PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

Edited by

Nicholas Bamforth
Fellow in Law,
The Queen's College, Oxford

and

Peter Leyland
Senior Lecturer in Law
London Metropolitan University

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A variation on this objection is that the imposition of a duty to give reasons will or may lead to excessive or unpredictable judicial intervention. In the American administrative law context, Martin Shapiro demonstrated that the evolved reasons requirement there confers upon reviewing judges considerable discretion to choose any point on a continuum from mild procedural review (you can reach any decision you please, as long as you give reasons) through intermediate review (you must give adequate reasons for the decision reached) to full substantive review (you must reach the best reasoned decision). According to Shapiro, the 'procedural veneer' of reason-giving requirements is 'an ideal cover' for judges intent on substantive review.[140]

Of course, exactly the same tension between correcting administrative errors and preserving administrative expertise exists in other common law jurisdictions. The non-transparent and instrumental selection by judges from a flexible range of review standards that Shapiro complains about is illustrated on the other side of the Atlantic by the flexible (for which read variable) application of *Wednesbury* unreasonableness.[141] In other words, reason-giving will not necessarily solve one of the enduring paradoxes of administrative law—*quis custodiet ipsos custodes* (who guards the guardians?). But coupled with a formal and explicit calibration of review standards, accompanied by criteria to guide selection, judicial discretion can be acceptably constrained.[142]

CONCLUSION

Constitutionalism requires justification of alleged rights-infringing behaviour and the adoption of a constitutional methodology of proportionality, balancing of rights and interests, and reasoned elaboration. Internationalisation accentuates that development by reinforcing, and in some instances adding to, the rights that claim recognition from the courts.[143] At least as regard 'rights' recognised by domestic human rights instruments or by the common law itself, the new constitutional methodology is firmly in place.[144] In a legal system without a 'capital C'

[140] M Shapiro, 'The Giving Reasons Requirement' [1992] *University of Chicago Legal Forum* 179, 181–89 reprinted in M Shapiro and A Stone Sweet, *On Law, Politics and Judicialization* (Oxford, Oxford University Press, 2002) 228. See generally S Shapiro and R Levy, 'Heightened Scrutiny of the Fourth Branch:Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions' [1987] *Duke LJ* 387.

[141] See Jowell and Lester, above n 94; Laws, above n 64.

[142] See *International Transport Roth Gmbh v Secretary of State for the Home Office* [2002] EWCA Civ 158; [2002] 3 WLR 344, at 372–78, per Laws LJ (dissenting)(CA).

[143] See Dyzenhaus, Hunt and Taggart, above n 131.

[144] Due to space constraints, the argument in this chapter is limited to administrative law cases involving alleged infringements of rights recognised in domestic, regional or international human rights instruments or by the common law. There is an important debate, yet to occur in the United Kingdom, about whether or not British public law will bifurcate into human rights law and general administrative law (ie, the area left when you subtract rights-centred litigation). Some will argue that the unreformed or classic model of administrative law should survive in the latter area. I can see no advantage in maintaining an administrative law rump, cut off from developments in human rights law. But that is a matter for another day.

constitution, such as the United Kingdom, rights-based adjudication takes place, by default, through administrative law proceedings. Consequently, administrative law is in the throes of adjusting to that enhanced role. I have described that process as the reinvention of administrative law, because of the magnitude of the departure from the classic model of administrative law. The emblem of the classic model, *Wednesbury* unreasonableness, is also in the process of being reinvented. It appears likely that *Wednesbury* unreasonableness will be either replaced altogether by proportionality or blended with it somehow.[145] The hard work of fashioning doctrines, procedures and techniques adequate to the task required by constitutionalism has only just begun.

[145] See eg, *Association of British Civilian Internees—Far Eastern Region* v *Secretary of State for Defence* [2002] EWCA Civ 473 (CA).

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Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'

MURRAY HUNT

INTRODUCTION

SINCE THE COMING into force of the Human Rights Act 1998 (HRA), one of the central concerns of courts and commentators concerned with public law has been the extent to which the advent of explicit human rights adjudication has affected the traditional grounds of judicial review. The focus of debate has largely been the extent to which the traditional *Wednesbury* approach to judicial review must now be replaced by the proportionality test which is required under the European Convention on Human Rights (ECHR), and the extent to which this has changed the nature of adjudication in public law.[1] Indeed, so much analysis has there been of this in the courts and in the journals that there is now a palpable weariness setting in amongst the discussants, and a growing consensus that the matter has now been settled beyond doubt and need no longer detain us.[2]

It is certainly true that at a purely doctrinal level the topic long since ceased to be very interesting. A number of masterly analyses have been produced explaining the way in which the proper application of a proportionality test requires a highly structured and sophisticated analysis quite different from anything that was ever required under the more traditional grounds of judicial review.[3] That the courts

[1] See eg Paul Craig, 'The Courts, the Human Rights Act and Judicial Review' (2001) 117 *LQR* 589; Mark Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 *CLJ* 301; Ian Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' [2002] *PL* 265; Richard Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' [2001] *EHRLR* 504.

[2] See eg Tim Owen, 'Assessment of Fact, Due Deference and the Wider Impact of the Human Rights Act in Administrative Law' in J Jowell and J Cooper (eds), *JUSTICE/UCL Seminars* (Oxford, Hart Publishing, 2003).

[3] See eg Michael Fordham and Tom de la Mare, 'Identifying the Principles of Proportionality' in J Jowell and J Cooper (eds), *Understanding Human Rights Principles* (Hart Publishing, 2001), 77–89; David Feldman, 'Proportionality and the Human Rights Act 1998' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 2000); Garreth Wong, 'Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality' [2000] *PL* 92.

are now required to follow this approach whenever Convention rights are in play, rather than the less rigorous approach followed before the HRA, has also now been authoritatively established at the highest level in a number of cases.[4] What is there left to say?

There is one important aspect of this debate, however, which has yet to be satisfactorily addressed by courts and commentators and which is not going to go away: the question of 'deference'. When is it appropriate and when is it not appropriate for courts to interfere with decisions made by other wielders of constitutional power, be they legislative, executive or administrative? More importantly, what *approach* should courts take to identifying the circumstances in which judicial interference is appropriate or inappropriate? This, after all, is the inescapable central question of public law in any legal system with a pretence to constitutionalism of any kind: what are the proper boundaries to the respective powers of the different branches of government, and who decides on where those boundaries are drawn? Despite the pride which leading protagonists often take in the anti-theoretical nature of English legal practice,[5] this subject is one of those doctrinal outcrops where the submerged assumptions of legal theory repeatedly defy practitioners' and judges' habituated techniques for keeping them conveniently concealed beneath the waterline.

This chapter attempts to sketch out the beginnings of a framework for approaching this inescapable and central question of public law. It takes as its point of departure the landmark decision of the House of Lords in *Daly*, which takes an important step towards a culture of justification in English public law, yet simultaneously appears to contain the means of its own undoing in Lord Steyn's teasing observation at the end of his seminal judgment that 'in law, context is everything'.[6] It asks how this elliptical but important statement should be translated into a judicial approach which remains true to the underlying vision of constitutionalism which animates the judgment, at the same time as recognising the limits to the legitimate judicial role in a modern constitutional democracy.

It is argued that in trying to work out how to achieve this delicate task, a false doctrinal step was taken in English law with the introduction of spatial metaphors into the language of judicial review, presupposing that there is a 'discretionary area of judgment' or a 'margin of discretion,' within which primary decision-makers are simply beyond the reach of judicial interference. Such an approach, it is argued, is entirely at odds with the notion of review for justification: it treats cer-

[4] Most notably *Daly v Secretary of State for the Home Department* [2001] 2 WLR 1622; *R v Shayler* [2002] 2 WLR 754.

[5] See, eg, Lord Hoffmann's pride in the pragmatism of English practice in his 2001 COMBAR Lecture, 'The Separation of Powers' [2002] *JR* 137, 138, para 5: 'Anyone who thinks it is a denial of justice for the Lord Chancellor to sit as one of five members of an appellate committee in a case in which he has not the slightest personal interest would be more comfortable in a state founded on theoretical or religious principles than in an old democracy whose institutions have been shaped by the way things work in practice'. The paradox of such a robust defence of legal pragmatism in a lecture invoking a highly formalistic theory of the separation of powers to justify limits to the judicial role is symptomatic of the continued vitality of the Diceyan account.

[6] *Daly*, above n 4, at para 28.

tain areas of decision-making, or of a particular decision-maker's responsibilities, as being beyond the reach of legality, and within the realm of pure discretion in which remedies for wrongs are political only. It also tends to prevent the proper articulation of what may be perfectly legitimate reasons for deferring, obscuring them behind a vocabulary of spaces and boundaries which are asserted as if the underlying assumptions about the constitutional division of powers were not contentious.

The chapter attempts to show that this false doctrinal step can be traced back to the central problem which continues to blight contemporary public law and to prevent its evolution into a mature system regulating the legality of the exercise of power in a modern polity. The blight is cast, it is argued, by English lawyers' weakness for the alluring idea of 'sovereignty' as a foundational concept. The conceptual neatness of sovereignty-derived thinking too readily seduces them into a conceptualisation of public law in terms of competing supremacies, which in fact bears little relation to the way in which public power is now dispersed and shared between several layers of constitutional actors, all of which profess an identical commitment to a set of values which can loosely be termed democratic constitutionalism.

The idea of sovereignty casts a double blight. On the one hand, the idea of the sovereignty of *Parliament* lives on, as vital as ever in contemporary accounts of our constitutional arrangements, notwithstanding the demonstrable fact that Parliament's power is now subject to a number of constitutional constraints which should long ago have made this claim embarrassingly at odds with both legal and political reality. On the other hand, the idea of the sovereignty of *the individual*, and of a correspondingly sovereign role for *the courts* in protecting the supposedly inviolable areas of the individual's life against democratic incursion, now increasingly features in contemporary accounts of public law, notwithstanding the explicit recognition in this country's institutional arrangements that Parliament has an important role in both the definition and protection of fundamental rights and values. The very language of our constitutional discourse therefore permits the co-existence of what should be the radically opposed narratives of democratic positivism (rooted in the sovereignty of Parliament) and liberal constitutionalism (rooted in the sovereignty of the individual and the courts' task in protecting that sphere).

Most damaging of all, however, is the strange persistence of the Diceyan attempt to accommodate both types of sovereignty within a single constitutional account. This leads to a public law of competing supremacies, in which the debate is always about how to define the boundaries of the respective areas of supremacy of the courts on the one hand and the political branches on the other, but the only justificatory arguments available within the model are irreconcilable premises which are selectively invoked depending on whether it is interference or non-interference which requires to be justified. This problem pervades our administrative law and has doomed many of its concepts to be built on constantly shifting sands. In terms of the current debate, it will be argued that this underlying conceptualisation translates inevitably into a spatial language of areas or margins of discretion,

exclusive zones within which the branch concerned is the master of all it surveys and is free from any interference by any other branch.

The chapter goes on to argue for an alternative approach which does not seek to delineate respective zones of competence, or to decide who has the power to define those boundaries, but which begins from the premise that in today's conditions both the courts and the political branches share a commitment *both* to representative democracy *and* to certain rights, freedoms and basic values, including those which are enshrined in the ECHR. In place of Diceyan constitutionalism with its irreconcilable premises, this approach attempts to root itself in a more coherent vision of constitutionalism which combines a non-positivist role for courts in articulating and furthering the fundamental values to which society is committed, at the same time as giving a meaningful role to the democratic branches and the administration in the definition and furtherance of those values.

It argues that the time has come to move beyond a public law conceptualised in terms of parallel or competing sovereignties, indeed to abandon the language of sovereignty altogether in favour of the language of *justification*, which attempts to reconceive our conceptions of law and legality away from formalistic concepts such as the historic will of Parliament, the separation of powers and ultra vires towards more substantive concepts of value and reason.[7] The crucial mediating concept for doing this, it is argued, is that of 'due deference'—the idea that in certain circumstances there may be good reasons why it is appropriate for courts not to interfere with decisions of the legislature, executive or administration, or of a lower court or tribunal, but that such deference from the courts must be *earned* by the primary decision-maker by openly demonstrating the justifications for the decisions they have reached and by demonstrating the reasons why their decision is worthy of curial respect.

After explaining how the 'due deference' approach would work in practice, the chapter goes on to demonstrate both the shortcomings and the dangers of the spatial approach, and the relative advantages of the due deference approach, by reference to some recent decisions in three specific contexts in which, on a crude approach, courts might be expected to recognise the existence of a wide 'discretionary area of judgment': immigration control, town and country planning, and social and economic policy. Each of these is, in a broad sense, a 'context' in which the European Court of Human Rights has indicated that it will afford a wide 'margin of appreciation' to the national authorities due to the nature of the subject matter, and there are already many instances of domestic courts translating this directly into a wide discretionary area of judgment, or margin of discretion, for primary decision-makers in these areas of decision-making. In each of them, however, there are some indications of the emergence of a less crude approach, though as yet no consistent formulation of the theoretical basis on which such an approach could be sustained.

[7] The thinking behind this chapter is indebted to the work of David Dyzenhaus, and in particular his efforts to build on Etienne Mureinik's conception of legality as 'a culture of justification': see eg D Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *SAJHR* 11.

THE PROBLEM: WHAT DOES *DALY* REQUIRE?

In one sense, the unanimous decision of the House of Lords in *Daly*[8] is a totem of the most dramatic change which the HRA requires of our traditional public law: the abandonment of the deferential *Wednesbury* standard in all cases involving Convention rights, and in its place the unequivocal embrace of proportionality. Lord Steyn's short speech on this subject[9] contrasted the approach which had been taken in the Court of Appeal in *Mahmood*[10] with the approach which was now required under the Human Rights Act. Lord Phillips MR's formulation of the approach to be adopted to assessing the proportionality of an interference with Convention rights in *Mahmood* was that 'the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognized by the Convention.'[11]

The House of Lords in *Daly* considered that to be couched in language reminiscent of the traditional *Wednesbury* ground of review, whereas under the proportionality approach which was now required 'the intensity of review is somewhat greater.'[12] Examples of the concrete differences this might make in practice were that the proportionality approach 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; and it may require attention to be directed to the relative weight accorded to interests and considerations. The greater intensity of review under the proportionality approach was said to be guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the interference being really proportionate to the legitimate aim being pursued. However, there was an important qualification: this shift to a greater intensity of review did not mean that there had been a shift to 'merits review'. Lord Steyn endorsed the observation of Jeffrey Jowell[13] that even under the HRA judges and administrators will remain fundamentally distinct.[14] To that extent, 'the general tenor' of the observations in *Mahmood* were said to be correct. Then came Lord Steyn's teasing conclusion that 'in law, context is everything'.[15]

Lord Steyn's great insight in his speech in *Daly* is not so much the fact that HRA adjudication requires a different approach from the traditional *Wednesbury* approach: this much had been obvious since the decision of the European Court of Human Rights in *Smith and Grady v United Kingdom*,[16] holding that the

[8] [2001] 2 WLR 1622.
[9] *Ibid* at 1634B-1636C
[10] *Mahmood v Secretary of State for the Home Department* [2001] 1 WLR 840.
[11] *Ibid* at 857, para 40.
[12] [2001] 2 WLR 1622 at 1635D, para 27.
[13] J Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *PL* 672.
[14] *Daly*, above n 12, at 1636B, para 28.
[15] *Ibid.*
[16] (2000) 29 EHRR 493.

inadequacy of judicial review for the purposes of determining the applicants' Article 8 claim in *Smith v Ministry of Defence*[17] was in breach of ECHR Article 13. The real insights in *Daly*, it is suggested, are twofold and are crucially interrelated.

First, Lord Steyn explicitly recognises that, although applying the proportionality approach may only make a difference to the outcome in a handful of cases, it will not be possible to identify those cases unless the approach itself is properly applied. It is therefore crucial to the effective protection of Convention rights that the highly structured proportionality approach is properly understood and applied by both decision-makers and reviewing courts wherever Convention rights are in play.[18] This should finally lay to rest the oft-repeated but banal observation that there is no real difference between *Wednesbury* and proportionality, because a decision which is disproportionate is also bound to be one to which no reasonable decision-maker could come. The real point is, as Lord Steyn makes clear, that proportionality is not so much a 'test' or a 'standard' as a new type of *approach* to adjudication which subjects the justification for decisions to rigorous scrutiny in order to determine their legality. Understood in this way, *Daly* is a major landmark on the road to the development of a true 'culture of justification,' a destination to which English public law has been feeling its way for several years, but now at an accelerated pace thanks to the HRA.[19]

The second insight in *Daly* is in the crucial observation that there is a difference between a proportionality approach and a full 'merits review.' This is of the utmost significance, because, as will be argued below, it preserves the very basis on which the meaningful existence of administrative law depends: the recognition by judges that in judicial review they do not have *primary* responsibility, but a secondary responsibility to ensure that the primary decision-maker has acted in accordance with the requirements of legality.[20] *Daly* delivers this crucial insight, but leaves entirely open the question of how it should be worked out in practice. Public law's big task for the next few years will be how to give practical effect to this second insight in *Daly*, in a way which does not forfeit the first. In other words, what approach should courts adopt to determining precisely how the 'context' of a particular decision affects the appropriate intensity of review?

Daly itself does not give us any answers to this question. Predictably, in the wake of the decision in *Daly* a number of courts have interpreted the 'context' qualification to Lord Steyn's statement of principle in order to justify continuing to apply the traditional *Wednesbury* standard. Lawyers representing defendant authorities

[17] [1996] QB 517.

[18] *Daly*, above n 12, at 1636, para 28: 'It is therefore important that cases involving Convention rights must be analysed in the correct way.'

[19] This first insight is an important step on the way to making more explicit the embrace by English courts of an attitude of 'constitutionalism': see Lord Steyn's 2002 Robin Cooke Lecture, 'Democracy Through Law' for the emerging contours of this judicial commitment. See also Lord Bingham, 'The Evolving Constitution' [2002] EHRLR 1.

[20] See D Dyzenhaus, (1998) 14 *SAJHR* 11 at 24–25 for a salutary reminder, from a South African perspective, that an instrumentalist approach to the justification for judicial review (contingent on whether the legislature or executive are good or bad at a particular point in time) will lead to inconsistency on this point.

in public law proceedings merely preface their familiar *Wednesbury* submissions with the words 'in context ....' If the more important insight in *Daly* is not to be lost, it is a matter of some urgency that a much more sophisticated approach be developed, one which attempts to articulate the sorts of contextual factors that will be relevant to the appropriate intensity of review, and is explicit about precisely how those factors relate to the degree of deference which is appropriate in the particular context.

In a recent contribution to this debate, Jeffrey Jowell has argued that two views are emerging about the extent to which courts should defer to Parliament and other bodies exercising public functions.[21] The first contends that courts should in principle bow to the decisions of the legislature and those exercising power on its behalf on matters of public interest (sometimes referred to as matters of public 'policy' or 'expediency'). The second contends that judges should assess those decisions by the standards of legality under domestic administrative law, allowing little or no 'discretionary area of judgment' to the primary decision-maker.[22]

It is certainly true that a review of both the literature and of HRA judgments reveals a mixture of utterances from a democratic positivist's perspective on the one hand, with its formalistic notion of the separation of powers and romantic attachment to the idea of parliamentary sovereignty, and a liberal constitutionalist's perspective on the other, with its equally romantic judicial supremacism about the priority of individual rights and the sovereignty of the courts as their ultimate guardian. From the democratic positivist's perspective, Parliament remains the supreme law-giver in our constitutional arrangements and is therefore the final arbiter of the meaning of Convention rights, and can exercise its sovereignty by defining what those rights mean in particular contexts.[23] For the democratic positivist, it is only an expression of the same foundational premise that in this legal universe Parliament can also delegate to executive and administrative decision-makers a zone of decision-making which is beyond the reach of judicial review because it is within some irreducible core of discretionary judgment. From the liberal constitutionalist's perspective, on the other hand, the courts are the final arbiter of whether a Convention right has been or is being violated, as they are the guardians of the area of inviolability into which public authorities cannot step, and there is therefore no room for judicial deference to democratic decision-makers, including Parliament.[24]

More interesting by far, however, than the existence of this spectrum of views is the fact that, despite their radically different theoretical underpinnings, the two views are often espoused by the same judge or commentator, depending on the issue they are addressing or whether they are seeking to justify judicial interference

[21] J Jowell, 'Due Deference under the Human Rights Act' in Jowell and Cooper (eds), above n 2.

[22] Jowell's preferred intermediate position, which rests on a distinction between constitutional competence and institutional competence, is considered further below.

[23] See eg K Ewing, 'The Human Rights Act and Parliamentary Democracy' [1999] *MLR* 79; JAG Griffith, 'The Common Law and the Political Constitution' [2001] *LQR* 43.

[24] See eg Clayton and Leigh, above n 1.

or abstention in a particular case.[25] This is the contemporary manifestation of our Diceyan inheritance: a constitutional discourse which selectively invokes democratic positivism and liberal constitutionalism in order to justify or explain a particular decision, but which lacks an overarching coherent vision of democratic constitutionalism in which the apparent contradiction of these foundational commitments is explicitly confronted and an attempt made to reconcile them without resort to the language of sovereignty.

The doctrinal vehicle which has so far emerged in English public law to address the central question of deference identified by Lord Steyn in *Daly* is, it will be argued, a product of this Diceyan prison, and unless an alternative approach is developed which is capable of transcending the language of sovereignty, we are in danger of perpetuating the Diceyan account into the era of the HRA.

THE FALSE STEP: EMERGENCE OF THE SPATIAL METAPHOR

Concerns about the Margin of Appreciation

In the period following the enactment of the HRA and its coming into force, there was a great deal of speculation as to whether the Strasbourg concept of the margin of appreciation would have any role to play in national courts under the Act. For public lawyers who hoped that the HRA might herald a more principled approach to judicial review, the particular concern was that English courts would simply substitute the language of the margin of appreciation for the language of *Wednesbury* review, leaving matters much the same as they had been before the HRA was passed. This concern led to the publication of articles arguing that the doctrine of the margin of appreciation was a doctrine of a supranational court and therefore had no direct application by national courts when they came to adjudicate on Convention issues under the HRA.[26] These arguments explicitly acknowledged,

[25] Many examples could be cited, but for present purposes it suffices to contrast Lord Hoffmann's invocation of liberal constitutionalism in his robust defence of the sovereign role of the courts in defending the individual's personal sovereignty against invasion by the majority (see eg *R v Secretary of State for the Home Department, ex parte Simms and O'Brien* [2000] 2 AC 115; 'The Separation of Powers', above n 5, at paras 12, 13 and 17), and his invocation of, amongst other things, democratic positivism as a justification for treating as non-justiciable by the courts certain decisions 'entrusted by Parliament' to executive or administrative decision-makers (see eg *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2001] 3 WLR 877; *Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389; 'The Separation of Powers', above n 5, at paras 9–11). Although Jowell does not agree with Lord Hoffmann's view that courts should defer on democratic grounds to the legislature on matters of public policy, the reliance on both democratic positivism and liberal constitutionalism is also evident in his account, in which the courts' constitutional role is said to be derived not from the very nature of democracy itself but from an exercise of Parliament's sovereign will in enacting the HRA.

[26] See eg R Singh, M Hunt and M Demetriou, 'Is there a Role for the "Margin of Appreciation" in National Law after the Human Rights Act?' [1999] *EHRLR* 15; D Pannick, 'The Discretionary Area of Judgment' [1998] *PL* 545; A Lester and D Pannick (eds), *Human Rights Law and Practice* (Butterworths, 1999), para 3.2.1.

however, that some of the underlying ideas that inform the margin of appreciation, being considerations of when it may not be appropriate for a judicial decision-maker to interfere with the decision of a primary decision-maker, would inevitably have some role to play in judicial review under the HRA.

The Wrong Turn

The argument that the margin of appreciation itself is of no direct application under the HRA was won before the Act came into force. In *Kebilene*, the issue was directly addressed by Lord Hope who said that the 'technique' of the margin of appreciation, being an integral part of an international supervisory jurisdiction, is not available to national courts when they are considering Convention issues arising in their own countries.[27] However, Lord Hope went on, quite rightly, to observe that a similar question arose for national courts in the application of the principles contained in the ECHR. He observed that the questions which the courts will have to decide in the application of those principles will involve questions of balance between competing interests, and issues of proportionality. Recognising that this could potentially involve the courts in revisiting difficult choices made by the executive or the legislature between the rights of the individual and the needs of society, Lord Hope sought to spell out how courts should approach the difficult question of the limits of their legitimate role. He said:

> In some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.

He also adopted Lester and Pannick's label of the 'discretionary area of judgment' as a convenient and appropriate description of 'the area in which these choices may arise.'

So Lord Hope chose an explicitly spatial solution to the problem: the concept of an *area* of judgment, within which the judiciary *will* defer. This clearly contemplates there being a zone or area of decision-making in which a decision-maker is immune from any interference by the court (and it follows that the decision-maker must therefore be immune from any review by the court within that area, as there is no point in any review if there can be no interference at the end of it). It is, in other words, a 'justiciability' doctrine, premised on the idea that certain issues are simply not amenable to judicial determination. The task then becomes identifying the circumstances in which such a discretionary area of judgment will be recognised by the courts. Lord Hope offered some assistance in this respect, by giving some examples: it would be easier to recognise such an area of judgment where

[27] [2000] 2 AC 326 at 380G. For similar acknowledgements of the inappropriateness of the margin of appreciation doctrine due to its supranational nature, se Lord Steyn in *Brown v Stott* [2001] 2 WLR 817 at 842 and Simon Brown LJ in *Porter v South Bucks District Council* [2002] 1 All ER 425 at 438–39, paras 25–27.

the rights at stake are qualified rights, where the Convention itself requires a balance to be struck; or where the issues involve questions of social or economic policy. It would be less easy where the rights at stake are stated in unqualified terms, or are of high constitutional importance, or of a kind where the courts are especially well placed to assess the need for protection.

This idea of there being a discretionary area of judgment, or a margin of discretion, within which courts will defer to primary decision-makers, has now gained widespread acceptance. It is frequently relied upon by advocates representing defendants to judicial review proceedings, and is now very frequently referred to by judges. Although, as will be seen below, some judges have conspicuously avoided referring to it,[28] and others use it in a slightly different sense from the non-justiciability sense in which Lord Hope appeared to use it in *Kebilene*,[29] it is by now sufficiently well established to have become a significant part of the public law landscape, and one which therefore demands particularly rigorous examination to ascertain whether it can really do the job for which it has been chosen.

What is Wrong with the Spatial Approach?

So long as it is distinguished from Strasbourg's margin of appreciation, and the 'width' of the margin or area of judgment is acknowledged to be variable depending on the context, what is wrong with this approach to what is acknowledged to be probably the most difficult question in contemporary public law? There are a number of problems with the spatial approach.

First, it fails to make clear whether the area which is identified as being a 'discretionary area of judgment' is, quite literally, a non-justiciable area, beyond the reach of law and in the realm of pure politics, or rather is an area within which decisions are still subject to scrutiny by the courts by the application of legal standards, albeit that in the course of conducting that scrutiny the reviewing court might decide that the decision, or aspects of it, are worthy of the court's respect. In other words, this approach fails to draw a clear distinction between deference as submission and deference as respect.[30] Deference as submission occurs when the court treats a decision or an aspect of it as non-justiciable, and refuses to enter on a

[28] Lord Steyn, for example, has consistently preferred to speak in terms of courts according a degree of deference to the legislature or executive where the context justifies it (see eg *Brown v Stott*, above n 27); and Lord Woolf has also consistently referred to paying degrees of deference to Parliament depending on the context (see eg *R v Lambert* [2001] 2 WLR 211 at 219, para 16; *Poplar Housing Association Ltd. v Donoghue* [2002] QB 48 at 70–71, para 69).

[29] Lord Bingham, for example, in both *Brown v Stott*, above n 27 and *Shayler*, above n 4,uses the language of a discretionary area of judgment but, crucially, does not suggest that the courts will automatically defer to any decision within that area, but rather suggests that they will *give weight* to decisions within that area—that is, they will accord such decisions the appropriate degree of deference. This significantly opens up the need to articulate the factors which will determine the degree of deference which is appropriate in the circumstances.

[30] The distinction is drawn by David Dyzenhaus in 'The Politics of Deference: Judicial Review and Democracy' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997), ch 13.

review of it because it considers it beyond its competence. Deference as respect occurs when the court gives some weight to a decision of a primary decision-maker for an articulated reason, as part of its overall review of the justifications for the decision.

Secondly, an approach based on spatial metaphors of 'areas' or 'margins' tends to pre-empt the articulation of the real reasons for deferring to an assessment of a primary decision-maker. As will be argued below, there are good reasons and bad reasons for deferring to a primary decision-maker, and what is important is that an approach be adopted which requires the explicit articulation and evaluation of those reasons. The spatial approach encourages courts to focus on a single factor which defines the nature of the context in which the decision-maker is operating and allows its approach to be determined by that factor. For example, a decision-maker who is taking decisions in the national security context is likely to be accorded a wide margin or area of discretionary judgment on that account alone, rather than have the court carefully examine the various possible reasons for why a degree of deference may be appropriate to certain aspects of the decision. The 'area' in which the decision-maker operates maps nicely onto a wide 'area' of discretion, to the exclusion of other factors which ought to be considered. In short, there is nothing in the spatial approach which encourages the articulation of the various factors which are relevant to the deference inquiry, and requires them to be rigorously related to the specific aspects of the decision to which they are relevant.

Thirdly, an awareness of the history of the development of modern public law should alert us to the dangers inherent in this spatial approach. Much of the progress of modern public law has been in rolling back what were formerly considered to be zones of immunity from judicial review, reformulating the considerations which were thought to justify total immunity and reintegrating them into substantive public law as considerations which affect the particular, contextualised application of what have increasingly become accepted as universally applicable general principles. That progress has been hard fought for, but it is constantly threatened by the failure to ground deference theory in anything other than crudely formalistic notions of the separation of powers and the supposed continued sovereignty of Parliament.

Fourthly and finally, there is no avoiding the multi-textured nature of the issues which fall to be adjudicated. Because rights and values are transcendent of context, cases cannot be neatly classified into categories according to the kind of subject matter they raise, and then a particular standard of review applied to them. This means that the relevant features which pull in different directions as far as the intensity of review is concerned are often present in the same case. Questions of fair trial, non-discrimination or the liberty of the individual (all matters on which courts consider themselves to have a special role) may arise in 'areas' of decision-making, such as national security or social and economic policy, in which the courts have traditionally been reluctant to interfere with primary decision-makers. It is too simple to suppose that cases can be classified according to their subject matter and the intensity or standard of review decided upon according to that cat-

egorisation: the nature of the subject matter of the decision is just one of a number of variables in play which may affect the degree of deference which is appropriate. Any approach to the limits of judicial review must be sufficiently sophisticated to reflect this basic truth.

Parallel Criticism of Strasbourg's Spatial Approach

Much of the above criticism of the spatial approach in domestic public law is reflected in critical contemporary commentary about the margin of appreciation doctrine in the jurisprudence of the European Court of Human Rights.[31] In its early days the margin of appreciation doctrine was often used by the European Court in a crude and blanket way, which attracted criticism of the Court for resorting to a standardless doctrine as a substitute for coherent legal analysis of the issues at stake.[32] Ronald St John Macdonald, for example, a former judge of the European Court, has said that the doctrine of the margin of appreciation had on occasion permitted the Court's evasion of its responsibility to articulate the reasons why its intervention in particular cases may or may not be appropriate.[33] The dangers of too readily conceding a wide margin of appreciation to national decision-makers has also been acknowledged by the European Court's Deputy Registrar Paul Mahoney:

> Cession, in inappropriate contexts, of over-broad discretion to national authorities to restrict the guaranteed human rights would run counter to the universality of human rights and would defeat the purpose of the Convention—which is to remove protection of human rights from the 'reserved domain' of the State and to make it instead an international responsibility. ... Some ten years ago Judge Ganshof van der Meersch urged that a margin of appreciation should not be conceded in a general fashion. As a matter of principle the Court should be extremely circumspect before deferring to the national authorities when they have interfered with the enjoyment of one of the guaranteed rights. Judicial self restraint should itself be exercised with restraint if the universal standards are not to be diluted or sacrificed in favour of national diversity.

Conceding a margin of appreciation 'in a general fashion' is precisely what the European Court is doing when it presumes a wide margin of appreciation in a particular context (eg 'the planning sphere'). To focus on one relevant factor (the nature of the subject matter) and found a presumption upon it about the

[31] See eg P Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 *Human Rights Law Journal* 1; C Ovey, 'The Margin of Appreciation and Article 8 of the Convention' *ibid* at 10; J Schokkenbroek, 'The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' *ibid* at 30; Y Arai, 'The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 41.

[32] Lord Lester, 'The European Convention on Human Rights in the New Architecture of Europe: General Report,' *Proceedings of the 8th International Colloquy on the European Convention on Human Rights* (Council of Europe, 1995), 227, 236–37.

[33] R St J Macdonald, 'The Margin of Appreciation' in R St J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1994), 83–124.