to the executive body.⁵⁹

Wheeler is, perhaps, not the only case analysed above where the court adopted the proportionality test. It will be recalled that Simon Brown LJ in *Regina v Coventry City Council, Ex parte Phoenix Aviation*⁶⁰ stated: “The council’s resolution was wholly disproportionate to the security risk presented at the time”.⁶¹ These words arguably imply that the judge may have reviewed the merits of the council’s decision. This was because he was employing the proportionality test rather than the *Wednesbury* test.⁶² A question therefore to be posed from these two cases, *Wheeler* and *Ex parte Phoenix Aviation*, is whether the judicial intervention on the grounds of irrationality, where it is arguably proportionality in all but name, is in fact a legitimate review of merits?

Similarly, what about another manner of judicial review disguised as irrationality, such as ‘hard look’? Is a judicial review of merits where this test has been adopted legitimate, too? It was submitted above that the Divisional Court in *Regina v Cambridge District Health Authority, Ex parte B*⁶³ may have adopted a low standard of unreasonableness in finding that the decision not to fund further medical treatment of a child with cancer was irrational. This is possible if Laws J was employing a different approach to irrationality – one based upon the ‘hard look’ review of administrative activity in the United States.⁶⁴

Craig states that the objective with ‘hard look’ is to ensure that policy alternatives are adequately considered, that reasons are proffered for agency decisions, and that

differing interests can present their views to the agency and have those views adequately discussed.⁶⁵ This test is clearly not the same as applying irrationality. Irrationality is concerned with the outcome of an administrative decision and whether it was outrageous in its defiance of logic, a not too difficult question for a court, it would seem. ‘Hard look’ involves a court in a more intensive method of review: the legality of the administrative decision is determined by a process of identifying relevant factors in the exercise of the discretion and deciding the weight to be attached to them.

The manner in which the court reviewed the merits of a decision is not the only means of assessing the legitimacy of the judicial intervention identified in the cases above: one could evaluate them from the perspective of the context of the administrative decision under examination, such as the protection of the applicant’s fundamental rights. For example, this issue clearly affected the standard of irrationality employed by Simon Brown LJ in *Ex parte Phoenix Aviation*.⁶⁶ Here the judge sought to uphold the rule of law and prevent lawful trade from being disrupted because of public protest:

Tempting though it may sometimes be for public authorities to yield too readily to threats of disruption, they must expect the courts to review any such decision with particular rigour – this is not an area where they can be permitted a wide measure of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role.⁶⁷

Similarly, Laws J arguably justified the adoption of a low standard of irrationality in *Ex parte B*⁶⁸ to account for the infringement of the applicant's right to life. He stated: "The law requires that where a public body enjoys a discretion whose exercise may infringe [a basic liberty], it is not to be permitted to perpetrate any such infringement unless it can show a substantial objective justification on public interest grounds".⁶⁹ Laws J was evidently not assessing the respondent's decision to make a judgment as to whether it had fallen within the range of responses lawfully open to the health authority, which is what he ought to have been doing if he was adopting the irrationality test. Can it be said, therefore, that Laws J was in fact acting in a constitutionally improper way by deploying a low standard of irrationality where the motive for doing so was the recognition of the applicant's fundamental right to life?

CONCLUSION

This article has analysed the judicial application of the irrationality test of review in practice. It finds that the courts have deployed an irregular standard of irrationality where a traditional interpretation of the case facts does not arguably support judicial intervention.⁷⁰ Some traditionalists within public law such as Lord Irvine may consider this development to be a usurpation by the judiciary of the power of the executive and a threat to the constitutional doctrine of the separation of powers.⁷¹ However, the author has posed the interesting question whether the adoption of low standards of irrationality by the courts here were in fact legitimate. To this end the author proposes to undertake further research to reassess the classic limits of judicial intervention, reflecting the possible

constitutional repositioning of the courts which he has identified. He shall question whether the judicial reviews of merits here under the auspices of adopting the irrationality test were within constitutional norms, not least since the coming into force of the Human Rights Act 1998 (HRA) in October 2000, obliging a court, *inter alia*, to interpret legislation in line with ‘Convention rights’⁷² “so far as it is possible to do so”.⁷³ It must be noted that the author has not ignored an examination of this important legislation in this article without good reason: because of the impossibility of addressing it with any degree of confidence in only one medium sized piece of work, he has reserved an analysis of the effect this statute has had on the constitutionality of merits-review for later study. For practical reasons, therefore, he has been able to work through only a limited range of questions, albeit in a manner that does prepare the ground for later analysis.

In a subsequent article the author considers whether the courts here may have been justified in reviewing merits because of the manner in which they applied a low standard of irrationality. In the period since the last case above, *Ex parte Aviation*, was examined the student of public law cannot fail to have observed that soon after the coming into force of the HRA the House of Lords in *Regina (Daly) v Secretary of State for the Home Department*⁷⁴ held that proportionality was the correct test to be adopted where there was a suspected breach of a ‘qualified right’ of the ECHR.⁷⁵ Following this, the Court of Appeal in *Regina (British Civilian Internees Far East Region) v Secretary of State for Defence*⁷⁶ showed little enthusiasm for the continued use of the irrationality test.⁷⁷ The reader may, therefore, legitimately question whether the constitutionality of

proportionality, not least as a separate principle of review, but also as a substitute for irrationality, still requires determination. However, whilst drawing some initial conclusions about the judicial review of merits being within constitutional norms where proportionality has been used as a cover for irrationality, importantly, the author identifies some commentators confusing the adoption of proportionality in practice with degrees of judicial intervention such as substitution of judgment where the courts are indeed overstepping their constitutional boundaries. This then possibly raises the more pressing question than that identified above: the viability of classifying any review of merits according to acceptable judicial limits by reference to the test of review employed by a court.

The second consideration of legitimacy will centre upon the argument that the courts in this article may also have been justified in reviewing merits because of the infringement of the applicants' fundamental rights. Again, there is a legitimate question whether this, too, is an issue that still requires determination since the courts' acceptance of a low standard of irrationality in such cases following, for example, the ruling of the Court of Appeal in *Regina v Ministry of Defence, Ex parte Smith*⁷⁸ (and the criticisms of the European Court of Human Rights in *Smith*'s subsequent appeal that the standard of intervention was set too high by the Court of Appeal to act as an effective protection of the appellants' privacy rights,⁷⁹ which arguably was one of the very reasons for the Legislature precipitating the enactment of the HRA in October 2000). Again, the author challenges this aspersion. After analysing *Smith* and other related cases he does draw initial conclusions about the constitutionality of merits-review where

fundamental rights have been infringed but then questions whether there are identifiable boundaries to legitimate judicial intervention based on the subject matter of the claim under review. This, too, perhaps raises a more pressing question than that identified above: the viability of classifying any review of merits according to acceptable constitutional limits by reference to the context of the administrative decision in question. In the long term, therefore, this study will conclude that an inability to identify legitimate boundaries of judicial intervention with any degree of certainty for the two reasons supposed in this conclusion is arguably a greater threat to the principle of the separation of powers than identifying isolated cases where individual judges have been mistaken in their appreciation of the degree of discretionary power conferred upon an administrative body by Parliament, when finding a decision to be irrational.

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¹ See, for example: H. Wade, "Law, Opinion and Administration" (1962) 78 LQR. 188. For more modern, and conciliatory liberal democratic approaches to the welfare state see, for example: T. Allan, "Legislative Supremacy and the Rule of Law" (1985) 44 CLJ 111; J. Jowell and A. Lester, "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] PL 368; J. Jowell and A.

Lester, “Proportionality: Neither Novel Nor Dangerous”, in J. Jowell and D. Oliver (eds.), *New Directions in Judicial Review* (Stevens, 1988) at 51-72; T. Allan, “Pragmatism and Theory in Public Law” (1988) 104 LQR 422; T. Allan, “Constitutional Rights and Common Law” (1991) 11 OJLS 453; J. Jowell, “Is Proportionality an Alien Concept?” (1996) 2 EPL 401; J. Jowell, “Beyond the Rule of Law: Towards Constitutional Judicial Review” [2000] PL 671; A. Lester, “Developing Constitutional Principles of Public Law” [2001] PL 684; J. Jowell, “Human Rights and the British Constitution”, in J. Jowell and D. Oliver (eds), *The Changing Constitution*, 5th ed (Oxford University Press, 2004) at 62-87; J. Jowell, “The Rule of Law Today” in J. Jowell & D. Oliver (eds), (*ibid*, 2004) at 5-25; A. Lester, “Beyond the Powers of Parliament” [2004] JR 95; A. Lester, “The Utility of the Human Rights Act: A Reply to Keith Ewing” [2005] PL 249. For more general discussions of political theory and public law, see, for example: M. Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992); and C. Harvey, “Talking About Human Rights” [2004] EHRLR 500.

² 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 20 March 1998. At the conference Craig described substitution of judgment as “extreme [review upon the] merits”. (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) at 85-106. Substitution of judgment has also been described as “primary-facts reviews of executive action” – F. Klug and C. O’Brien, “The First Two Years of the Human Rights Act” [2002] PL 649, at 659.

³ R. Clayton, “Judicial Deference and ‘Democratic Dialogue’: The Legitimacy of Judicial Intervention Under the Human Rights Act 1998” [2004] PL 33. Clayton calls for an approach to breaches of the ECHR based on a ‘democratic dialogue’ between the legislature and the judiciary (p.42). This is discussed in more detail in a later article.

⁴ Hunt – M. Hunt, “Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of ‘Due Deference’” in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2004) at 337-370 – has recently called for an approach to judicial review in ECHR called ‘due deference’. ‘Due deference’ is where a court would only accord deference to a decision by a public body after it has earned the respect of the court by openly demonstrating the justification for the decision it has reached (at 347). This, too, is discussed in more detail in a later article.

⁵ Taggart – M. Taggart, “Reinventing Administrative Law” in N. Bamforth and P. Leyland (eds), *ibid*, at 311-335 – calls for a similar approach to Hunt (see endnote above): “a culture of justification” by the executive (at 332-334). This, too, is discussed in more detail in a later article.

⁶ P. Craig, *Administrative Law*, 5th ed (Sweet and Maxwell, 2003) at 3.

⁷ S. De Smith, H. Woolf and J. Jowell, *Principles of Judicial Review* (Sweet and Maxwell, 1999) at 20.

⁸ This dichotomy between review and appeal is arguably unsatisfactory. It is simplistic and gives the impression that a court is always acting in an appellate capacity when it is reviewing merits. This is not the case; a court can be reviewing merits but not substituting its judgment, which is what a review court would be doing if acting in an appellate manner. Substitution of judgment (and

other degrees to which judges engage in a review of merits such as proportionality and hard look) are analysed in a later article of this study. Suffice it to say there is some information to be found about this method of judicial review in endnote no.2.

⁹ P. Craig, *op.cit.* (2003), p.7.

¹⁰ Not all decision-makers derive their discretionary powers from statute.

Nevertheless, several administrative decisions, such as those taken under the royal prerogative or royal charter, are amenable to judicial review even though Parliament has not conferred the power to take them upon the executive – see, for example, the speech of Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Recent cases where the courts have extended the boundaries of judicial review (albeit ‘victims’ for the purposes of enforcing Convention rights under the Human Rights Act 1998 – see later article) include *Regina (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 where the court entertained a challenge to the arbitrary detention of British Al-Qaeda suspects by US authorities at Camp Delta, Guantanamo Bay, Cuba; *Regina (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606 where the Court of Appeal found that the applicant was able to pursue judicial review proceedings notwithstanding that he was living in the USA and had been refused a right to enter the UK; and *Al-Skeini v Secretary of State for Defence* [2004] EWHC 2911 (Admin) where the relatives of a deceased Iraqi man who had died in suspicious circumstances in British military custody in Iraq were able to pursue a claim notwithstanding the events occurred abroad. (There was an appeal to the Court of Appeal – [2005] EWCA Civ 1609 – but as regards this issue the case was sent back to the

Administrative Court for consideration again in the light of new evidence. At the time of writing the case is still pending.)

¹¹ Lord Irvine, “Judges and Decision-Makers: the Theory and Practice of *Wednesbury* Review” [1996] PL 59, at 60-61. The argument that Lord Irvine objects to the judicial review of merits is strictly incorrect. He rejects the review of merits where the courts are employing principles of the common law (i.e. irrationality), but does not do so when they are applying the proportionality to certain breaches of the European Convention on Human Rights (ECHR) – see, for example: Lord Irvine, “The Impact of the Human Rights Act: Parliament, the Courts and the Executive” [2003] PL 308, at 313; Lord Irvine, “The Development of Human Rights in Britain” [1998] PL 221, at 229. The issue of a judicial review of merits because of suspected breaches of the ECHR will be discussed in a later article of this study.

¹² For further support, see, for example, J. Griffith, “The Political Constitution” (1979) 42 MLR 1; J. Griffith, *The Politics of the Judiciary*, 5th ed (Fontana Press, 1997). Griffith was famously suspicious of the unelected judiciary so preferred a system where there was less legal accountability of the executive and more political accountability. Adam Tomkins is perhaps Griffith’s modern day standard bearer – see, for example, A. Tomkins, “In Defence of the Political Constitution” (2002) 22 OJLS 157; A. Tomkins, *Public Law*. (Oxford University Press, 2003); A. Tomkins, “What is Parliament For?” in N. Bamforth and P. Leyland (eds.), *op.cit.*, at 53-78; A. Tomkins, “Readings of *A v. Secretary of State for the Home Department*” [2005] PL 259. Other recent academic criticism of judicial power includes: R. Ekins, “Judicial Supremacy and the Rule of Law” (2003) 119 LQR 127.

¹³ D. Galligan, *Discretionary Powers*. (Clarendon Press, 1986) at 323.

¹⁴ [1985] AC 374. For a more recent classification of the heads of review, see, for example, M. Fordham, “The Judge at Your Shoulder: New Principles of Governmental Accountability” [2004] JR 122.

¹⁵ *Ibid.*, at 410-411. Lord Diplock countenanced the emergence of a fourth ground of judicial review, proportionality. This test is discussed in the main body but is analysed in more detail in a later article.

¹⁶ Judicial review is often justified on the basis that it is enforcing the will of Parliament – see, for example: D. Oliver, “Is the Ultra Vires Rule the Basis of Judicial Review?” [1986] PL 543. Other commentators have argued otherwise. Sir John Laws extra-judicially has described the enforcement of legislative will as the basis for judicial review as a ‘fig leaf’ – see: Sir John Laws, “Law and Democracy” [1995] PL 72. By expressing the fallacy of this argument, Laws is seeking to undermine the sovereignty of Parliament so that the courts would be justified in exercising their common law powers of review over primary legislation (Acts of Parliament), and not just over secondary legislation and discretionary powers which is the case at present. This would be where there had been an infringement of a ‘higher-order’ law. (If the reader wishes to follow the legitimacy of judicial review debate, including the justification that the courts are exercising their powers of review because of a common law right to do so – famously advanced by Christopher Forsyth in “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review” (1996) 50 CLJ 122 – see e.g. C. Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000) and P. Craig *op.cit.*, (2003) at 12-20.)

¹⁷ e.g. *Regina v Somerset County Council, Ex parte Fewings* [1995] 3 All ER 20; *Magill v Porter* [2001] UKHL 67.

¹⁸ e.g. *Roberts v Hopwood* [1925] AC 578; *Bromley LBC v Greater London Council* [1983] 1 AC 768.

¹⁹ e.g. *Wheeler v Leicester City Council* [1985] AC 1054; *West Glamorgan County Council v Rafferty* [1987] 1 WLR 457.

²⁰ e.g. *Regina v Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operator's Association* [1972] 2 QB 299.

²¹ e.g. *Ridge v Baldwin* [1964] AC 40.

²² e.g. *Dimes v Grand Junction Canal* (1852) 3 HL Cas 759; *Magill v Porter* [2001] UKHL 67.

²³ e.g. *Agricultural Training Board v Aylesbury Mushrooms* [1972] 1 All ER 280. This sub-ground of review is very similar to the “illegality” rule that the executive must not ignore relevant considerations and/or take irrelevant ones into account. However, there it is a matter for the courts, being the final arbiters of the law, to decide which are, and which are not, relevant considerations; here the statute is explicit in which (procedural) rules must be followed

²⁴ [1985] AC 374 at 410.

²⁵ In *GCHQ* Lord Diplock, with reference to the judgment of Lord Greene in the Court of Appeal in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, said that irrationality could now be succinctly referred to as “*Wednesbury* unreasonableness” (at 410). Thus in this article the terms irrationality and unreasonableness are used interchangeably, although universal agreement that they are synonymous in English administrative law is possibly lacking; for a contrary view, see the judgment of Sir Thomas Bingham

MR (as then was) in the Court of Appeal in *Regina v Secretary of State for the Home Department, Ex parte Onibiyo* [1996] QB 768, at 785.

²⁶ Lord Scarman in the House of Lords in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, at 248. In the House of Lords in *Regina v Chief Constable of Sussex, Ex parte International Trader's Ferry Limited* [1999] 2 AC 418 Lord Cooke appeared to lessen the force of Lord Diplock's language (though this definition seems not have had its judicial supporters). Lord Cooke said that having an extreme definition of irrationality was unnecessary. The test for his Lordship was whether the decision was one which a reasonable authority could reach (at 452).

²⁷ [1991] 1 AC 696.

²⁸ *Ibid.*, at 765. More recently, this principle has been emphasised extra-judicially by Lord Hutton. He says – Lord Hutton, “Reasonableness and the Common Law” (2004) 55 NILQ 242: “[The] essence of [irrationality]...is that when a local authority has exercised a discretion given to it by Parliament, it is not for the court to sit as a court of appeal and for the judge to substitute his or her view of what is a reasonable exercise of the discretion for the view of the authority”. (at 255)

²⁹ *The Times*, 14 October, 1972. Though this case was reported only in *The Times*, it has been widely referred to in textbooks as a classic example of an irrational administrative decision – e.g. S. Bailey, B. Jones and A. Mowbray, *Cases, Materials and Commentary on Administrative Law*, 4th ed (Sweet and Maxwell, 2005) at 574-575; and H. Wade and C. Forsyth, *Administrative Law*, 9th ed (Oxford University Press, 2004) at 389.

³⁰ P. Cane, *An Introduction to Administrative Law*, 3rd ed (Clarendon Press, 1996) at 209.

³¹ P. Craig, *op.cit.* (2003), at 589.

³² J. Jowell and A. Lester *op.cit.* (1987). In recognition that the courts review the merits of administrative decisions, Jowell and Lester called for the substitution of *Wednesbury* unreasonableness with ‘substantive principles of Administrative Law’ derived from standards of administrative propriety, the basic rights and liberties of the individual and of citizenship (at 372).

³³ By the word ‘substance’ the author is referring to the administrative decision itself rather than the process in arriving at a decision. Invariably, the courts state they should confine themselves to reviewing only the decision-making process rather than the substance of a decision (e.g. Lord Templeman in the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521, at 526). However, it is common for the courts to review substance since Cane – *op.cit.* – discusses the judicial review of administrative activity on this ground of challenge in a separate chapter – ‘Output’ (Chapter 9) – to one examining ‘The Decision Making Process’ (Chapter 7).

³⁴ [1985] AC 1054.

³⁵ At the time of this case, the government of South Africa operated a policy of ‘apartheid’ which separated people of different races. This caused the country to be a pariah in the international community. Trade sanctions were imposed as a way of forcing South Africa to reverse its policy. Formal sporting links were severed, but there were unofficial (rebel) rugby and cricket tours from the United Kingdom.

³⁶ [1985] AC 1054, at 1078. There is possibly some doubt about the actual ground upon which the House of Lords found the council’s decision to be unlawful. Lord Templeman, despite agreeing with Lord Roskill, appeared to find that the decision was illegal, rather than irrational, for the reason that the council had exercised its

powers for an improper purpose: “The club having committed no wrong, the council could not use their statutory powers in the management of their property or any other statutory powers to punish the club”.

³⁷ He said – *ibid*: “My Lords, the House recently had to consider problems of this nature in *Council for the Civil Service Unions v Minister for the Civil Service* [1985] AC 374. In his speech, at 410-411, my noble and learned friend Lord Diplock classified these already well established heads or set of circumstances in which the court will interfere. First, illegality, second, irrationality and third, procedural impropriety”.

³⁸ The Race Relations Act 1976, section 71, stated (because it was amended by s.2(1) of the Race Relations (Amendment) Act 2000): “Without prejudice to their obligation to comply with any provision of this Act, it shall be the duty of every local authority to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need – (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity, and good relations, between persons of different racial groups”.

³⁹ G. Peiris, “*Wednesbury* Unreasonableness: The Expanding Canvas” (1987) 46 CLJ 53, at 81. Peiris is not the only person to express disbelief at the ruling of the House of Lords. For example, Cranston says – R. Cranston, “Reviewing Judicial Review”, in G. Richardson and H. Genn (eds.), *Administrative Law and Government Action* (Clarendon Press, 1994) 45-80, at 52: “To the surprise of many sensitive to the need to promote better race relations the House of Lords held that the council had acted unreasonably”.

⁴⁰ Furthermore can the decision of Leicester City Council be regarded as unreasonable in a public law sense when the court of first instance – *Regina v*

Leicester City Council, Ex parte Wheeler (unreported, 27 September, 1984) – and the Court of Appeal – *Wheeler and Others v Leicester City Council* [1985] AC 1054 – both ruled that its decision to withdraw the use of the recreation ground from Leicester Rugby Club was not irrational?

⁴¹ [1987] 1 WLR 457.

⁴² *Ibid.*, at 477.

⁴³ The Caravan Sites Act 1968, section 6, stated (because it was repealed by s.80(1) of the Criminal Justice and Public Order Act 1994): “[It shall be the duty of local authorities] to exercise their powers...so far as may be necessary to provide adequate accommodation for gypsies residing in or resorting to their area”.

⁴⁴ S. Bailey, B. Jones and A. Mowbray *op.cit.*, at 575. Writing extra-judicially Carnwath J – Sir Robert Carnwath, “The Reasonable Limits of Local Authority Powers” [1996] PL 244 – has implied that the Court of Appeal adopted a low standard of irrationality (at 261): “[In *Rafferty* it] was held unreasonable for an authority to evict gypsies from its property, when to do so would put it under a duty to them under the Caravan Sites Act which it was unable to fulfill. The authority had a genuine dilemma, and no-one categorised its conduct as outrageous”.

⁴⁵ *The Times*, 18 January, 1989.

⁴⁶ G. Borrie, “The Regulation of Public and Private Power” [1989] PL 552, at 557. The decision of the Divisional Court was reversed by the Court of Appeal – *Regina v Secretary of State for Trade and Industry, Ex parte Lonrho PLC* (1989) 139 NLJ 150 – and the subsequent appeal was dismissed by the House of Lords – *Regina v Secretary of State for Trade and Industry, Ex parte Lonrho PLC* [1989] 1 WLR 525. Both courts held that the Minister had not acted unreasonably. Indeed,

regarding the Secretary of State's second decision not to refer the bid to the Monopolies and Mergers Commission, Mustill LJ in the Court of Appeal said the Divisional Court had conducted merits-review (at 512).

⁴⁷ [1992] 1 WLR 427.

⁴⁸ *Ibid.*, at 436.

⁴⁹ *Op.cit.*, at 209.

⁵⁰ [1995] 1 FLR 1055.

⁵¹ *Ibid.*, at 1063.

⁵² *Ibid.*, at 1056.

⁵³ The ruling of Laws J was reversed by the Court of Appeal – *Regina v Cambridge District Health Authority, Ex parte B* [1995] 1 WLR 898. Sir Thomas Bingham MR (as then was) cautioned reviewing courts against determining issues other than the lawfulness of administrative activity. The judge said: "The courts are not arbiters as to the merits of cases of this kind. Were we to express opinions as to the likelihood of the effectiveness of medical treatment, or as to the merits of medical judgment, then we should be straying far from the sphere which our constitution has accorded to us. We have one function only, which is to rule upon the lawfulness of decisions". (at 905)

⁵⁴ R. Mullender, "Judicial Review and the Rule of Law" (1996) 112 LQR 182, at 184-185.

⁵⁵ [1995] 3 All ER 37.

⁵⁶ *Ibid.*, at 63.

⁵⁷ J. Jowell and A. Lester, "Proportionality: Neither Novel Nor Dangerous", in J. Jowell and D. Oliver (eds.), *op.cit.* (1988), at 61.

⁵⁸ ‘Qualified rights’ are generally recognised as being Articles 8-11 of the ECHR. (The test can be applied to other Articles of the ECHR such as Article 15, which allows a state to derogate from certain Articles of the ECHR in times of war or public emergency threatening the life of the nation. However, in a domestic context, as Article 15 is not a Convention right enforceable in UK Law according to section 1 of the Human Rights Act 1998, a derogation is not lawful unless designated by section 14 of that Act.) A recent case illustrating the application of the proportionality test to an alleged breach of a qualified right is *Regina (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15. Here the claimants were teachers at independent schools and parents who sent their children to those schools. They believed that biblical sources supported the view that corporal punishment was necessary for the proper upbringing of children. Therefore section 548 of the Education Act 1996 – the statutory ban on corporal punishment in all schools – was incompatible with their right under Article 9(1) of the ECHR, the right to freedom of conscience, thought and religion. However, although ruling that Article 9(1) was engaged, the House of Lords held that section 548 pursued a legitimate object of protecting the rights of others as allowed under Article 9(2) and so was not disproportionate; that is, it promoted the welfare of children by protecting them from the infliction of physical violence in an institutional setting.

⁵⁹ For a useful explanation of how proportionality differs from irrationality see, for example: M. Taggart, “Reinventing Administrative Law” in N. Bamforth and P. Leyland (eds), *op.cit.*, at 311-335. This revisits the *Wednesbury* case in the light of the enactment of the Human Rights Act 1998 (HRA) and the adoption of the proportionality test to infringements of Articles 8 (the right to respect for one’s private and family life,

home and correspondence) and 10 (the right to freedom of expression) of the ECHR.

These would be the convention rights at issue if the same case facts – prohibiting children under the age of 15 from attending cinemas on a Sunday without an adult – were to arise again in the post HRA era.

⁶⁰ [1995] 3 All ER 37.

⁶¹ *Ibid.*, at 63.

⁶² M. Fordham, *Judicial Review Handbook*, 2nd ed (John Wiley Press, 1997) at 505.

⁶³ [1995] 1 FLR 1055.

⁶⁴ R. James and D. Longley, “Judicial Review and Tragic Choices: *Ex Parte B*” [1995] PL 367 at 371. For an American case where ‘hard look’ was employed, see, for example: *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Company* 463 US 29 (1983).

⁶⁵ *Op.cit.*, 3rd ed (1994), at 438.

⁶⁶ [1995] 3 All ER 37.

⁶⁷ *Ibid.*, at 62.

⁶⁸ [1995] 1 FLR 1055.

⁶⁹ *Ibid.*, at 1060.

⁷⁰ Supporting the author’s conclusion is a study undertaken by Le Sueur where he analyses the application of the irrationality principle in the period between January 2000 and July 2003 – A. Le Sueur, “The Rise and Ruin of Unreasonableness?” [2005] JR 32. He does not attempt the same method of identifying merits-review as the author of this article, preferring a more quantitative approach. He looks at 41 cases where irrationality was adopted and discovers a finding of unreasonableness by the courts in 18 of them. He concludes (at 43): “[G]iven what is often described as the high “threshold” of the

unreasonableness test, is it not surprising that claimants seem to succeed in a relatively large proportion of cases?”

⁷¹ C. Montesquieu *De l'Esprit des Lois*, 1748, Chapter XI, at 3-6 famously said there would be no liberty if the judicial power were not separated from the legislative and executive functions of the state. Though this principle of separation has never been strictly enforced in the UK – 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 – the tenets of such a philosophy still hold true – see, for example, Lord Hoffman, “The Separation of Powers” [2002] JR 137; Lord Steyn, “The Case for a Supreme Court” (2002) 118 LQR 382 and Lord Steyn, “2000-2005: Laying the Foundations of Human Rights Law in the United Kingdom” [2005] EHRLR 349. Furthermore, Parliament has recently affirmed this constitutional principle by enacting the Constitutional Reform Act 2005, most sections of which became law in April 2006. Section 3, for example, enshrines in law a duty on government ministers to uphold the independence of the judiciary. In addition this legislation reforms the Office of the Lord Chancellor, creates a Supreme Court for the UK to replace the Appellate Committee of the House of Lords and introduces an independent Judicial Appointments Commission.

⁷² The Human Rights Act 1998, section 1, identifies Articles 2 – 12 and 14 of the ECHR, Articles 1-3 of the 1st Protocol of the ECHR and Protocol 13 of the ECHR as ‘Convention rights’.

⁷³ Section 3. If a court cannot interpret a statute ‘so far as it is possible to do so’ s.4(2) of the HRA 1998 provides: “If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of incompatibility”. The dilemma whether

to interpret the legislation to make it Convention compliant or to issue a declaration of incompatibility, which excludes the courts from judicially reviewing an Act of Parliament on the basis that it infringes a Convention right, has proved difficult for the courts, providing much fertile ground for academic comment, not least in the last couple of years (e.g. A. Kavanagh, “The Elusive Divide Between Interpretation and Legislation Under the Human Rights Act 1998” (2004) 24 OJLS 259; D. Nicol, “Statutory Interpretation and Human Rights After Anderson” [2004] PL 274; A. Kavanagh, “Statutory Interpretation and Human Rights After Anderson: A More Contextual Approach” [2004] PL 537; A. Kavanagh, “Unlocking the Human Rights Act: The “Radical” Approach to Section 3(1) Revisted” [2005] EHRLR 259; A. Young, “*Ghaidon v. Godin-Mendoza*: Avoiding the Deference Trap” [2005] PL 23; Lord Steyn, “Deference: A Tangled Story” [2005] PL 346; Lord Steyn, “2000-2005: Laying the Foundations of Human Rights Law in the United Kingdom” [2005] EHRLR 349 Laying the Foundations of Human Rights Law in the United Kingdom” [2005] EHRLR 349; and S. Sayeed, “Beyond the Language of ‘Deference’” [2005] JR 111.). This issue is explored in more detail in a later article of this study.

⁷⁴ [2001] UKHL 26.

⁷⁵ See endnote 58 above.

⁷⁶ [2003] EWCA Civ 473.

⁷⁷ Dyson LJ said there was a strong case for recognising proportionality as part of English domestic law which did not involve Community law or human rights but it was not for the Court of Appeal to perform the *Wednesbury* ‘burial rites’. The continuing existence of the *Wednesbury* test had been acknowledged by the House of Lords on more than one occasion ([2003] QB 1397, CA at 1413-1414). The longevity of irrationality, with its possible replacement by proportionality, is

discussed in more detail in a later article. Suffice it to say the reader my wish to see, in particular, T. Hickman, “The Reasonableness Principle: Reassessing its Place in the Public Sphere” (2004) 63 CLJ 166; and, more selectively, M. Elliott, “The Human Rights Act 1998 and the Standard of Substantive Review” [2002] JR 97; M. Fordham, “Common Law Proportionality” [2002] JR 110; M. Fordham, “Administrative Law: A Practitioner’s Long Range Forecast” [2003] JR 67; I. Thomas and N. Greaney, “Wither *Wednesbury*?” (2003) 153 NLJ 829; K. Olley, “Proportionality at Common Law” [2004] JR 197; A. Le Sueur, *op.cit.* ⁷⁸ [1996] QB 517. Here Sir Thomas Bingham MR (as he then was) accepted the submission of counsel for one of the appellants, Mr. Pannick QC, regarding the standard to be employed by the courts when reviewing decisions that have infringed fundamental rights. He stated (at 554): “The 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”.

⁷⁹ In *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 the ECtHR said (at 543): “The threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued,

principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention".