PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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its evaluation of the legal legitimacy of governmental (or, if appropriate, legislative) action by reference to norms of EC law and Convention rights. Those norms have sometimes been taken by national courts to require an *adjustment* in national practices or in the relative freedom to act of different national institutions, but such adjustments tend ultimately to be made by reference to the pre-existing constitutional order at national level. This has allowed national courts, to date, to afford practical primacy to EC law—as in *Factortame(2)*—even though continued judicial reliance on constitutional orthodoxy has limited the extent to which EC law has become integrated at national level.[59] Anthony criticises this orthodoxy in normative terms, but his evaluation of existing judicial approaches would seem to allow for the possibility—in an extreme case such as unilateral British withdrawal from the EU—that national courts and the Court of Justice might arrive at different conclusions given their respective points of constitutional reference.

It has been argued in this section of the chapter that a variety of explanations can be advanced for the overriding influence of EC law before national courts. Some accounts tie the phenomenon to the national layer, although there is scope for disagreement as to the role of different institutions within this layer and the extent to which it might be possible for a member state unilaterally to disobey the requirements of EC law. Other accounts, by contrast, tie the phenomenon either to the nature of EC law itself, or to the interaction between the national and EC layers. Again, these accounts offer divergent views concerning the possibility that a member state might disobey the norms of EC law: for example, by unilateral withdrawal from the EU. It should be added that just as there might in practice be an overlap between the arguments advanced by Lord Bridge and Laws LJ concerning the roles of the courts and Parliament at national level, accounts which root the overriding power of EC law in the roles of institutions at national level need not be seen as inherently incompatible with MacCormick's 'pluralist' analysis. For the accounts which we have analysed tend to ignore pluralist analysis rather than to rebut it. The merits and demerits of the various accounts have been canvassed in this section of the chapter. The crucial point, in terms of our analysis of the 'multi-layered' constitution, is that each account offers a differing picture of the relationship between the national and EC layers (and, in many cases, of the role of institutions at national level), and that the variety of accounts which exist demonstrates the uncertainty which still surrounds our understanding of the multi-layered constitution in the context of EC law—whichever account one ultimately favours. One's understanding of the multi-layered constitution will therefore vary according to the account adopted. The reception of the Convention into national law, by contrast, involves a rather different set of considerations, which will be considered in the next section of the chapter.

[59] See also n 8 above, chs 3 & 4, esp pp 73–4.

THE HUMAN RIGHTS ACT 1998 AND THE COURTS

The decision of the House of Lords in *R. (Daly) v Secretary of State for the Home Department* provides a powerful illustration of the influence of the jurisprudence of the Court of Human Rights in domestic judicial review since the entry into force of the Human Rights Act.[60] For the House of Lords explicitly recognised that proportionality was now, in Lord Steyn's words, 'applicable in respect of review where [C]onvention rights are at stake'.[61] In reaching a similar conclusion, Lord Cooke relied heavily on the fact that the Strasbourg Court had condemned the *Wednesbury* standard of review in *Smith v United Kingdom* as offering inadequate protection to Convention rights, thereby violating the Article 13 right to an effective remedy.[62] A further illustration of the role of the Convention can be seen in *Porter v Magill*, where the House of Lords amended the standard of review for bias so as to give proper weight to Article 6.[63]

It would be wrong, however, to think that Convention rights—or decisions of the Strasbourg Court concerning those rights—have the same overriding significance at national level as do norms of EC law. This is due to the nature of the Convention and the drafting of the Human Rights Act. The Convention is binding on signatory states as a matter of international law, and the Strasbourg Court seeks to prescribe the minimum acceptable standards for the protection of Convention rights at national level.[64] Unlike norms of EC law, however, the Convention's reception within the domestic legal system of *any* signatory state turns to a considerable degree on the nature of the mechanism used in that state for bringing the Convention into national law.[65] The Convention contains no principles of supremacy or direct effect: unlike EC law, it has the authority at national level of a standard international treaty. In consequence, when giving effect to Convention rights via the 1998 Act, courts have been concerned not so much with the nature of the relationship between the European and national layers—the question which appears ultimately to be crucial when considering the limits of the courts' powers

[60] [2001] UKHL 26; [2001] 2 WLR 1622.

[61] N 60 above, para [27]. This begs two questions. The first is whether proportionality should be seen as a ground of review in its own right, in the manner of 'illegality' or 'procedural impropriety'. Doubt may be cast on this by the fact that, technically, the proportionality test is merely a *part of* a court's assessment of whether a public authority has violated its statutory duty under s 6(1) of the 1998 Act to act compatibly with Convention rights. Paul Craig categorises s 6 simply as creating a new head of illegality (*Administrative Law* (4th edn, London, Sweet & Maxwell, 1999), pp 556–7). The second is whether it is consistent with the Strasbourg case law for domestic courts to employ proportionality when determining whether an 'unqualified' Convention right has been violated: see further R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford, OUP, 2000), paras 6.86–6.91, 6.123–6.147A.

[62] N 60 above, para [32], referring to *Smith v United Kingdom* (2000) 29 EHRR 493. As *Daly* demonstrates, the fact that Article 13 is not included in the list of Convention rights brought into English law by the 1998 Act (see s 1 and schedule 1) has not affected the ability of domestic courts, using s 2, to draw upon relevant Strasbourg case law.

[63] [2001] UKHL 67, [2002] 2 WLR 37.

[64] *Handyside v United Kingdom* (1976) 1 EHRR 737, paras 47–9.

[65] See C Gearty (ed), *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (The Hague, Martinus Nijhoff, 1997), chs 2 to 8.

in the EC law context—but with the degree of priority to be accorded to Convention rights *as they understand them and relative to* competing considerations inherent in the 1998 Act and in the domestic constitutional order more broadly.[66] One obvious consideration is that the drafting of the Act makes clear that there are limits to how far national courts may apply Convention rights.[67] According to sections 3 and 4, legislation must be interpreted so far as possible in the light of Convention rights, but must be applied as it stands if it is incompatible with them[68]—the court's only option in such a case being to consider whether to issue a declaration of incompatibility. This position is reinforced by the susceptibility of section 2(1)—which requires courts to 'take into account' relevant Strasbourg case law, but only in so far as they regard it is as 'relevant to the proceedings' in hand—to flexible interpretation.

The existence of competing considerations is evident in the Human Rights Act case law to date. In cases such as *Daly* and *Porter v Magill*, the House of Lords was content to amend the relevant standards of judicial review. As creations of the common law, such standards have always been open to judicial development, but the Human Rights Act provided the necessary impetus. Section 2(1) allowed the House of Lords to take full account of the Strasbourg case law, which appeared to require the developments concerned. Furthermore, those developments were not felt by the House of Lords to take judicial review impermissibly into territory traditionally reserved for elected bodies. In the *Alconbury* case, by contrast, Lord Hoffmann was concerned to avoid reaching a conclusion—based on a wide reading of Article 6—which would be 'undemocratic' in the sense that it would involve courts in reviewing the merits of specialist decisions, something which would go beyond their accepted constitutional role in judicial review.[69] Lord Hoffmann also suggested that since section 2(1) did not expressly bind national courts to follow Strasbourg decisions:

> if I thought ... that they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed.[70]

More broadly, the idea of judicial restraint clearly underpins the notion of the 'discretionary area of judgment', initially articulated by Lord Hope in *Kebilene*.[71]

[66] See further MacCormick, n 16 above, pp 107–8.

[67] That Convention rights could be overridden by national legislation was made clear as the Human Rights Bill passed through Parliament: HL Deb, 5 February 1998, col 839 (Lord Irvine); HL Deb, 16 February 1998, col 771 (Lord Irvine). See also *R v Secretary of State for the Home Department, ex p. Simms* n 3 above, 341–2 (Lord Hoffmann).

[68] See also s 6(2)(a) concerning judicial review.

[69] *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, para [129]. See also Lord Slynn at para [50]; Lord Clyde at paras [159], [171].

[70] N 69 above, para [76]. See also Lord Hoffmann's approach in *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, [2003] 1 All ER 731, paras [35], [37], [42–6], [50] & [59].

[71] *R v Director of Public Prosecutions, ex p. Kebilene* [2000] 2 AC 326, 380–1. See also *Wilson v First County Trust (No 2)* [2002] QB 74, para [33]; *International Transport Roth v Secretary of State for the Home Department* [2002] EWCA Civ 158; *R v British Broadcasting Corporation, ex p. Prolife Alliance* [2003] UKHL 23. For critical analysis, see RA Edwards, ' Judicial Deference under the Human Rights Act' (2002) 65 *MLR* 859 and the Hunt chapter in this volume.

Lord Hope made clear that judicial deference to elected institutions should play an important role in Human Rights Act judicial review cases. Where difficult policy choices had to be made by the executive or the legislature between the rights of the individual and the needs of society, it would be appropriate for the judiciary to defer to the elected body. This notion of deference was a home-grown concept: it did not emanate from Strasbourg, even if it might in some situations implicate analogous factors to those involved in the Strasbourg Court's 'margin of appreciation' principle.[72] Given these various concerns, it is perhaps understandable that Laws LJ felt able to state in *R. (Mahmood) v Secretary of State for the Home Department* that the 1998 Act did not:

> authorise the judges to stand in the shoes of Parliament's delegates, who are decision-makers given their responsibilities by the democratic arm of the state. The arrogation of such a power to the judges would usurp those functions of government which are controlled and distributed by powers whose authority is derived from the ballot box.[73]

The weight which courts feel inclined to accord to the competing factors identified here will clearly vary according to the context: whether, for example, the recognition of a more intense form of review than officially existed hitherto will lead them into inappropriate territory. Equally, some judges might be keener than others to prioritise the demands of the Strasbourg case law over common law constitutional norms: for example, while Lord Hoffmann stressed in *Alconbury* that Convention rights could not override fundamental constitutional norms, the drafting of section 2(1) is such that other readings are possible.[74] The requirements and implications of the Strasbourg case law are also sometimes ambiguous: some commentators therefore criticised early Human Rights Act decisions for failing to distinguish clearly enough between issues going to the nature of proportionality review at Strasbourg level, and issues going to the proper measure of judicial deference.[75] For present purposes, such points clearly illustrate the fact that in the absence of EC law-style principles such as direct effect and supremacy in the Convention, judicial interpretation of the Human Rights Act is ultimately likely—particularly given the Act's drafting—to involve the striking of some sort of balance between giving effect to Convention rights as understood by *national* courts and remaining within the perceived dictates of *national* constitutional law.

[72] See *Kebilene*, n 71 above. See further the Hunt chapter in this volume.

[73] [2001] 1 WLR 840, para [33].

[74] For example, Lord Slynn's judgment in *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions*, n 69 above, para [26] may allow for greater weight to be given to the Strasbourg jurisprudence; see also G Anthony, 'Interacting Legal Orders and Inter-Court Disputes: the ECHR Beds into UK Public Law', in G Amato, G Braisant and E Venizelos (eds), *The Constitutional Revision in Today's Europe* (London, Esperia, 2002), pp 577–606. The role of comparative—and particularly Commonwealth—case law might also be significant in judicial evaluations of the requirements of Convention rights. See *R v Home Secretary, ex p. Daly*, n 60 above, para [27]; D Feldman, 'Proportionality and the Human Rights Act 1998' in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart, 1999), esp at pp 118–122, 142–4; R Clayton and H Tomlinson, n 61 above, paras 6.40, 6.74, 6.75–6.81.

[75] R Clayton, 'Regaining a Sense of Proportion: the Human Rights Act and the Proportionality Principle' [2001] EHRLR 504; C Gearty, n 3 above.

In other words, 'national' level concerns can assume a prominent role, without the need—as in EC law cases—to engage in difficult constitutional speculation concerning the reason for and extent of their prominence. As Laws LJ suggested in *Mahmood,*

> Much of the challenge presented by the enactment of the 1998 Act consists in the search for a principled measure of scrutiny which will be loyal to .. Convention rights, but loyal also to the legitimate claims of democratic power ....[76]

Attempts to strike such a balance are clearly at the centre of the courts' task in interpreting the Human Rights Act—making clear that a very different 'multi-layered' exercise is in play from that involved in national cases which turn on points of EC law. Both the Human Rights Act and the European Communities Act 1972 require national courts to have regard to the case law emanating from the European layer, but in the Strasbourg context this does not have overriding effect at national level, the power of the Strasbourg jurisprudence clearly being mediated—in so far as UK courts are concerned—by national constitutional considerations.

THE 'SPILL OVER' EFFECT

The dualist nature of the domestic legal system might perhaps suggest that the impact of EC law standards and Convention rights ought to be confined to cases falling within the scope of the European Communities Act 1972 and the Human Rights Act 1998 respectively. However, prior to the coming into force of the 1998 Act, courts sometimes—but not always—used standards which would be enforced in cases involving EC law as a justification for developing domestic law consistently even when EC law was *not* involved, and employed Convention-style reasoning despite the fact that the Convention had not then been brought into domestic law.[77] As Gordon Anthony asserts:

> On some occasions, the courts ... seemingly viewed the processes of change attributable to European law and domestic law as separate and distinct. However, on other occasions, the courts ... permitted a fusion of domestic and European legal standards to occur'.[78]

This latter possibility—sometimes referred to as 'spill over'[79]—raises the possibility that, now that the 1998 Act is in force, national law might be developed by reference to Convention norms even where the Act does not officially have a role to play. The possibility of 'spill over' is therefore of considerable interest when evaluating the role of courts in a 'multi-layered' constitution: for it suggests that, despite the boundaries which the 1972 and 1998 Acts formally place around the

[76] N 73 above, para [33].

[77] G Anthony, n 8 above, pp 6–9, 17–22, chs 5 & 6. Perhaps the most obvious example is *M v Home Office* [1994] 1 AC 377, where the availability of interim relief against ministers acting in official capacity in cases involving EC law was used to justify its extension to cases with no EC element.

[78] N 8 above, p 3.

[79] Anthony, n 8 above, p 54; see also his 'Community Law and the Development of UK Administrative Law: Delimiting the 'Spill-over' Effect' (1998) 4 *EPL* 253.

situations in which European norms may be employed, courts might allow such norms in practice to influence the development of domestic law on a broader basis. These issues can be illustrated by considering in greater detail the role of proportionality in judicial review.

Before the Human Rights Act came into force, proportionality was not officially recognised as a ground of review save in cases involving EC law.[80] This was reaffirmed by the House of Lords in *R. v Secretary of State for the Home Department, ex p. Brind*, where Lord Bridge suggested that it would be a 'judicial usurpation of the legislative function' for a court to require that a statutory discretion be exercised in accordance with Convention rights (and thus reviewed using proportionality), given that this would amount to the judiciary bringing the Convention into national law.[81] Richard Clayton and Hugh Tomlinson thus categorise *Brind* as being based upon a 'strict "dualist" view': a treaty that had not then been brought into national law by Parliament 'could only be relevant if [a] statute was ambiguous'.[82] Nonetheless, it is very often suggested that proportionality was employed *in practice* by the courts at this time.[83] This argument is based on a series of cases (including *Brind* itself) involving fundamental rights, in which an approach labelled 'anxious scrutiny' was used regardless of the ground of review that was formally in play. The phrase 'anxious scrutiny' comes from Lord Bridge's assertions in *R. v Secretary of State for the Home Department, ex p. Bugdaycay* that a court 'must ... be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue' and that 'when an administrative decision ... is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'[84] Perhaps the most broadly cited formulation of this approach—at least, in the context of *Wednesbury* unreasonableness—was found in *R. v Ministry of Defence, ex p. Smith*, where Sir Thomas Bingham MR suggested that:

> 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

[80] Eg, *Stoke-on-Trent C.C. v B&Q* [1991] Ch 48 (Hoffmann J); [1993] AC 900 (HL); *R v Ministry of Agriculture, Fisheries and Food, ex p. First City Trading* [1997] 1 CMLR 250.

[81] [1991] 1 AC 696, 748 (Lord Bridge). See also 750F (Lord Roskill); 760–6 (Lord Ackner); 766–7 (Lord Lowry); see also *R v Secretary of State for the Environment, ex p. NALGO* (1993) 5 Admin LR 785, 798, 800; P Craig, 'Unreasonableness and Proportionality in UK Law', in E Ellis (ed), n 74 above, pp 90–91; G de Búrca, 'Proportionality and *Wednesbury* Unreasonableness: the Influence of European Legal Concepts on UK Law', in M Andenas (ed), *English Public Law and the Common Law of Europe* (London, Key Haven, 1998), pp 59–66.

[82] N 61 above, para 2.33. There is clearly a typographical error in the text: Clayton & Tomlinson refer to 'an incorporated treaty'.

[83] J Jowell, 'Is Proportionality and Alien Concept?' (1996) 2 *EPL* 401; G de Búrca, n 81 above, pp 66–71; P Craig, n 81 above, pp 91–3, 96–9.

[84] [1987] 1 AC 514, 531; see also Lord Templeman at 537. For general analysis, see M Hunt, *Using Human Rights Law in English Courts* (Oxford, Hart, 1997), chs 5 & 6; R Clayton and H Tomlinson, n 61 above, paras 2.30–2.40; P Craig, n 81 above, at pp 96–9; M Fordham, 'What is 'Anxious Scrutiny'?' [1996] *JR* 81; M Beloff and H Mountfield, 'Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales' [1996] *EHRLR* 467.

> 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 can be satisfied that the decision is reasonable ....[85]

Where a decision interfered heavily with a fundamental right, the decision-maker was thus required to produce a strong justification to convince the court that the decision fell within the range of reasonable responses. As Sir Thomas went on to make clear, however:

> [t]he greater the policy content of a decision, and the more remote the subject matter ... from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational ....[86]

Supporters of the notion that 'anxious scrutiny' resembles or entails proportionality analysis can invoke many examples from the pre-Human Rights Act case law. In *Brind* itself, Lord Templeman—when considering whether it was *Wednesbury* unreasonable to prohibit the broadcast of the voices of leading members of prescribed terrorist groups on radio and television—asserted that it was better to ask whether a reasonable minister could reasonably conclude that this interference with freedom of expression was justifiable, rather than whether the Home Secretary had acted irrationally or perversely (the traditional *Wednesbury* test). This meant that:

> [i]n terms of the Convention, as construed by the European Court, the interference with freedom of expression must be *necessary and proportionate* to the damage which the restriction is designed to prevent.[87]

Paul Craig therefore suggests that Lord Templeman 'reasoned in a manner directly analogous to proportionality' in *Brind*, and that Lord Bridge—while refusing explicitly to recognise proportionality—employed it covertly by making clear that only an *important* competing public interest would be enough to justify the restriction of freedom of expression, given freedom of expression's importance as a human right.[88] Sir Thomas Bingham MR's formulation in *Smith* might also be understood in terms of proportionality. For the standard which a respondent was required to meet in order for their decision to survive scrutiny was related to the seriousness of the interference with human rights, enabling Craig to

[85] [1996] QB 517, 554. This test was originally propounded extra-judicially by Sir John Laws in 'Is the High Court the Guardian of Fundamental Rights?' [1993] *PL* 59, 69. See also the analogous approach employed in 'illegality' cases: *R v Secretary of State for the Home Department, ex p. Leech (No. 2)*, n 3 above, 209, 216–7; *R v Secretary of State for Social Security, ex p. Joint Council for the Welfare of Immigrants*, n 3 above; *R v Lord Chancellor, ex p. Witham*, n 3 above; *R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539, 575 (Lord Browne-Wilkinson); *R v Secretary of State for the Home Department, ex p. Simms*, n 3 above, 340 (Lord Steyn), 341–2 (Lord Hoffmann). See also M Fordham and T de la Mare, 'Anxious Scrutiny, the Principle of Legality and the Human Rights Act' [2000] JR 40.

[86] N 85 above, 556.

[87] N 85 above, 751E–F (emphasis added).

[88] P Craig, n 81 above, p 92.

argue that the real question was whether the interference with a given right was the least restrictive possible in the circumstances—a proportionality-related inquiry.[89] Perhaps the most obvious overlap between 'anxious scrutiny' and proportionality was found in *R. v Secretary of State for the Home Department, ex p. Simms.*[90] This was technically an illegality case, but Lord Steyn considered whether the respondent's policy restricting prisoners' communications with journalists was necessary in a democratic society in the sense that a pressing social need could be shown for it, and asked whether the restrictions were no more than proportionate to the legitimate aim pursued—a proportionality test frequently employed by the Strasbourg Court.[91] Lord Steyn went on to equate this test with Sir Thomas Bingham MR's formulation from *Smith.*[92] Lord Hobhouse condemned the respondent's policy as *both* unreasonable *and* disproportionate, and like Lord Steyn went on to cite with approval Sir Thomas Bingham's test from *Smith.*[93] At least in the context of *Simms* itself, both judgments therefore treated Sir Thomas Bingham's formulation as analogous to—if not synonymous with—a proportionality test.

From the standpoint of the 'multi-layered' constitution, the question whether a form of proportionality review was in use in these cases is significant because an affirmative answer would suggest that the dualist position articulated in *Brind*—that Convention-style proportionality review could not be deployed without Parliament bringing the Convention into national law—was in practice disregarded by the courts in the cases in issue. Instead, a 'European' norm—proportionality—influenced judicial decision-making outside the areas where this was formally permitted at the time, suggesting that judicial practice reflected 'multi-layered' influences rather more than orthodox theory allowed for. For an affirmative answer to be given, however, we would need to be clear that a sufficiently close relationship did indeed exist between 'anxious scrutiny' and Convention-style proportionality. This requires us to consider the intensity and clarity of review under each heading, and the implications of this for the role of the courts: interrelated issues about which there is no definite consensus of opinion.

The intensity of review refers to the closeness with which a court will scrutinise the impugned decision. That *Wednesbury* review can vary in intensity is clear from the fact that some *Wednesbury* cases involve 'anxious scrutiny' and others do not. However, the intensity of review would appear, from Sir Thomas Bingham MR's judgment in *Smith*, to vary even within 'anxious scrutiny': for the *more* substantial the interference with fundamental rights, the *more* the court will require by way of justification in order to be satisfied that the decision under review was reasonable.

[89] N 81 above, pp 92–3, 97. See also G de Búrca, n 81 above, pp 70–1. Proportionality has also been associated with *Wednesbury* outside of the 'anxious scrutiny' pocket: see Taylor LJ's description of proportionality as merely 'a facet of irrationality' in *R v Secretary of State for Health, ex p. US Tobacco* [1992] 1 QB 353, 366.

[90] N 3 above. The case was decided after the Human Rights Act was passed but before it came into force.

[91] N 3 above, 336–40.

[92] N 3 above, 340.

[93] N 3 above, 352–3.

However, proportionality can also vary in intensity. When using proportionality, the Strasbourg Court habitually asks whether an interference with a 'qualified' Convention right

> corresponded to a 'pressing social need', whether it was 'proportionate to the legitimate aim pursued', [and] whether the reasons given by the national authorities to justify it are 'relevant and sufficient'...[94]

The intensity with which this standard is applied varies depending upon the nature and drafting of the Convention right in issue. The Court has made clear, in the context of Article 8, that where an interference affects:

> a *most intimate* aspect of private life ... there must exist *particularly serious* reasons before interferences on the part of public authorities can be legitimate.[95]

The Court has also suggested that its evaluation of the 'necessity' of an interference will be connected with the nature of a 'democratic society', the hallmarks of which include 'pluralism, tolerance and broadmindedness' towards unpopular groups and practices.[96] In relation to Article 10, the Court has made clear that in deciding whether a restriction on freedom of expression was 'necessary' in a 'democratic society', it could not overlook the 'duties and responsibilities' which that Article specifically states are owed by those exercising the right.[97] Finally, the Court employs a looser proportionality test—based on the concept of a 'fair balance'—when dealing with Article 1 of the First Protocol than it does in relation to Articles 8 to 11.[98] Given that both proportionality and 'anxious scrutiny' can vary in intensity, it might therefore be felt that the crucial issue, at least in cases involving Convention rights, is not so much the identity of the ground of review which is *formally* in play as the *intensity* of the review itself, whatever name review is conducted under.[99]

Nonetheless, the House of Lords asserted in *Daly*—its post-Human Rights Act response to the decision of the Court of Human Rights in *Smith v United Kingdom* (the appeal from *Smith* before the Court of Appeal)—that proportionality is more intensive than 'anxious scrutiny' and should be used in Human Rights Act cases. In *Smith v United Kingdom*, the Strasbourg Court had found that Sir Thomas Bingham MR's 'anxious scrutiny' standard was too restrictive, and that the claimants had been denied an effective remedy contrary to Article 13.[100] This led Lord Cooke

[94] *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at para 62, citing *Handyside v United Kingdom*, paras 48–50.

[95] *Dudgeon v United Kingdom*, (1981) 4 EHRR 149, para 52 (emphasis added).

[96] *Handyside v United Kingdom*, n 94 above, para 49; *Dudgeon v United Kingdom*, n 95 above, para 53; *Smith v United Kingdom*, n 62 above, para 87.

[97] *Handyside v United Kingdom*, n 94 above, para 49.

[98] R Clayton and H Tomlinson, n 61 above, paras 6.45, 18.26, 18.76–18.81.

[99] It is clear from *Daly* that the intensity of proportionality review will vary: see Lord Steyn, n 60 above, para [28]. Furthermore, while the domestic standard of review was found to be inadequate from the standpoint of Article 13 in *Smith v United Kingdom*, n 62 above, this has not always been the case: compare *Vilvarajah v United Kingdom* (1991) 14 EHRR 248; *Chahal v United Kingdom* (1996) 23 EHRR 413; *Hatton v United Kingdom* (2002) 34 EHRR 1.

[100] N 62 above, paras 136–8.

to suggest in *Daly* that while *Wednesbury*-related 'anxious scrutiny' and proportionality would often produce the same results, the Strasbourg Court's decision in *Smith* marked the 'quietus' of the view that the two were 'substantially the same'.[101] Lord Steyn observed that, although there was an overlap between the two standards,[102] the intensity of review was 'somewhat greater' using proportionality.[103] Indeed, Lord Steyn categorised the fact that proportionality sometimes went beyond Sir Thomas Bingham MR's formulation as one of the concrete differences which existed between the two standards. For under proportionality, the intensity of review was to be:

> guaranteed by the twin requirements that the limitation of the [claimant's] right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.[104]

To reach any general conclusion about the similarity or difference between the two standards based only upon the intensity of review would, however, be insufficient. For it is important also to consider the clarity with which review is conducted—something which in turn has implications for the institutional role of the courts. It might well be said that opinion is divided not so much as to the existence of differing degrees of judicial clarity concerning the nature of review conducted under the 'anxious scrutiny' and proportionality headings, but as to the significance of this phenomenon. It seems clear that full-scale proportionality review—whatever the intensity with which it is conducted—requires courts in principle to engage in a much clearer *comparative* assessment of the weights to be ascribed to rights and to the competing policy justifications for restricting them than is the case with 'anxious scrutiny', under which the weight accorded to particular rights is frequently difficult to gauge.[105] This can clearly be seen in *Smith*. As a general matter, Sir Thomas Bingham MR's 'anxious scrutiny' formulation offers no guidance as to how much weight the court should accord human rights *relative to* matters of policy. We are told that the closeness with which a court will review a decision should vary depending upon the level to which that decision interferes with a right and the degree to which it involves matters of policy. However, we are told nothing about the *comparative* degree of priority to accord to rights and policy in a case where both are involved. This is reflected in the Court of Appeal's

[101] N 60 above, para [32].

[102] N 60 above, para [26].

[103] N 60 above, para [27]; see also Lord Bingham at para [23].

[104] N 60 above, para [27].

[105] See, generally, PP Craig, n 61 above, pp 546–52, n 81 above, pp 94–99; D Feldman, 'Proportionality and the Human Rights Act 1998', in E Ellis (ed), n 74 above, pp 127–9. For examples, see *R v Secretary of State for the Home Department, ex p. Bugdaycay*, n 84 above, 531–4 (Lord Bridge), 537–8 (Lord Templeman); *R v Secretary of State for the Home Department, ex p. Brind*, n 81 above, 748–9 (Lord Bridge); 750–1 (Lord Templeman); 757–9 (Lord Ackner); 763–6 (Lord Lowry). This criticism does not apply so strongly to judicial usage of 'anxious scrutiny' in the 'illegality' cases considered at n 85 above, in which rights considerations appear to have been given a positive weight. This is unsurprising, given that courts are generally less sensitive in 'illegality' cases to the charge that they are interfering inappropriately in executive decision-making.

handling of the case. The appellants were arguing that the Ministry of Defence's policy—whereby lesbian, gay or bisexual members of the armed forces would automatically be discharged from military service—was *Wednesbury* unreasonable. Sir Thomas Bingham acknowledged that the case concerned 'innate qualities of a very personal kind', that '[t]he applicants' rights as human beings are very much in issue',[106] and that their arguments were of 'very considerable cogency'.[107] He noted, however, that the discharge policy had been supported by Parliament and by the professional advice available to the Ministry of Defence, that the Ministry had not had the chance to consider any alternatives, that Parliament was itself reviewing the policy,[108] and that the applicants' claim involved the possibility of a major policy change.[109] In consequence, the policy could not be categorised as *Wednesbury* unreasonable. It may be observed, however, that while Sir Thomas Bingham's judgment contains a perfectly coherent statement of the competing rights and policy arguments in *Smith*, these arguments were never weighed *against* one other so as to explain why the Ministry's policy was not unreasonable.

This appears to stand in sharp contrast to proportionality, which—as Gráinne de Búrca has argued—in theory requires 'the *express* articulation and *explicit* weighing of the specific aims of a measure in relation to its impact on a right or interest invoked by the applicant.'[110] Rights and policy must be balanced *against* one another, with a specific weight assigned to each. From this viewpoint, the intellectual focus of proportionality is sharper than that involved in the typical 'anxious scrutiny' case, whatever the intensity of review in play. It might be argued that this difference of focus is reflected in Lord Steyn's suggestions in *Daly* that proportionality—unlike 'anxious scrutiny'—'may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions',[111] and that proportionality 'may require attention to be directed to the relative weight accorded to interests and considerations.'[112] These differences at the level of clarity might, in turn, be felt to reflect differing perceptions of the appropriate institutional roles of courts under each heading of review.

Nonetheless, some theorists have down-played the significance of differences at the level of clarity. For example, Mark Elliott has argued—using a comparison between the judgments at Court of Appeal and Court of Human Rights levels in *Smith*—that the distinction between the two approaches 'is one of degree rather than of type'.[113] Elliott suggests that 'anxious scrutiny' offers the executive a 'substantial margin of freedom, thereby permitting judicial intervention only if

[106] N 85 above, 556D See also Simon Brown LJ in the Divisional Court, below at 540–1.
[107] N 85 above, 557.
[108] N 85 above, 558.
[109] *Ibid.*
[110] N 81 above, pp 54–5 (emphasis added); see also P Craig, n 81 above, pp 99–100.
[111] N 60 above, para [27].
[112] *Ibid.*
[113] 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 *CLJ* 301, 308 & 313.

the lack of balance' between the right and the competing policy objective in play:

> is so great that as to be manifestly unreasonable. In contrast, the proportionality doctrine requires much closer scrutiny of the balance; in turn, a much lower level of imbalance is needed in order to trigger intervention by the reviewing court.[114]

That this may not be *radically* significant can, however, be seen—Elliott argues—by considering the practical operation of the two standards. For proportionality—like 'anxious scrutiny'—can still in practice involve a relatively unstructured weighing of competing interests in practice, suggesting that 'far from representing wholly distinct modes of judicial review, they constitute different points on—or, more accurately perhaps, sections of' a spectrum.[115] This being so, the availability of proportionality in Human Rights Act cases should not be seen as heralding the demise of 'anxious scrutiny' (or presumably even traditional *Wednesbury*) review in non-Human Rights Act cases: rather, the official recognition of proportionality merely allows for more intense judicial scrutiny where Convention rights are involved.[116]

An evaluation of the merits of the competing positions would lie beyond the scope of the present chapter.[117] Their importance, for present purposes, lies in the constitutional significance which each would ascribe to the possible 'spill over' of proportionality now that the Human Rights Act is in force. It is important here to separate analytical, institutional and normative viewpoints (in so far as such a separation is possible). Elliott's argument operates from an analytical viewpoint: his major concern is that, as a matter of legal logic, proportionality and 'anxious scrutiny' are insufficiently distinctive—considered as approaches to judicial review—to justify the conclusion that the former might 'replace' the latter outside of the Human Rights Act. Other theorists might of course argue differently,[118] but the key point for Elliott would appear to be that 'spill over' is not a radically significant issue analytically-speaking. As Elliott acknowledges, however, things might be seen differently from an institutional viewpoint—that is, a viewpoint which is concerned with the appropriate role of the courts in the national constitutional structure. The institutional viewpoint which Elliott articulates is clearly dualist in nature: he suggests that courts might have felt inhibited—in the absence of express Parliamentary approval—about openly recognising the existence of proportionality review prior to the coming into force of the Human Rights Act 1998.[119] The Act provided a sufficiently solid constitutional foundation for the recognition of proportionality review, explaining why such recognition only

[114] N 113 above at 313.

[115] N 113 above at 315.

[116] N 113 above, at 314–5, 322ff.

[117] See further the Taggart chapter in this volume. For a critique of Elliott's approach, see G Anthony, n 74 above.

[118] Elliott's argument is intended as a riposte to Paul Craig's suggestion that *Wednesbury* review 'might be caught in the "pincers" of the tests used in EC law and the HRA' (n 61 above, p 586; see also P Craig, n 81 above, pp 96–9).

[119] Save in EC law cases, in which Parliamentary approval might be inferred from the European Communities Act 1972.

occurred in *Daly*.[120] As Elliott suggests, however, this argument might prove to be something of a two-edged sword in terms of the legitimacy of 'spill over': for, just as it might be said that that the Act permits the judicial recognition of proportionality, it might equally be said to limit the extent of that recognition to cases falling *within* the scope of the Act itself.[121] From this viewpoint, one's view concerning the preferable reading of the Act will determine one's position concerning the permissible extent of 'spill over'. However, normatively-speaking, further arguments are possible. For example, Gordon Anthony takes Elliott to task for focusing excessively on the dictates of domestic law, instead of acknowledging the positive weight which 'European' legal norms can have on the re-shaping of national law.[122] From this standpoint, 'national level' constitutional constraints should presumably be capable of being ignored or over-ridden by national courts if such an approach is necessary in order to encourage a normatively desirable outcome, namely consistency between all levels of the 'multi-layered' constitutional structure.

This dispute concerning the significance of 'spill over' has been paralleled, in the case law since the Human Rights Act came into force, by judicial disagreement as to whether such a phenomenon is occurring in practice.[123] If it is, then the dualist view that an Act of Parliament must exist in order to permit the use of 'European' norms in individual cases might be felt to have been surpassed in practice: begging the much broader question whether a court's *own* view concerning its place in the 'multi-layered' constitutional structure is not now the key issue when determining the influence of European norms via the process of 'spill over'. If this is the case, then the significance of national measures such as the 1972 and 1998 Acts might in fact be less significant than we would at first assume—a conclusion with radical consequences for our preceding discussions. As we have seen, however, it may equally be felt—in a more 'neutral' sense—that the differences between 'anxious scrutiny' and proportionality are insufficiently great that they should generate significant constitutional questions. In consequence, the role of courts within a multi-layered constitution leaves many questions unanswered. Such questions may only be resolved by reference to normative criteria, and it is to these that we turn in the next section of the chapter.

THE MULTI-LAYERED CONSTITUTION AND PUBLIC LAW THEORY

It has been argued that the courts are now required to take account—in different ways, depending upon the issue in play—of the multi-layered nature of the

[120] N 113 above, pp 310–1.

[121] Such an abrupt distinction between permission for and prohibition of judicial activity might, in practice, be seen as somewhat artificial, however: see further P Craig and N Bamforth, 'Constitutional Analysis, Constitutional Principle and Judicial Review' [1991] *PL* 763.

[122] N 74 above, pp 16–28.

[123] Compare *R (Medway Council and Kent County Council) v Secretary of State for Transport* [2002] EWHC 2516 Admin; *R (Association of British Civilian Internees) v Secretary of State for Defence* [2003] EWCA Civ 473.

contemporary constitution. Where appropriate, national courts give priority to norms of EC law or Convention rights. The degree of priority—and its practical consequences—depends upon a court's understanding of the role of EC law or the Convention within national law: in other words, upon that court's interpretation of the requirements imposed, at national level, by the existence of a multi-layered constitution. Of course, this phenomenon influences judicial decision-making *throughout* domestic law. It is, however, particularly important in the public law context given the consequences it has for the way in which we determine the *proper* role of the courts, normatively-speaking: that is, for how we evaluate the role of the courts from the standpoint of public law theory. It will be argued in this section of the chapter that the various questions highlighted in previous sections must be resolved, ultimately, by reference to such issues.

In two well-respected analyses of public law theory—namely Carol Harlow and Richard Rawlings' *Law and Administration*[124] and Martin Loughlin's *Public Law and Political Theory*[125]—the competing approaches to the proper roles of the courts, Parliament and the executive have been divided into three groups. Harlow and Rawlings talk of red-light, green-light and amber-light theories; Loughlin talks of conservative normativist, functionalist and liberal normativist theories.[126] Both accounts devote a large amount of attention to the Westminster Parliament, the executive, and the national courts. The appropriateness—or inappropriateness—of judicial decisions and decision-making tends to be assessed in terms of how far the courts appear to be willing to trespass into areas more appropriately reserved for (or, according to perspective, inappropriately dominated by) Parliament and/or the executive. Neither account, however, pays sustained attention to the impact of EC law or the Convention at national level, even though both phenomena have important constitutional consequences for the present-day role of national courts. This absence is perhaps unsurprising: both books approach public law theory via an analysis of its historical development, and EC law can rightly be seen as a late entrant, historically-speaking, into the field. Furthermore, both books were published before the Labour government came to power in 1997, explaining the lack of discussion of Convention rights other than in the context of existing amber-light/liberal normativist theories. It will be argued in this section of the chapter that, given the multi-layered nature of the contemporary constitution, it is now rather more difficult to assess the role of the courts—and to offer guidance concerning that role—using just the three approaches mentioned above. In Human Rights Act cases and in cases involving EC law, national courts are subjected to a series of pressures to comply with the jurisprudence of the Strasbourg and Luxembourg courts. The attitudes with which these pressures are dealt

[124] (2nd edn, London, Butterworths, 1997), esp chs 1–4.

[125] (Oxford, Clarendon Press, 1992.)

[126] Harlow and Rawlings seem to treat Loughlin's categorisation as working in parallel to their own: see *Law and Administration*, n 124 above, pp 37–8 (n 10), 67. For a critique of Loughlin's categorisation, see Paul Craig, book review, (1993) 13 *Leg St* 275. For the sake of simplicity, the two characterisations will be treated as analogous in this section of the chapter.

with are often related to the three approaches, but such an overlap is not inevitable and is sometimes non-existent. This being so, the three approaches cannot provide a complete theoretical explanation of the role of national courts in the contemporary, multi-layered constitution.

To understand this argument, it is necessary first to sketch out the three competing theoretical approaches. Useful summaries of each have been provided by Adam Tomkins. Tomkins characterises red-light theorists/conservative normativists as believing:

> (1) that law is autonomous to and superior over politics; (2) that the administrative state is something which needs to be kept in check by the law; (3) that the preferred way of doing this is through rule-based adjudication in courts; and (4) that the goal of this project should be to enhance individual liberty ... an idea of liberty which is best realized by having small government.[127]

As Tomkins's fourth point reveals, red-light theory/conservative normativism rests on a particular ideological perspective. As Carol Harlow and Richard Rawlings therefore suggest, for such theorists, 'the primary function of administrative law should be to control any excess of state power and subject it to legal, and more specifically judicial, control'—behind which lies 'a preference for a minimalist state'.[128] Traditionally, such theorists have favoured the notion of a balanced constitution, with the executive being controlled politically by Parliament and legally by the courts. However, the apparent decline of Parliamentary power legitimated the onset, during the later stages of the twentieth century, of greater judicial intervention.[129] Nowadays, when it comes to the control of state power, 'the emphasis' under this approach to public law is 'on courts rather than government'.[130]

According to Harlow and Rawlings, green-light theorists—functionalists, in Loughlin's terminology—are 'inclined to pin their hopes on the political process' rather than on judicial control of executive power and the idea of a balanced constitution.[131] For Tomkins, such theorists believe:

> (1) that law is nothing more than a sophisticated (or elitist) discourse of politics ..; (2) that public administration is ... a positive attribute to be welcomed; (3) that the objective of administrative law and regulation is not merely to stop bad administrative practices, but to encourage and facilitate good administrative practices ... and ... that the

[127] A Tomkins, 'In Defence of the Political Constitution' (2002) 22 *OJLS* 157 at 158; see also M Loughlin, *Public Law and Political Theory*, n 125 above, pp 60–61 (note that Loughlin is only talking only about *conservative* normativism at this point).

[128] N 124 above, p 37.

[129] N 124 above, pp 45–7; see also M Loughlin, n 125 above, p 180.

[130] N 124 above, p 67; M Loughlin, n 125 above, p 189. Note Harlow and Rawlings' observation (infra, p 158) that courts nonetheless insist in judicial review cases that they are not engaging in independent value judgments, but are instead asserting Parliament's sovereign will. This is perhaps no coincidence.

[131] N 124 above, p 67. As Loughlin demonstrates (n 125 above, pp 190–206), caution is however necessary at this point: for different functionalist writers have subtly divergent views concerning the role of courts and the law.