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## The Executive and the Courts

Richard Clayton

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# The Executive and the Courts

Richard Clayton QC, Barrister\*

## Table of Contents

INTRODUCTION .....	513
THE REGULATION OF EXECUTIVE DECISION MAKING .....	514
<i>The Ultra Vires Principle and Local Government</i> .....	514
<i>The Decision-Making Powers of Central Government</i> .....	515
<i>The Crown's Prerogative Powers</i> .....	515
<i>The Crown's Additional Common Law Powers</i> .....	517
<i>The Impact of the Human Rights Act</i> .....	518
CHALLENGING THE MERITS OF EXECUTIVE DECISIONS ON JUDICIAL REVIEW GROUNDS .....	521
<i>Introduction</i> .....	521
<i>The Wednesbury Rationality Test</i> .....	523
<i>The Development of the Proportionality Test</i> .....	525
CONCLUSION .....	529

## INTRODUCTION

Analysing the relationship between the executive and the courts is particularly interesting to an English lawyer when it takes place at a conference devoted to constitutional law. In the UK, we of course have no written constitution, and the term “unconstitutional” has no defined legal content. As a Canadian writer put it, for the American, anything unconstitutional is illegal, however it may seem: for the British, anything unconstitutional is wrong, however legal it may be.<sup>1</sup>

As a result, the relationship between the executive and the courts in English law is not regulated by any formal constitutional framework, but

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1. See A. BRADLEY AND K. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 27 (12th ed. 1997) (citing J.R. MALLORY, *THE STRUCTURE OF CANADIAN GOVERNMENT* (1984)).

has evolved as a result of history and convention. The enactment of the Human Rights Act (the HRA) in 1998 therefore resulted in a significant constitutional shift—by enacting the European Convention of Human Rights into English law, the courts have acquired a wider supervisory jurisdiction over executive decision making, which it is vital to consider.

In this paper I propose to focus on two principal issues:

- the extent to which executive decisions is regulated by law; and
- the degree to which the Court scrutinises executive decision making when reviewing the merits of particular decisions.

### THE REGULATION OF EXECUTIVE DECISION MAKING

Differentiating the source of power a public body is potentially exercising is important when considering the extent to which the Courts regulate executive decisions.

The paradigm case of public law decision-making in England is that created by statute. Obviously, both central and local government decision makers have statutory powers and duties, and these decisions will invariably be subject to review. In particular, local authorities are statutory bodies and therefore cannot make any decisions that are outside the scope of those statutory powers.

#### *The Ultra Vires Principle and Local Government*

Any decision of a local authority which is not based on a statutory power is *ultra vires* because it has acted without jurisdiction to do so. The concept of *ultra vires* is said to be based on parliamentary intent, but whilst the concept plainly applies to public law challenges based on the absence of statutory authority, the principle of *ultra vires* provides no explanation for complaints about the exercise of common law powers, like the use of the royal prerogative.<sup>2</sup> Where a decision is *ultra vires*, the Court must establish its invalidity. Where the Court grants a remedy, however, it will normally treat the unlawful act as being null and void so that the decision in question is retrospectively held to be invalid.

The *ultra vires* doctrine has created a number of difficulties for local authorities where the courts have decided that the authority had no legal power to make the decision in question. Thus, in *Hazell v. Hammersmith* the House of Lords decided there was no express statutory power entitling the council to enter into highly speculative loan swapping

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2. For a valuable discussion of these issues, see JUDICIAL REVIEW AND THE CONSTITUTION (Christopher Forsyth ed., Hart Publishing, 2000).

financial transactions although it had an implied power under section 111 of the Local Government Act 1972 to do anything which was ancillary to the discharge of any of its functions.<sup>3</sup> Nevertheless, the House of Lords decided that it was not the function of the authority to enter into loan swaps.<sup>4</sup> In *R. v. Richmond L.B.C. Ex parte McCarthy & Stone* the House of Lords decided that no charge could be made for pre-application advice in relation to a planning application; giving pre-application advice was not itself a function of the local planning authority within the meaning of section 111(1) of the Local Government Act 1972 and to charge for such advice did not facilitate, nor was it conducive or incidental to, the authority's functions of considering and determining planning applications.<sup>5</sup>

These well known limitations were intended to be overcome when the Government decided in 2000 to enact a general power allowing a local authority to promote or improve social, economic or environmental well-being.<sup>6</sup> However, the Court of Appeal in *Brent LBC v. Risk Management* decided that a decision by local authorities to save money by entering into a mutual insurance company was not undertaken to achieve the purpose of promoting welfare; nor was it incidental or conducive to a local authority function.<sup>7</sup>

The *ultra vires* doctrine therefore continues to impose significant restrictions on local government decision-making.

### *The Decision-Making Powers of Central Government*

Central government exercises statutory powers, powers which derive from the Crown's prerogative and other common law powers. The need for central government to exercise non-statutory powers means that there are some areas of decision making that are not subject to any form of legal control.

### *The Crown's Prerogative Powers*

In addition to its statutory powers the Crown retains a discretionary power at common law known as the Crown prerogative. In the landmark decision in 1984 in the *GCHQ* case the House of Lords decided that

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3. See *Hazell v. Hammersmith & Fulham London Borough Council*, [1992] 2 A.C. 1 (H.L.).

4. See *id.*

5. See *R v. Richmond upon Thames London Borough Council, ex parte McCarthy & Stone*, [1992] 2 A.C. 48 (H.L.).

6. See Local Government Act, 2000, c. 22, § 2 (Eng.).

7. See *Brent London Borough Council v. Risk Management Partners Ltd.*, [2009] E.W.C.A. Civ 490.

powers derived from the royal prerogative were subject to judicial review provided they were justiciable.<sup>8</sup> In that case the House of Lords took the view that it could subject a decision to de-recognise trade unions at a Government communications centre which intercepts phone calls without having gone through a process of consultation despite it having created a legitimate expectation that it would do so. The courts have subsequently decided that a number of prerogative powers such as:

- the residual prerogative power of the Home Secretary in the immigration field;<sup>9</sup>
- the power to make *ex gratia* payments to victims of miscarriages of justice;<sup>10</sup>
- the power to intercept telephone calls;<sup>11</sup> and
- the power to grant a pardon.<sup>12</sup>

However, prerogative powers which relate to the defence of the realm or foreign policy or relations are not justiciable and within the scope of judicial review. Consequently, the Divisional Court held that it would not consider whether the Iraq War was a breach of international law or a breach of UN Resolution 144,<sup>13</sup> and the Court of Appeal took the view that it would not review the merits of possessing nuclear weapons in order to decide whether their decommission was unlawful.<sup>14</sup>

But the traditional approach the courts have taken towards justiciability of the royal prerogative is open to question on at least two grounds. First, the English courts have been obliged to consider these issues in other contexts and have not been deflected by any question concerning justiciability. Thus, in the Human Rights Act case concerning the legality of the Iraq War the House of Lords would have ruled on this issue, had the human rights claim itself been well founded.<sup>15</sup> Secondly, so far as any question of expertise arises, the English courts are increasingly familiar with the idea of construing international conventions.

8. *See Council of Civil Service Unions v Minister of the Civil Service*, [1985] A.C. 374 (H.L.).

9. *See R. v. Secretary of State for the Home Department ex parte Beedasse*, [1989] C.O.D. 525.

10. *See R. (Christofides) v. Secretary of State for the Home Department*, [2002] 1 W.L.R. 2769 (Q.B.).

11. *See R. v. Secretary of State for the Home Department Ex parte Ruddock and Others*, [1987] 1 W.L.R. 1482 (Q.B.).

12. *See R. v. Secretary of State for the Home Department Ex parte Bentley*, [1994] Q.B. 349; *Lewis v. Attorney General of Jamaica*, [2001] 2 A.C. 50.

13. *See R. (Campaign for Nuclear Disarmament) v. Prime Minister*, [2002] E.W.H.C. 2777 (Admin).

14. *See R. (Machiori) v. Environment Agency*, [2002] Eu.L.R. 225.

15. *See R. (Gentle) v. Prime Minister*, [2008] 1 A.C. 1356 (H.L.).

*The Crown's Additional Common Law Powers*

The courts have also recognised that the Crown has common law powers to do acts which do not infringe the rights of others and are not prohibited by law such as:

- the power to make *ex gratia* payments,<sup>16</sup>
- the power to maintain a list of individuals considered to be unsuitable to work with children in the absence of an express statutory power.<sup>17</sup>

The basis for these powers is said to be that the Crown as a legal personality has the same capacity as a natural person and therefore can do anything a natural person can do, although the rationale is not convincing.<sup>18</sup>

In *R. (Shrewsbury & Atcham BC and Congleton BC) v. the Secretary of State for Communities*, the Court of Appeal accepted that the Crown had a common law power to taking preparatory steps to introduce anticipated legislation, such as inviting and consulting on proposals to change local government structures, because it was bound by previous Court of Appeal decisions.<sup>19</sup> In that case, however, there was an important division of the Court of Appeal about the powers of the Court to intervene. Lord Justice Carnwath thought that:

[A]s a matter of capacity, no doubt, [the Crown] has power to do whatever a private person can do. But as an organ of government, it can only exercise those powers for the public benefit and for identifiably “governmental” purposes within limits set by the law.<sup>20</sup>

By contrast Richards LJ took the view that it was:

[U]nnecessary and unwise to introduce qualifications along the lines of those suggested by Carnwath LJ . . . to the effect that [such powers] can only be exercised “for the public benefit” or for “identifiably ‘governmental’ purposes.” It seems to me that any such limiting principle would have to be so wide as to be of no practical utility or would risk imposing an artificial and inappropriate restriction upon the work of government.<sup>21</sup>

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16. See *R. (Hooper) v. Secretary of State for Work and Pensions*, [2005] 1 WLR 1681.

17. See *R. v. Secretary of Health ex parte C*, [2000] 1 FCR 471.

18. See John Howell QC, *What the Crown May Do*, Delivered at the Constitutional and Administrative Law Bar Association Summer Conference (July 24-26, 2009).

19. See *R. (on the Application of Shrewsbury & Atcham BC and another) v. Secretary of State for Communities and Local Government* [2008] E.W.C.A. Civ. 148.

20. *Id.* ¶ 48.

21. *Id.* ¶ 74.

Waller LJ said:

The question is thus whether there should be an ability to challenge as unlawful an action taken “not for the public benefit” or which has not been taken for identifiably governmental purposes.<sup>22</sup>

It is respectfully submitted that as a matter of principle, the analysis of Carnwath LJ is to be preferred. The view of Richards LJ in substance involves a claim (a) that it is for the executive, not Parliament to decide, in what new activities the government may engage, in what circumstances and under what conditions and (b) that ministers have an unfettered discretion in relation to what they thus do, provided that in each case they do not do anything unlawful or which they are prohibited from doing. This claim creates scope for the abuse of public power that the courts have rejected in line with the development of modern public law. By leaving unlimited the purposes for which ministers may act and thus also the considerations which they may take into account, it allows public powers to be exercised other than in the public interest and other than for public purposes.

#### *The Impact of the Human Rights Act*

Before turning to the question of how the Human Rights Act (HRA) affects the legal regulation of executive decision making, it is important to say something about the nature of the HRA itself. The HRA was enacted in 1998 to give effect to the European Convention of Human Rights.

It has been widely recognised that the HRA is a statute of constitutional significance because the Convention is effectively our Bill of Rights: see, for example, the dicta in *Brown v. Stott*<sup>23</sup> of Lord Bingham<sup>24</sup> and Lord Steyn<sup>25</sup> and those of Lord Woolf CJ in *R v. Offen*.<sup>26</sup> Similarly, in *McCartan Turkington Breen v. Times Newspapers*<sup>27</sup> Lord Steyn said that the HRA was a constitutional measure designed to buttress freedom of expression, fulfilling the function of a Bill of Rights in our legal system.<sup>28</sup> In *R. (Laporte) v. Chief Constable of*

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22. *Id.* ¶ 80.

23. *Brown v. Stott*, [2003] 1 A.C. 681.

24. *See id.* at 703.

25. *See id.* at 708.

26. *See R. v. Offen*, [2001] 1 WLR 253, 275.

27. *See McCartan Turkington Breen v. Times Newspapers Ltd.*, [2001] 2 A.C. 277, 297.

28. *See generally* Jeffrey Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial Review*, [2000] Pub.L. 671; G. Huscroft, *Rights, Bills of Rights and the Role of Courts and Legislatures*, in *LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW* (G. Huscroft and P. Rishworth eds. 2002).

*Gloucestershire Constabulary* Lord Bingham described the HRA in giving effect to Articles 10 and 11 as representing a “constitutional shift.”<sup>29</sup> Furthermore, section 3 of the HRA, in effect, permits judicial review of Acts of Parliament; its far-reaching character (exemplified by *Ghaidan v. Godin- Mendoza*)<sup>30</sup> represents a radical change to the conventional view of parliamentary sovereignty as traditionally understood.<sup>31</sup> As Lord Bingham emphasized in the Belmarsh detainee case, the courts have been given a wholly democratic mandate by Parliament under HRA to delineate the boundaries of a rights based democracy.<sup>32</sup>

The enactment of the HRA has resulted in a sea change in English law; where a public authority interferes with qualified rights like the right of respect for private life or freedom of expression, the public body must justify that interference by showing that the interference is “prescribed by law” and “proportionate.”

The obligation of being “prescribed by law” under the Convention therefore reverses the approach of Megarry J in *Malone v. Commissioner of Police for the Metropolis* when he held that public authorities are permitted to do anything which is not unlawful.<sup>33</sup> The principle that underlies the idea of being “prescribed by law” or “in accordance with the law” is that restrictions on rights must comply with the rule of law by satisfying the requirement of legal certainty.<sup>34</sup>

The concept of “prescribed by law” does not, however, merely refer back to domestic law; it refers to the quality of the law, requiring it to be compatible with the rule of law, a principle that is expressly mentioned in the preamble to the Convention.<sup>35</sup>

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29. See *R. (on the Application of Laporte) v. Chief Constable of Gloucestershire Constabulary*, [2007] 2 A.C. 105, ¶ 34 (H.L.).

30. See *Ghaidan v. Godin- Mendoza*, [2004] 2 A.C. 557 (H.L.).

31. See *Pickin v. British Railway*, [1974] A.C. 765, 782G (H.L.) (Statement of Lord Reid).

32. See *A v. Secretary of State for the Home Department*, [2005] 2 A.C. 68, ¶ 42.

33. See *Malone v. Commissioner of Police for the Metropolis*, [1979] Ch. D. 344; *Cf. R. v. Somerset County Council, ex parte Fewings*, [1995] 1 All ER 513 (observing that approach taken by Laws J. where he observed that rule of law that applied to private and public persons were wholly different). Whereas a private person can do whatever he likes unless the law prohibits it, a public body has no rights, and any action it takes must be justified by positive law. See *id.* The principles which apply to statutory bodies do not affect the Crown, which (like a private individual) is free to do whatever it chooses unless this is expressly prohibited. See *id.*; see also *R. v. Secretary of State for Health ex parte C.*, [2000] 1 F.L.R. 627.

34. See *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, [1998] 3 W.L.R. 675, 681 (Lord Clyde).

35. See *Malone v. U.K.*, App. No. 8691/79, 7 Eur. H.R. Rep. 14 ¶67 (1984); *Silver v. U.K.*, App. No. 5947/72, 5 Eur. H.R. Rep. 347, ¶90 (1983); *Golder v. U.K.*, App. No. 4451/70, 1 Eur. H.R. Rep. 524, ¶ 34 (1975).

In a trilogy of cases, *Sunday Times v. United Kingdom*,<sup>36</sup> *Silver v. United Kingdom*<sup>37</sup> and *Malone v. United Kingdom*,<sup>38</sup> the Court has ruled that the phrase “prescribed by law” and/or “in accordance with the law” creates three requirements:

- the interference in question must have some basis in domestic law;
- the law must be adequately accessible; and
- the law must be formulated so that it is sufficiently foreseeable.

It is instructive to compare two decisions of the House of Lords in considering the impact of the prescribed by law principle. In *R. (Gillan) v. Commissioner of Police for the Metropolis*<sup>39</sup> it was argued that the powers to authorise and confirm stop and search powers under the Terrorism Act 2000 for the whole of the Metropolitan District were not “accessible”: so that a member of the public might know that the police had the stop and search power, but not know that, for example in Battersea, that he might be liable to be stopped or that the police were authorised to stop and search him. However, Lord Bingham doubted whether the authorisation and confirmation process should be regarded as “law” rather than a procedure for bringing the law into potential effect and pointed out that it would stultify public protection if authorisation or confirmation were publicised prospectively.<sup>40</sup> Lord Hope stressed that the sufficiency of the measures had to be viewed against the nature and degree of the interference with Convention rights and took the view that the intrusion under the stop and search powers was not very great.<sup>41</sup> Lord Brown rejected the criticism that the power would be used so arbitrarily as to be inconsistent with the principle of legal certainty.<sup>42</sup> The context in which the challenges were made obviously heavily conditioned the approach taken by the House of Lords. Nevertheless, it is respectfully submitted that the analysis of the House of Lords is open to question. Those doubts were confirmed when the case recently came before the European Court of Human Rights where the European Court rejected the House of Lords’ approach and decided that the powers the

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36. *Sunday Times v. U.K.*, App. No. 6538/74, 2 Eur. H.R. Rep. 245, 271 (1980).

37. *Silver v. U.K.*, 5 Eur. Ct. H.R. Rep. 347 (1983).

38. *Malone v. U.K.*, 7 Eur. Ct. H. R. Rep. 14 (1984).

39. *R (Gillan) v. Comm’r of Police for the Metropolis*, [2006] U.K.H.L. 12; [2006] 2 W.L.R. 537 (Eng.).

40. *See id.* ¶ 35.

41. *See id.* ¶ 56.

42. *See id.* ¶¶ 76-77.

police exercised were not sufficiently circumscribed nor subject to adequate legal safeguards against abuse.<sup>43</sup>

The House of Lords also took a more rigorous line, however, in the very recent case of *R. (Purdy) v. DPP*.<sup>44</sup> In a case decided on 30 July 2009, the House had to consider the liability of a husband to be prosecuted for assisting suicide of his wife who is an MS sufferer when her condition became unbearable. The Code for Crown Prosecutors would normally provide sufficient guidance to Crown Prosecutors and to the public as to how decisions should or were likely to be taken as to whether, in a given case, it would be in the public interest to prosecute. However, that could not be said of cases where the offence was aiding or abetting the suicide of a person who was terminally ill or severely and incurably disabled, who wished to be helped to travel to a country where assisted suicide was lawful and who, having the capacity to take such a decision, did so freely and with full understanding of the consequences. The Code was insufficient to satisfy the requirements of accessibility and foreseeability in assessing how prosecutorial discretion was likely to be exercised. That difficulty was underlined by the decision letter in another similar case in which the DPP, when considering the discretion under section 2(4), had found that many of the factors listed in the Code were irrelevant and that other unlisted factors had to be considered in such difficult cases. The DPP was required to promulgate an offence-specific policy, identifying the facts and circumstances that he would take into account in deciding whether to consent to a prosecution.

These two House of Lords decisions serve to demonstrate that context in which a case must be decided is often decisive. This is a topic to which I shall return later.

However, I should now consider my second area of discussion, the English approach to challenging executive decisions where the complaint is about the underlying merits of the decision in question.

## CHALLENGING THE MERITS OF EXECUTIVE DECISIONS ON JUDICIAL REVIEW GROUNDS

### *Introduction*

In order to work out the proper approach to a merits challenge in an administrative law case, it is necessary to identify a governing principle, and in England we take the view that the principle of separation of

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43. *Gillan v United Kingdom*, App. No. 4158/05, ¶¶ 76-87 (2010), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=48950829&skin=hudoc-en> (enter 4158/05 in the Application Number field) (last visited Mar. 16, 2010).

44. *R. (Purdy) v. DPP*, [2009] U.K.H.L. 45, [2009] 3 W.L.R. 403 (Eng.).

powers justifies the courts taking a stand off approach to executive decision making. This highly deferential approach closely resembles the rationality standard applied by the American courts and is known in English law as the *Wednesbury* test.<sup>45</sup>

However, the principle of separation of powers is not itself well developed in English law. It has been overshadowed in English law by the more dominant constitutional principles of parliamentary sovereignty and the rule of law. Prior to the Constitutional Reform Act 2005 the Lord Chancellor both was a Cabinet minister and could sit in the House of Lords. And the highest court in the UK has been a committee of the upper legislative house until October 2009 when the Supreme Court came into operation.

In any event, the principle of separation of powers has little application to executive decision-making (as opposed to legislative policy choices). The rationale for judicial deference towards decisions of the executive is based on the principle of separation of powers,<sup>46</sup> that it is not the task of the judiciary to usurp the function of the executive by substituting its decisions for the authority charged by law to decide the matters in question.<sup>47</sup> However, the constitutional status of executive decision-making can be overstated.

First, it is not self evident that administrative decisions should be accorded primary weight by the judiciary, simply by virtue of the fact that they fall within the executive's province where they clash with other principles we value and where the court can exercise a supervisory role. The fact that the court will acknowledge that the executive has special expertise which makes it better equipped to decide certain questions of fact

45. See *Assoc. Provincial Picture Houses v. Wednesbury Corp.*, [1948] 1 K.B. 223.

46. See CHARLES DE SECONDAT MONTESQUIEU, 1 *THE SPIRIT OF LAWS* 150-52 (Thomas Nugent trans., The Colonial Press 1900):

Political liberty is to be found only . . . when there is no abuse of power. But constant experience shows us that every man is invested with power is apt to abuse it, and to carry his authority as far as it will go. . . .

To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. . . .

. . . .

When the legislative and executive powers are united in the same person . . . there can be no liberty. . . .

. . . .

Again, there is no liberty, if the judiciary power be not separated from the legislature and executive. . . .

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers. . . .

*Id.*

47. See *Chief Constable of North Wales Police v. Evans*, [1982] 3 All E.R. 141, [1982] 1 W.L.R. 1155, 1160 (Eng.) (Lord Halsham); see generally Lord Irvine, *Judges and Decision-Makers: the Theory and Practice of Wednesbury Review* [1996] Pub. L. 59.

(such as whether there is a genuine threat to national security) does not mean it should concede to the executive's views on the crunch constitutional question: whether, for example, the limitations on freedom of expression accord with the democratic requirements of constitutional review.<sup>48</sup> In other words, it is valuable to draw on Jeffrey Jowell's important distinction in this context between constitutional competence and institutional competence. Secondly, routine decision-making by civil servants or local government officers has no direct connection with voters making choices through the ballot box. Thirdly, where the lawfulness of an administrative decision is being assessed, the court is not being called upon to evaluate the underlying policy and its objectives, and it is difficult to understand why the judicial assessment of an executive decision is inherently less valid or legitimate than that initially made by a civil servant. Finally, the separation of powers is not the cornerstone of the English constitution, at least by comparison with the subtly structured institutional framework in the United States.

### *The Wednesbury Rationality Test*

When applying the *Wednesbury* test the court is always involved in a "review" exercise: it has to make a secondary judgment about the reasonableness of the decision-maker's primary judgment. The appropriate test of reasonableness is the very stringent one of posing the question, "is the decision so absurd that no sensible person could ever dream it lay within the powers of the decision-maker"<sup>49</sup>; "is the decision so wrong that no reasonable person could sensibly take that view"<sup>50</sup>; or "is the decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it."<sup>51</sup>

When considering whether a decision maker has acted irrationally, however, the courts use a sliding scale of intensity of review ranging from *super Wednesbury* managerial decisions where there is a high degree of deference to the decision-maker (such as decisions involving the allocation of resources or policy)<sup>52</sup> to cases involving human rights:

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48. See Jeffrey Jowell, *Judicial Deference: Servility, Civility or Institutional Capacity?*, [2003] Pub.L. 592 [hereinafter Jowell, *Judicial Deference*].

49. See *Assoc. Provincial Picture Houses v. Wednesbury Corp.*, [1948] 1 K.B. 223, 764.

50. See *Sec'y of State for Educ. & Sci. v. Tameside Metro. Borough Council*, [1977] A.C. 1014, 1026 (H.L.) (Lord Denning).

51. See *Council of Civil Serv. Unions v. Minister for the Civil Serv.* [1985] A.C. 374, 410 (H.L.) (Lord Diplock).

52. See *R. v. Sec'y of State for the Envt., ex parte Nottinghamshire County Council* [1986] A.C. 240 (H.L.); *R. v. Sec'y of State for the Envt., ex parte Hammersmith and Fulham London Borough Council* [1991] 1 A.C. 521. (H.L.).

where (as the Court of Appeal emphasised in *R. v. Ministry of Defence, ex p. Smith*)<sup>53</sup> 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.

Nevertheless, there are obvious and real problems for the practitioner on the coal face about applying such a strict rationality principle. The threshold test is so high that it seldom has practical utility. In particular, in complex factual cases, the *Wednesbury* test is just too crude as a means of supervising executive decision-making.

The limitations of the *Wednesbury* test were revealed in *Smith*, a case regarding gays in the military, where the Court of Appeal accepted that dismissals of gays from the military did not amount to *Wednesbury* reasonableness.<sup>54</sup> Sir Thomas Bingham MR observed that to dismiss a person from his or her employment on the grounds of a private sexual preference and to interrogate him or her about private sexual behaviour would not appear to show respect for that person's private and family life and that there might be room for argument as to whether the policy answered a "pressing social need" and, in particular, was proportionate to the legitimate aim pursued. However, he held that these were not questions to which answers could be properly or usefully proffered by the Court of Appeal, but rather were questions for the European Court of Human Rights to consider in relation to a complaint that the right to respect for privacy had been breached.

Subsequently, the European Court decided in emphatic terms that the UK had breached the right of respect to private life.<sup>55</sup> As Lord Steyn stressed in his seminal opinion in *R. v. Secretary of State for the Home Department ex p. Daly*<sup>56</sup> even the heightened scrutiny *Wednesbury* test developed by the Court of Appeal in *Smith* is not necessarily appropriate to the protection of human rights.<sup>57</sup> And Lord Cooke, the former President of the New Zealand Court of Appeal, observed in *Daly*:

I think that the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.* was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial

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53. *R. v. Ministry of Defence, ex p. Smith* [1996] 1 Q.B. 517.

54. *See id.*

55. *See Smith & Grady v. U.K.*, App. Nos. 33985/96 and 33986/96, 29 Eur. H.R. Rep. 493 (1999).

56. *R. v. Sec'y of State for the Home Dep't, ex parte Daly*, [2001] UKHL 26, [2001] 2 A.C. 532 (U.K.).

57. *See Smith & Grady v. U.K.*, 29 Eur. H.R. Rep. 493.

invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.<sup>58</sup>

### *The Development of the Proportionality Test*

The powerful criticisms of the *Wednesbury* test has led English lawyers to argue that a crude rationality test should be replaced by a structured proportionality test when the Court reviews executive decisions.

Although the development of a proportionality test in administrative law was predicted by Lord Diplock in the *GCHQ* case in 1984, that day has not yet arrived.<sup>59</sup> In *R. v. Secretary of State for the Home Department, ex parte Brind*,<sup>60</sup> the House of Lords rejected the idea that proportionality should be a ground for judicial review.<sup>61</sup> After a period of considerable debate,<sup>62</sup> Lord Slynn remarked in *R. (Alconbury Developments Ltd.) v. Environmental Secretary*<sup>63</sup> that the time had come to recognise proportionality as part of administrative law.<sup>64</sup> Nevertheless, in *R. (British Civilian Internees (Far East Region) v. Secretary for Defence* the Court of Appeal held that proportionality had

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58. *R. v. Sec'y of State for the Home Dep't, ex parte Daly* [2001] UKHL 26, [2001] 2 A.C. 532 at 549.

59. *See Council of Civil Service Unions v Minister of the Civil Service*, [1985] A.C. 374 (H.L.) (Lord Diplock).

60. *See R. v. Sec'y of State for the Home Dep't, ex parte Brind*, [1991] 1 A.C. 696, 696 (H.L.).

61. *See id.* Although Lords Bridge, Roskill and Templeman left open its possible recognition as an independent ground of judicial review. *See id.* at 749-51. Compare Neill LJ in *R. v. Secretary of State for the Environment, ex parte NALGO*, [1992] 5 Admin. L.R. 785, 800-01 (Wales) (taking view that House of Lords rejected doctrine of proportionality in *Brind*), with Hoffman LJ in *R. v. Plymouth City Council, ex parte Plymouth and South Devon Cooperative Society*, [1993] P.L.R. 75, 88 (holding that status of principle as instrument of English judicial review was to say least uncertain), and Sedley J. in *R. v. Manchester Metropolitan University, ex parte Nolan*, [1994] E.L.R. 380, 395 (U.K.) (saying proportionality was potentially available today as discrete head of challenge in appropriate cases).

62. *See, e.g., S.A. DE SMITH ET AL., JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 411-421 (5th ed. 1995); Lord Irvine, *supra* note 47; Jeffrey Jowell, *In the Shadow of Wednesbury*, [1997] J.R. 75; Sir John Laws, *Wednesbury, in THE GOLDEN METWAND AND THE CROOKED CORD* 185 (Sir William Wade, Christopher Forsyth & Ivan Hare eds., Oxford University Press 1998).

63. *See R. (Alconbury Developments) v. Env't Sec'y*, [2003] 2 A.C. 295, ¶ 53.

64. *See Tucker v. Sec'y of State for Social Sec.*, [2002] H.L.R. 27. *See generally*, Mark Elliott, *The HRA 1998 and Standard of Substantive Review*, [2002] J.R. 97; Michael Fordham, *Common Law Proportionality*, [2002] J.R. 110; Richard Clayton, *Proportionality and the HRA 1998: Implications for Substantive Review*, [2002] J.R. 124.

not replaced the *Wednesbury* test in for administrative law cases which raise no human rights or European Community law issues.<sup>65</sup> Although the Court of Appeal expressed strong reservations about the justification for retaining the *Wednesbury* test, it took the view that it was not their role to perform the burial rights.<sup>66</sup>

Nevertheless, as a result of the HRA the English courts have developed a structured proportionality test which could be readily adopted when they review executive decision making. The House of Lords has held that under the HRA, proportionality requires<sup>67</sup> the Court to examine four distinct issues:

- whether the objective justifying the interference is sufficiently important to justify limiting the right;
- whether the measures designed to meet the objective of the interference are rationally connected to it;
- whether the means used to impair the Convention right are no more than is necessary to accomplish that objective; and
- whether the interference strikes a fair balance between the rights of the individual and the interests of the community which requires carefully assessing the severity and consequences of the interference.<sup>68</sup>

In order to make the proportionality test context sensitive, however, the Courts have adopted a principle of judicial deference. This principle of judicial deference describes the idea that the courts (out of respect for the legislature or executive) will decline to make their own independent judgment on a particular issue. The principle and its rationale have been highly controversial.<sup>69</sup>

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65. See *Ass'n of British Internees v. Sec'y of State for Def.*, [2003] Q.B. 1397.

66. *Id.* ¶¶ 34-35.

67. See *R. (Clays Lane Housing Coop.) v. Housing Corp.* [2005] 1 W.L.R. 2229 (noting test of proportionality is different for Article 1 of First Protocol).

68. See *R. v. A. (No 2)*, [2002] 1 A.C. 45; *R. v. Sec'y of State for the Home Dep't, ex parte Daly*, [2001] 2 A.C. 532; *Huang v. Sec'y of State for the Home Dep't* [2007] 2 A.C. 167, ¶ 19 (emphasizing fourth element); *A. v. Sec'y of State for the Home Dep't* [2005] 2 A.C. 68, ¶ 30, (Lord Bingham suggesting that to some extent these issues are, or may be, interrelated).

69. See, e.g., D. Pannick, *Principles of Interpretation of Convention Rights Under the Human Rights Act and the Discretionary Area of Judgment*, [1998] Pub.L. 545; Richard A. Edwards, *Judicial Deference Under the Human Rights Act*, 65 MODERN L. REV. 859 (2002); Murray Hunt, *Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'*, in PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION 337 (Nicholas Bamforth & Peter Leyland eds., Hart Publishing 2003); Jeffrey Jowell, *Judicial Deference*, *supra* note 48; Richard Clayton, *Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention Under the Human Rights Act 1998*, [2004] Pub. L. 33 [hereinafter Clayton, *Judicial Deference*]; T.

In *R. (Pro-Life) v. BBC*,<sup>70</sup> Lord Hoffmann took the view that the word “deference” is inappropriate to describe a decision as to which branch of government in a particular instance has the decision-making power and what the limits of that legal power are.<sup>71</sup> He stressed that the allocation by the courts of its decision-making powers to another branch of government is not a matter of courtesy or deference, but is based on recognised legal principles such as the principle that the independence of the courts is necessary for a proper decision of disputed legal rights, or that the principle that majority approval is necessary for a proper decision on policy or the allocations of resources.<sup>72</sup>

Lord Steyn, however, has taken issue with the suggestion that there is a democratic prohibition preventing the courts from examining certain issues that they are not competent to adjudicate on national security or other issues, or that democracy entails that there are zones of immunity that are not subject to judicial review.<sup>73</sup>

When considering the degree of judicial deference that is appropriate, it is important to differentiate between institutional and constitutional competence of the courts to decide the relevant question. Under the HRA there is no need for the courts to defer to Parliament or the executive on the ground that they are elected and thus responsible to the people, as Lord Bingham discusses in the Belmarsh case, *A. v. Secretary of State for the Home Department*, discussed earlier.

Additionally, in *Huang v. Secretary of State for the Home Department*<sup>74</sup> Lord Bingham considered detailed submissions on the question of judicial deference in the context of whether the interferences with family life were justified under Article 8(2) of the European Convention and observed that:

14. Much argument was directed on the hearing of these appeals, and much authority cited, on the appellate immigration authority’s proper approach to its task, due deference, discretionary areas of judgment, the margin of appreciation, democratic accountability, relative

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Hickman, *Constitutional Dialogue: Constitutional Theory and the Human Rights Act 1998*, [2005] Pub. L. 306; Richard Clayton, *Principles of Deference*, [2006] J.R. 109.

70. *R. (Pro-Life Alliance) v. BBC*, [2003] UKHL 23, [2004] 1 A.C. 185 (H.L.). See also Lord Hoffman, *Separation of Powers*, The COMBAR Lecture 2001, 23rd October 2001 [2002] J.R.; Eric Barendt, *Free Speech and Abortion*, [2003] Pub.L. 580; Jeffrey Jowell, *Judicial Deference*, *supra* note 48.

71. See *R. (Pro-Life Alliance) v. BBC*, [2003] UKHL 23, [2004] 1 A.C. 185, ¶¶ 75, 76.

72. See *id.* ¶ 76.

73. See Lord Steyn, *Deference: A Tangled Story*, [2005] Pub. L. 346. See also Richard Clayton, *Judicial Deference*, *supra* note 69.

74. *Huang v. Sec’y of State for the Home Dep’t*, [2007] UKHL 11, [2007] 2 A.C. 167 (U.K.).

institutional competence, a distinction drawn by the Court of Appeal between decisions based on policy and decisions not so based, and so on. We think, with respect, that there has been a tendency, both in the arguments addressed to the courts and in the judgments of the courts, to complicate and mystify what is not, in principle, a hard task to define, however difficult the task is, in practice, to perform. . . .

15. The first task of the appellate immigration authority is to establish the relevant facts. . . .

16. The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on. . . . The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is 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.<sup>75</sup>

Nevertheless, I would respectfully suggest that the approach taken by the House of Lords is not entirely helpful. To say that it is easy to recognise the elephant in the room (however difficult it is to describe that elephant) does not meet the challenge of working out how to apply a structured proportionality test to very different contexts. This issue is critical because of the principle of legal certainty, the idea that decision makers should have some confidence in their ability to predict with accuracy whether or not a decision is vulnerable to legal challenge. This problem cannot be answered by the mantra of appealing to a number of general (but undefined) criteria or asserting that the courts should take a hard look at the facts. I would argue that the courts need to provide

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75. *Id.* ¶¶ 14-16.

much more specific guidance in order to resolve these fundamental questions.

#### CONCLUSION

The absence of any constitutional framework inevitably means that the legal regulation of the executive is patchy in English law. As I have indicated earlier, there remain areas of executive decision-making that appear to be immune from legal scrutiny. The legal test for assessing the merits of executive decision-making has traditionally been extremely deferential, but the recent case law in England has taken a much more rigorous approach. The courts now exercise a more active role in ensuring that the executive is accountable to the legal process.

