PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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desiring Sunday cinema openings, an elaborate scheme was installed by regulations providing for a vote at an advertised public meeting and, if required, a polling of local electors.[51] By April 1946, 115 Orders had been made by Parliament at the request of local communities. In nearly 70 per cent of these cases, a public meeting had voted against the initiative, only to be overruled by the poll of electors.[52]

Without archival work, it cannot be said with any certainty what prompted the Wednesbury electors to vote for Sunday cinema opening or what motivated the councillors to impose the condition. What we do know is that Birmingham, Wednesbury's more populous neighbour, had agreed to open its cinemas on Sunday as early as 1932, over the spirited opposition of churches and moralists.[53] Elsewhere in Britain, the factors at play included the profound effect of the Second World War on social attitudes and mores, the decline of organised religion and the extraordinary popularity of the medium, especially among the working classes.[54] What is clear is that after the Second World War the local electors in Wednesbury succeeded in gaining an Order authorising Sunday cinema opening in the town.

Leading counsel for the cinema made the most of this, and put his best argument in two parts: 'It is material that in the present case there had been a poll of the electorate in favour of Sunday opening,' and 'No reasonable authority could have imposed the condition preventing the persons who have voted for Sunday performances taking their children under fifteen with them.'[55] In other words, the councillors of the town should not be able to frustrate the wishes of the majority of local electors who favoured Sunday opening, by imposing a condition that meant their children (and likely some parents as well) would be denied the fruits of that victory. By the mid-1940s, secularisation of English life was well advanced but not yet complete or universal. And there is reason for thinking that the town had 'strong ecclesiastical traditions.'[56] In the telling phrase of Harry Hopkins, which on its own probably explains the result in *Wednesbury*: 'the shed skin of Sabbatarianism was not yet wholly cleared away.'[57]

Lord Greene MR—Vinerian Scholar, Fellow of All Souls and long-time standing counsel to the University of Oxford[58]—swiped that submission aside, saying '[t]he

[51] See Sunday Cinematograph Entertainment (Polls) Order 1932, SR & O 1932/828. See generally 'Sunday Cinema Polls' (1947) 211 *JP* 204, 219 and 236 (3 Pts).

[52] *Ibid* at 204.

[53] Richards, above n 31.

[54] See P Addison, *Now the War is Over: A Social History of Britain 1945–51* (London, British Broadcasting Corporation and Jonathan Cape Ltd, 1985), ch 5; J Chapman, 'British Cinema and "The People's War"' in N Hayes and J Hill (eds), *'Millions Like Us'? British Culture in the Second World War* (Liverpool, Liverpool University Press, 1999), 33: J Richards, 'Cinema-going in Worktown: Regional Film Audiences in 1930s Britain' (1994) 14 *Historical Journal of Film, Radio & Television* 147.

[55] *Wednesbury*, above n 4, at 225–6, argument of Gallop KC. Constantine Gallop, a graduate of University College London and Balliol, was a brilliant student, placed first in the First Class Honours lists in the Bar finals and at UCL. He took silk in 1946. See *Who Was Who: 1961–1970* (London, A & C Black, 1972), 410.

[56] See Cooke, above n 27, at 13 and Ede, above n 31, at chs 3, 6 and 10.

[57] H Hopkins, *The New Look: A Social History of the Forties and Fifties in Britain* (London, Secker & Warburg, 1963), 210.

[58] AB Schofeld, *Dictionary of Legal Biography 1845–1945* (Chichester, Barry Rose Law Publishers Ltd, 1998), 182.

vote was merely for opening the cinema on Sunday "subject to such regulations as the authority thinks fit to impose".'[59] The authority had been given a 'discretion...without limitation.' It was a discretion to be exercised executively not judicially, and furthermore there was no appeal provided to the courts. The discretion was 'entrusted' to a 'responsible body,' the local authority, which 'was entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with.'[60]

From the very beginning of cinema licensing in 1909, there was concern over the scope of local authorities' power to impose conditions on licences. For many years, The *Justice of the Peace and Local Government Review* ran an advisory service, regularly fielding questions from subscribers about the ability to impose conditions under the Acts of 1909 and 1932. Indeed, in 1940 one subscriber anticipated the question to arise in the *Wednesbury* case—can children be excluded altogether from a licensed Sunday cinema exhibition—and the opinion ventured was in the negative, such a condition would be ultra vires.[61] The refrain over this long period was that these discretions, although wide, were not unlimited.[62] The well-worn phrase from *Sharp v Wakefield* was routinely invoked: '[d]iscretion means that something is to be done within the rules of reason and justice, not according to private opinion; according to law and not humour. It is not to be arbitrary, vague or fanciful, but legal and regular.'[63]

Lord Greene agreed, of course. The ideal of the Rule of Law, not of men or women, demanded (and still demands) agreement.[64] But the Master of the Rolls went on to ask: 'what does [reasonably] mean?,'[65] and answered famously by ascribing a special, administrative law meaning to the term 'unreasonable,' to which the geographical epithet 'Wednesbury' has attached thereafter.[66] *Wednesbury* unreasonableness meant to the Master of the Rolls 'something so absurd that no sensible person could ever dream that it lay within the powers of the authority' or 'so unreasonable that no reasonable authority could ever have come to it.'[67] Of course, he really had no need to add, '[t]o prove a case of that kind would require something overwhelming'.[68]

[59] *Wednesbury*, above n 4, at 225 (in arguendo).

[60] *Ibid* at 229–30.

[61] See (1940) 104 *JP* 196.

[62] For a selection see (1931) 95 *JP* 587; (1932) 96 *JP* 284; (1933) 97 *JP* 629; (1935) 99 *JP* 494; (1936) 100 *JP* 739, 769; (1938) 102 *JP* 866; (1943) 107 *JP* 418.

[63] [1891] AC 173 (HL).

[64] I think this is what Sir John Laws must have meant when he referred to the 'rule of reason' as one of two underpinnings of the *Wednesbury* case: J Laws, 'Wednesbury' in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford, Clarendon Press, 1998), 185, 186. For criticism of Laws' characterisation, see below at nn 86–87 and accompanying text.

[65] *Wednesbury*, above n 4, at 229.

[66] See *Hawkins v Minister of Justice* [1991] 2 NZLR 530 at 534, per Cooke P (CA) ('the geographical epithet adds nothing').

[67] *Wednesbury*, above n 4, at 229–30.

[68] *Ibid* at 230.

It is part of the *Wednesbury* legend that the decision was delivered *ex tempore* late on a Friday afternoon;[69] the inference being that the judgment was 'tossed off' and considered run-of-the-mill. This might have explained the infuriating repetition in the judgment—*seemingly* the same thing said four times and in four different ways! But it appears the judgment was held off over the weekend and delivered on the following Monday.[70] Probably, Lord Greene was as surprised as anyone that the case gained admission to the Pantheon of leading public law cases.[71] It may be an illustration of the modern tendency, disparaged by Lord Radcliffe, to discover leading cases 'before they have proved that they have in them the quality to lead.'[72]

Back to the Future

In the *Wednesbury* litigation it is unlikely that the Wednesbury Gaumont cinema was acting simply only out of its own parochial financial interest. As one of over 300 cinemas in the Gaumont chain,[73] it is likely that Head Office wanted a precedent in its favour to prevent the spread of this aberrant licensing practice. Counsel for APPH is reported to have said that '[s]o far as his clients knew, no other local authority in the kingdom had taken the same line as Wednesbury.'[74] What the Gaumont chain may have been resisting was the spectre of 'tin-pot dictatorships' of councils dotted all over Britain, each a law unto themselves, imposing increasingly bizarre conditions.[75] This concern harkens back to one of the hallowed administrative law cases of the late nineteenth century, *Kruse v Johnson*.[76]

[69] M Beloff, 'Wednesbury, Padfield, and All That Jazz: A Public Lawyer's View of Statute Law Reform' (1994) 15 *Statute LR* 147, 157.

[70] *Ibid.*

[71] In addressing law students in Birmingham in 1938, Sir Wilfrid Greene spoke against lifting principles out of the context of cases in which they were applied. He said: 'The desire for simplification is a perennial weakness of the human mind, even the mind of judges; and the temptation to take a statement of principle out of its context of fact is one always to be resisted, particularly if the recital of facts fills many dreary pages in the report and the principle is concisely stated in the head-note. But it is a temptation that must be resisted by those who fully understand the proper use of precedent in the judicial method': 'The Judicial Office' (Presidential address to the Holdsworth Club, Faculty of Law, University of Birmingham, 13 May 1938), 12. This lecture was published at the time, but it was not included in the volume of selected Presidential addresses published to celebrate the 50th anniversary of the Holdsworth Club. See BW Harvey (ed), *The Lawyer and Justice: A Collection of Addresses by Judges and Jurists to the Holdsworth Club of the University of Birmingham* (London, Sweet & Maxwell, 1978).

[72] Lord Radcliffe, *Not in Feather Beds: Some Collected Papers* (London, Hamish Hamilton, 1968), 211, 216–17.

[73] By 1948 the commonly owned but separately run Odeon and Gaumont chains operated 317 and 304 cinemas respectively. The rival Associated British Cinemas chain had 442 cinemas. See A Eyles, 'Exhibition and the Cinema-going Experience' in R Murphy (ed), *The British Cinema Book* (London, British Film Institute, 1997), 217, 219–21.

The Gaumont chain started in Birmingham, and was headquartered there until 1939. In this and several other ways, Birmingham was 'in the forefront of cinema development in Britain in the 1930s.' See Richards, above n 40, at 36.

[74] 'Sunday Entertainment for Children' (1949) 113 *JP* 599, 600.

[75] The flavour of this is evident from *ibid* ('We find it very difficult to accept the view that it is for each elected local authority to determine, within its own (often accidental) boundaries').

[76] [1898] 2 QB 91 (DC, seven-judge bench). This case was relied upon in *London County Council v Bermondsey Bioscope Co Ltd*, above n 23.

In its own time *Kruse's* case was as famous and influential as *Wednesbury*, which replaced it in the administrative law catechism. It involved a challenge to a newly-created by-law prohibiting the playing of music in public within 50 yards of a dwelling house. The two persons convicted of this offence were associated with the Salvation Army, and it seems clear that the police employed the by-law to stop Salvationists from singing hymns in public.[77] The primary challenge to the validity of the by-law was on the ground of unreasonableness. Despite considerable unease within the legal profession as to the potential tyranny by tin-pot local bodies, each promulgating different local rules, a specially constituted Divisional Court upheld the by-law (by a majority of six to one).

The case is famous for its expression of judicial restraint, emphasising the need for 'benevolent interpretation' of the by-laws of elected local authorities. This golden thread runs through *Wednesbury*, and stitches the emblem on the classic model of administrative law. The classic model was long on rhetoric, as is shown by Lord Chief Justice Russell's listing of the grounds upon which the courts would intervene:[78]

> But unreasonable in what sense? If, for instance, they are found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules, they are unreasonable and ultra vires.'

In saying that the courts will protect formal equality—each treated alike as are similarly situated—the court held out the hope that inconsistency of treatment could be combated. I suspect the *Wednesbury* case was not argued under the breach of equality head of unreasonableness (discussed in *Kruse*) because the Sunday Entertainments Act appeared to recognise that individual local authorities could impose different conditions from one another. That was the compromise adopted by the legislature in 1932: regularisation of Sunday cinema openings in areas where this had been illegally allowed, and elsewhere allowing a 'local option' by poll. There was already in the 1909 Act a broadly conferred and much exercised power to impose licence conditions on the other six days of the week. An expressly conferred additional power to impose conditions in relation to *Sunday* openings must have been intended to allow local attitudes and feelings to come into play.

Was *Wednesbury* Rightly Decided?

The *Wednesbury* case is almost universally portrayed as the product of post-war deference by the judiciary; an exemplar of the self-induced lethargy that blotted

[77] See DGT Williams, 'Subordinate Legislation and Judicial Control' (1997) 8 *Public Law Review* 77, 79–81 and generally R Vorspan, '"Freedom of Assembly" and the Right of Passage in Modern English Legal History' (1997) 34 *San Diego LR* 921.

[78] Above n 76, at 99–100.

the judicial escutcheon in the middle decades of the twentieth century. I think one has to be careful to separate the case from its emblematic character. Situated in its time and place, it seems to me the result was almost inevitable on the facts and the law.[79] More importantly for our purpose, however, the logic of the classic model of administrative law also compelled the result. The high threshold for judicial intervention, coupled with the lack of transparency and difficulties of proof, almost guaranteed non-intervention.

WEDNESBURY TODAY

It is oft-remarked that the *Wednesbury* case would not be decided the same way today. That is true, but trite. The motivating forces—the hangover of Sabbatarianism and Parliament's reluctance to legislate on that moral issue at one fell swoop, across the entire United Kingdom—are not present today. Since the Second World War the decline of organised religion and the secularisation of society has continued apace. Today it would be as unthinkable to banish children from the cinema on Sunday on the basis of age and Sabbatarianism as it was for Lord Greene to contemplate the dismissal of a school teacher on the ground of natural red hair colour.[80] But the important point in revisiting *Wednesbury* today, is to identify what has changed from a legal perspective, rather than to note changes in social attitudes or mores. In this section, I will examine how a case, identical to *Wednesbury*, would be dealt with by an English court today.[81]

'Righting 'Administrative Law

This is no place for a primer on developments in administrative law since the mid-twentieth century, but something must be said about the tremendous growth of the subject.[82] So rapid have been the developments since the mid-1960s that Lord

[79] Cf Sir Stephen Sedley, 'Sounds of Silence: Constitutional Law Without A Constitution' (1994) 110 *LQR* 270, 279; *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532, at 549, per Lord Cooke of Thorodon (HL).

[80] The 'red haired school teacher' illustration of *Wednesbury* unreasonableness (above n 4, at 229) has passed into legal folklore.

[81] I am using *Wednesbury* here to bring out the different methodology of constitutionalism and internationalisation, in contrast to the classic model of administrative law. This is, however, quite artificial because so much has changed in the world and in the law since then. If nothing had changed legally then, as Mark Aronson pointed out to me, the result would be the same today as in 1947. But if everything else in law stayed constant (ie prohibition on Sunday cinema exhibitions, subject to override by poll, broad discretionary power) except for the modern injection of human rights law, this would in my view make a difference in terms of limiting the breadth of the discretion so as to be compatible with the HRA. It is hoped that the disadvantage of this artificiality is offset by the utility of the analysis.

[82] For chapter and verse see the trinity: P Craig, *Administrative Law* (4th edn, London, Sweet & Maxwell, 1999); SA de Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action* (5th edn, London, Sweet & Maxwell, 1995); HWR Wade and C Forsyth, *Administrative Law* (8th edn, Oxford, Oxford University Press, 2000).

Diplock felt able to say in the early 1980s that 'any judicial statements on public law if made before 1950 are likely to be a misleading guide to what the law is today.'[83] According to the orthodox account, in the mid-1960s the judges awoke from their 'long sleep' and set about renovating the house of judicial review.[84] To list only a few developments; prerogative powers are no longer immune from judicial review; the concept of jurisdiction was first expanded and then collapsed into a flexible error of law standard; the administrative/judicial dichotomy has withered under the fairness sunlamp; the concept of legitimate expectation has emerged first as a procedural doctrine and latterly as a substantive one; evidential and factual review has sprung up.

Amid all this expansion, paradoxically the *Wednesbury* formula not only survived but became a mantra, repeated literally thousands of times all over the common law world. Nor has the tide of citation been stemmed by stern criticism.[85] In part, this is because the dicta have a protean quality; it is 'a legal formula, indiscriminately used to express different and sometimes contradictory ideas.'[86] As such, it is ideally suited to flexible application and, indeed, susceptible to reinvention.

This is no better exemplified than by Sir John Laws' description of the *Wednesbury* case as reflecting 'the rule of reason,' whereby intrusions upon individual freedom by public authorities 'must be objectively justified.'[87] Of course, this stands the case on its head. As shown above, the inscrutable Corporation never explained or justified its decision and the court was complicit in this non-transparency by assuming the answer to the very question to be decided and inferring what the Corporation must have thought and done. *Wednesbury* is the antithesis of the rule of reason.

What are missing from *Wednesbury* to complete the desired reinvention are a rights-centred approach and the creation of the justificatory mechanisms to instantiate the Rule of Law. In fairness to Laws LJ, it must be said that he has been willing to do the necessary spadework on both fronts, both judicially and extra-judicially.[88]

[83] *R v IRC, ex parte Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, at 649.

[84] The quoted phrase is Sedley's (above n 79) but the sentiment is shared by all leading administrative textbook writers (see above n 81). An American political scientist has deployed statistical analysis to show that, despite this claim of judicial passivity, large numbers of claimants on both appeal and review succeeded against the government in this period. See S Sterett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (Ann Arbor, University of Michigan Press, 1997), ch 2.

[85] See the comprehensive critique by Thomas J in *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).

[86] The quotation is from Justice Felix Frankfurter in *Tiller v Atlantic Coast Railroad Co*, 318 US 54, 68 (1943). Sir Roger Ormrod gave *Wednesbury* as an example of this process in 'Words and Phrases and their Influence on the Law in Practice' in P Wallington and RM Merkin (eds), *Essays in Memory of Professor FH Lawson* (London, Butterworths, 1986), 145, 149. See also DGT Williams, 'Law and Administrative Discretion' (1994) 2 *Indiana Journal of Global Legal Issues* 191, 210.

[87] Above n 64, at 186, 191.

[88] See, eg, the material referred to in M Hunt, *Using Human Rights Law in English Courts* (Oxford, Hart Publishing, 1997), 164–74; *R v Ministry of Agriculture, Fisheries and Food, ex parte First City Trading* [1997] 1 CMLR 250 (QB); *Chesterfield Properties Plc v Secretary of State for the Environment* [1998] JPL 568, 579–80 (QB). See also the discussion of an unpublished paper by Sir John Laws in R Thomas, 'Reason-giving in English and European Community Administrative Law' (1997) 3 *European Public Law* 213, 220.

The 'Righting' of administrative law is a large and complicated topic, which cannot be done justice here.[89] It predated the Human Rights Act 1998, but that legislation now confirms and requires the application of a methodology that profoundly challenges the tenets of the classic model of administrative law. Two colleagues and I argued a few years ago that such a domestic human rights instrument fundamentally changes the traditional administrative law grounds for review of discretionary decision-making.[90] A public authority must comply with the Human Rights Act unless required to do otherwise by statute. Within that vague limit, however, the authority must exercise its discretion compatibly with rights in the Human Rights Act. Some of the rights are not absolute but rather are qualified by limitations, and this entails a 'balancing exercise,' whereby the private right and public interests are weighed by the judge.[91]

The focus of this right-centred inquiry differs from that under the classic model of administrative law. The starting point is the right allegedly infringed by the exercise of discretionary power by the public authority. Next is the inquiry into whether the right has been reasonably or justifiably limited in terms of the express qualifications on the right. If it has not *and* exercise of the discretionary power in conformity with the right is not precluded by the statute, then the public authority *must* decide in accordance with the Human Rights Act. When this stage is reached the right is a constitutional trump, preventing the decision-maker from exercising the discretionary power in a way that infringes the right. We called this a decisive consideration in order to distinguish it from traditional administrative law analysis.

It is elementary that in the legal control of discretionary power there is a hierarchy of considerations.[92] At the top is the mandatory relevant consideration: this may be expressly provided in the statute or may be implied. Such considerations must be taken into account by the decision-maker and given genuine consideration. In the middle is the permissive relevant consideration, which is one that the decision-maker may lawfully take into account but is not obliged to do so. Last of all, at the bottom, is the irrelevant consideration, and it is unlawful for the decision-maker to take this into account at all. As regards the two types of relevant considerations, the weight given each consideration is for the decision-maker, not the court, unless it can be said that the decision-maker has acted unreasonably.

[89] See generally Hunt, above n 88 and M Loughlin, 'Rights Discourse and Public Law Thought in the United Kingdom' in GW Anderson (ed), *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (London, Blackstone Press, 1999), 193.

[90] J McLean, P Rishworth and M Taggart, 'The Impact of the New Zealand Bill of Rights on Administrative Law' in *The New Zealand Bill of Rights Act 1990* (Auckland, Legal Research Foundation Inc, 1992), 62–97. What follows is a summary of that argument drawn from M Taggart, 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990' [1998] *PL* 266, 274–79.

[91] See *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* [2000] 5 LRC 196 (PC, Bahamas) at 217: 'Human rights conventions and equivalent constitutional provisions recognise that the protection afforded to rights ... is not absolute ... Broadly stated, a balancing test is then called for'.

[92] See generally J McLean, 'Constitutional and Administrative Law: The Contribution of Lord Cooke' in P Rishworth (ed), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorodon* (Wellington, Butterworths, 1997), 221, 227–30.

The Human Rights Act methodology sketched above supersedes this analysis. If the discretionary power can be exercised in conformity with the (reasonably limited) right, it must be so exercised. In contradistinction to traditional administrative law theory, this is not just something a decision-maker may or must have regard to, it is a legal impediment to exercising the power in a way that infringes the Human Rights Act.

Often in the past in administrative law cases, 'rights' issues were not visible at the abstract level of principle or were lost sight of amid the flexible application of doctrine in particular contexts or the clamour of controversy. For example, who spoke for the 'rights' of the children or their parents or the majority of electors who voted for Sunday cinema opening in *Wednesbury*? What weight was given to the 'right' of the cinema owner to invite whomever it liked onto its property?[93] The 'rights centred-ness' of the Human Rights Act entails that arguments about context, policy, justiciability and deference generally must relate to the definition of the right or its prescribed limitations. This is a more focused, consistent and transparent methodology than that prevalent in traditional administrative law adjudication, where 'rights' issues can be swept over in conclusory findings that the exercise of the power was or was not *Wednesbury* unreasonable.

As Jeffrey Jowell and Anthony Lester demonstrated 15 years ago, the mantra of *Wednesbury* unreasonableness in administrative law has obscured the underlying role of administrative law in protecting rights.[94] The claim here is not that administrative law methodology could not recognise rights or appropriately balance them against other interests. It is rather that the judges had considerable leeway in how they approached and resolved such issues in traditional administrative law terms. There was no accepted methodology that required rights issues to be identified and approached in the same manner and sequence (definition of right, limitations on right, relation to statute, etc). The Human Rights Act changes all that.

By section 6 of the Human Rights Act 1998 it is unlawful for a public authority to act in a way which is incompatible with the European Convention on Human Rights (ECHR), unless compelled to do so by statute (in which case a declaration of incompatibility may be made). The number of instances in which a statute will require a discretionary power to interfere with a reasonably limited right is likely to be relatively small. So the argument made here will likely be available in the

[93] Susan Sterett has shown that judges were most active on review and appeal in areas where the individual's property rights were threatened by the state: above n 84. She does not, however, consider the *Wednesbury* case in terms of property rights; nor did the Court of Appeal in *Wednesbury*. The trial judge, Henn Collins J, took the view that the 1932 Act did not abridge rights but extended them by waiving the Sunday observance prohibition: *Associated Provincial Picture Houses, Ltd v Wednesbury Corporation* [1947] 1 All ER 498, at 499 (KB).

It all depends on starting point, of course. Some American legal scholars would view the local authority's action there as expropriating without compensation the right of the cinema owner to admit and exclude whomever it likes on whatever day it likes. See above n 18. That the British have never viewed the situation this way, but rather as clearly within the 'police power' of local government to regulate licensed activity, is suggestive of further comparative common law research on licensing and property rights. See *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621 (CA).

[94] J Jowell and A Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] *PL* 368.

preponderance of cases where public authorities exercise discretionary powers in such ways as to infringe Convention rights. Certainly, should a *Wednesbury* case reappear today, there would appear to be scope to exercise the condition-imposing power in ways that would not unreasonably infringe rights so that it could not be said that rendering the discretion compatible with the Convention would empty it of content and trigger section 6(2) of the Human Rights Act 1998.

Wednesbury under the ECHR and the Human Rights Act 1998

Although somewhat artificial, there is value in looking at how a case on all fours with *Wednesbury* would be decided today under the Human Rights Act 1998.[95]

Wednesbury Corporation is a public authority, and as such cannot lawfully 'act in a way which is incompatible with a Convention right.'[96] The actions of the Corporation in *Wednesbury* essentially constitute a specific restriction upon the liberty of a certain class of persons (children under 15) to attend the cinema on a certain day of the week, together with a restriction on the freedom of cinema operators to admit such persons on that day. Is this compatible with Convention rights?

To invoke the Human Rights Act a person must be a 'victim' of an unlawful act, as defined in the ECHR.[97] The jurisprudence of the European Court of Human Rights establishes that persons or companies claiming to be victims of a violation of one or more of the Convention rights must be able to show that they were 'directly affected' by the measure complained of.[98] The excluded children and the cinema owner are victims under this test, but neither the children's parents nor various representative bodies would likely qualify.

Several rights might be invoked on the facts of *Wednesbury*,[99] but I will focus on the rights to freedom of expression and respect for family life.

The right to hold and express opinions includes the freedom to receive information and ideas without interference by public authorities. Prima facie, exclusion of children from the cinema interferes with the right of those children to receive information and ideas.[100] Although Article 10 provides that '[t]his Article shall not prevent States from requiring the licensing of ... cinema enterprises,' a licence condition excluding children from cinema admission exceeds the obvious

[95] A more realistic situation today would be local authority imposed curfews for children. See Criminal Justice and Police Act 2001, ss 48–9.

[96] Human Rights Act 1998, s 6. It is not necessary to explore here the issue whether the interpretive principle in s 3 provides broader catchment than s 6.

[97] *Ibid* s 7, cross referencing to ECHR Article 34.

[98] See eg, *Open Door Counselling Ltd and others v Ireland*, judgment of 29 July 1992, Series A, No 242; (1993) 15 EHRR 244.

[99] The other Convention rights of possible relevance to this situation are: Article 5 (right to liberty and security); Article 11 (freedom of assembly and association); Article 14 (prohibition of discrimination); Article 1 of the First Protocol (peaceful enjoyment of property).

[100] ECHR Article 10 has been held to protect someone who is prevented from receiving information: *Autronic AG v Switzerland*, judgment of 22 May 1990, Series A, No 178; (1990) 12 EHRR 34; *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606; [2002] 3 WLR 481.

limitation of freedom of expression necessarily consequent upon introduction of a licensing scheme.[101] For the limitation to pass muster, it must comport with Article 10(2), being a restriction 'prescribed by law and necessary in a democratic society, in the interests of ... the protection of health or morals.'

The first issue is whether the imposition of a condition pursuant to a broad open-ended discretion is 'prescribed by law.' Initially, the European Court of Human Rights spoke tough—affirming the Rule of Law ideal that law be accessible, knowable, sufficiently precise to guide action, with foreseeable consequences—but tempered this with realism: 'many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.'[102] There is nothing in subsequent jurisprudence from the European Court to suggest that the broad discretion to impose conditions on cinema licences would not satisfy the 'prescribed by law' test.[103] The second issue is, assuming the condition at issue in *Wednesbury* was imposed today, whether it would be upheld as necessary to protect the health or morals of children? The answer to this is surely no. The European Court, in cases concerning whether or not Article 10 has been justifiably restricted, have taken what amounts to a balanced, proportional approach; essentially asking whether the scope of the impugned restriction is too broad or intrusive, extending further into the realms of merits-based review in more egregious cases. The condition would not be considered a proportionate response, and likely no permissible margin of appreciation would be able to save the condition.

The same result would be reached under Article 8, which protects 'family life.'[104] The argument here is that the decision of parents and children to accompany each other to the cinema is a 'family' matter within the protected sphere of 'family life.' There is no single definition of 'family life' in the European jurisprudence. Whereas the separation of parent(s) and child is very short term—a matter of hours—compared to the immigration cases that routinely raise Article 8 challenges, it is not implausible to invoke this Article. But even if an infringement was made out, Article 8 contains similar qualifications to Article 10 and the Corporation would fare no better today in attempting to justify its condition.

But the important lesson is that the burden of justification and persuasion—

[101] See FG Jacobs and RCA White, *The European Convention on Human Rights* (Oxford, Clarendon Press, 1996), 230–32.

[102] *Sunday Times v United Kingdom*, judgment of 26 April 1979, 270 Series A, No 30; (1979–80) 2 EHRR 245, at 270.

[103] In the European sequel to the House of Lords' decision in *R v Home Secretary, ex parte Brind* [1991] 1 AC 696, the Commission on Human Rights held a statutory discretionary power satisfied the 'prescribed by law' requirement if its scope and manner of application could be understood with sufficient clarity: *Brind v United Kingdom* (Application 18714/91), 9 May 1994, (1994) 77 ADR 42. The same fudging has occurred in Canada with the identical phrasing in s 1 of the Charter of Rights and Freedoms. See *Slaight Communications Inc v Davidson* (1989) 59 DLR 416 (SCC).

[104] The cinema, not being human and not capable of having a family, cannot be considered to be a 'victim' for the purposes of s 7 of the Human Rights Act 1998, and thus could not raise this Article on its own behalf. This problem could be solved easily by joining a party to the proceeding who could lay claim to the status of 'victim', eg, a family affected by the Corporation's prohibition being the obvious example.

that the right has been reasonably limited—falls squarely on the public authority. Wednesbury Corporation could not today maintain its inscrutability. It would have to justify the restriction on the children's right to freedom of expression or lose the litigation. The methodology of rights adjudication forces the local authority to give reasons and to back those up with as much evidence as possible, including sociological evidence.

As noted above, in 1947 the Wednesbury Corporation could have put forward a formidable case. A so-called 'Brandeis brief', containing sociological and economic evidence,[105] could have included studies on the impact of the cinema on children, and information about the church-going habits of the population, the variable 'take-up' of the opportunity to permit Sunday openings elsewhere in the country and the varying conditions imposed by other licensing authorities where Sunday cinema opening was allowed. The Corporation never had to do this. Indeed, it never had to give any reasons or provide any evidence at all as to why it did what it did. Not only did the classic model not require justification, it actively discouraged it. It was for the challenging cinema to discover and show legal error, and to get over a very high threshold. The collectivity could sit tight-lipped. What rights-centred adjudication has done—and this is revolutionary—is to fundamentally and irrevocably change the methodology, and hence the rules, of the public law game.

This leads on to another important difference between rights adjudication in administrative law guise today and the position in 1947. Back then it was APPH, simultaneously pursuing its private financial interest and the public interest in ensuring lawful administration, which appeared and was heard. In so far as the interests of the children, their parents, or the majority of electors who had voted for Sunday cinema opening were heard at all, it fell to counsel for the cinema to advocate for them. The reported argument suggests it was done, at best, obliquely. There were no other plaintiffs, neither in court nor 'maintaining' the action.[106] No intervenors appeared, and no amicus curia was appointed.[107]

Imagine the scene today if such a condition was imposed. Children and parents' rights groups would gather under the banners of human rights for children and family 'choice'. The Human Rights Act and the ECHR would be bandied about, buttressed by reference to the International Covenant on Civil and Political Rights (ICCPR)[108] and the ratified but unincorporated Convention on the Rights of Children (CRC).[109]

[105] On the 'Brandeis brief' see DM Walker, *Oxford Companion to Law* (Oxford, Clarendon Press, 1980), 148.

[106] The reference here is to the tort and crime of maintenance, whereby someone without a legally recognisable interest in the subject matter of a civil action provides financial assistance to a party to that action.

[107] I am not saying that the Rules of Court allowed all of this in the 1940s. The point is that the absence of such is consistent with the classic model of administrative law.

[108] 999 UNTS 171. See D Fottrell, 'Reinforcing the Human Rights Act: the Role of the International Covenant on Civil and Political Rights' [2002] *PL* 485.

[109] United Nations Convention on the Rights of the Child 1989, 1577 UNTS 3. The ECHR makes few explicit references to children and has been said to 'lack even the most basic recognition of the rights of children': U Kilkelly, *The Child and the European Convention on Human Rights* (Aldershot, Dartmouth, 1999), 3. This makes reference to the CRC all the more important.

ICCPR Article 19 and CRC Article 13 regarding freedom of expression are in very similar terms to ECHR Article 10. Moreover, CRC Article 3 provides that '[i]n all actions concerning children ... undertaken by ... administrative authorities ... the best interests of the child shall be a primary consideration.' Case law in New Zealand and Canada treat this ratified but unincorporated international legal obligation as a relevant consideration that administrative decision-makers must take into account; in other words, a mandatory relevant consideration.[110] Interestingly, this is little more than the Court of Appeal did in *Wednesbury*: reading the broad discretion as 'implicitly' recognising the relevance of the best interests of the children. Again, the difference today is that we have fundamentally different perceptions of what is good for children and who should determine that issue (as between the parents/care-givers, the children and the state), than was the case in England immediately after the Second World War.

Today, 'victims' (in terms of the requirements of the Human Rights Act and ECHR) would be found by children's and parents' rights groups to take representative actions, and the groups themselves would seek standing. Amicus curiae might be appointed by the court. If the English legal establishment was unpersuaded, a trip to Strasbourg might be embarked upon. But court action would be only one strand of a co-ordinated strategy of lobbying and public campaigning. At the international level, these same non-governmental organisations (NGOs) would complain to the Human Rights Committee and the Committee on the Rights of the Child at the periodic reviews of the United Kingdom's performance under the ICCPR and CRC, and likely provoke adverse comment. This would be used to flay the government, and on it goes ...

This bears the hallmark of what Abram Chayes called 'public law litigation.'[111] The object of such litigation is the vindication of constitutional rights or statutory policies.[112] Suffice it to say here, this model of litigation rejects almost all of the constraints of judicial method and procedure contained in the classic model of administrative law. For complex reasons, pressure groups are increasingly bringing political/policy disputes to court, for resolution there rather than in the legislature or elsewhere in government and society.[113] 'Bringing rights home' has given these groups in British society, and the individuals represented by them, legal pegs in the form of rights upon which to hang administrative law challenges. A further dimension is added by the increasing imbrication of human rights instruments—domestic, regional and international—each influenced by, and building upon, the instruments that have gone before. It is part of the complex

[110] *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); *Baker v Canada (Minister of Citizenship and Immigration* [1999] 2 SCR 817; (1999) 174 DLR (4th) 193 (SCC); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, at 304, per Gaudron J (HCA).

[111] See A Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harv LR* 1281. See also C Harlow, 'Public Interest Litigation in England: The State of the Art' in J Cooper and R Dhavan (eds), *Public Interest Law* (London, Blackwell, 1986), 90. Cf RL Marcus, 'Public Law Litigation and Legal Scholarship' (1988) 21 *Michigan Journal of Law Reform* 647.

[112] Chayes, above n 111, at 1284.

[113] The pioneering book in the United Kingdom is C Harlow and R Rawlings, *Pressure Through Law* (London, Routledge, 1992).

process of globalisation, which is being played out in various ways as regards human rights law.[114]

To some, the international human rights lobby is a bogey, pushing the envelope of politics onto (for the most part) an unsuspecting and naïve British judiciary.[115] Perhaps even more worrying, from this point of view, is the minority of judges who are already aboard 'the rights band-wagon.'[116] Importing 'rights talk' and the paraphernalia of constitutional adjudication from the USA and Europe (with the foreshadowed legalisation of politics and politicisation of the judiciary) is said to undermine the tenets of the *English* Constitution.[117] Critics of these developments sometimes become unlikely supporters of the reasoning and result in *Wednesbury*. For example, it has been said of JAG Griffith, a principal supporter of the 'Political Constitution,'[118] that his criticisms of Lord Greene's judgment 'strangely echoes Griffith's own views.'[119]

The indigenousness of *Wednesbury* is an attraction also to those on the political Right. Here there is support for 'fundamental rights,' but of the home grown variety, rooted in English soil and history, mixed with a good deal of scepticism of what is to be gained from reliance on European sources.[120] This cashes out in a preference for *Wednesbury* terminology over the Euro-speak of proportionality. For this to be a viable option the monolithic skin of the *Wednesbury* standard has to be shed to reveal that it has always been a chameleon, taking its hue from the nature of the issues involved. On this basis, five years ago Sir John Laws was prepared to pronounce *Wednesbury* 'alive and well.'[121]

Indeed, *Wednesbury* is far too healthy for the liking of some commentators. Those who do not share all the qualms of the Left about the judiciary adjudicating rights or the Right's suspicion of regional and international human rights standards, worry that the *Wednesbury* standard will continue to license human rights

[114] See C McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *OJLS* 499; reprinted in K O'Donovan and GR Rubin (eds), *Human Rights and Legal History: Essays in Honour of Brian Simpson* (Oxford, Oxford University Press, 2001).

[115] See, eg, C Harlow 'Public Law and Popular Justice' (2002) 65 *MLR* 1, especially 9,12–13, 16–18.

[116] C Harlow, ' Export, Import: The Ebb and Flow of English Public Law' [2000] *PL* 240, 251.

[117] See further M Taggart, ' "The Peculiarities of the English": Resisting the Public/Private Law Distinction' in P Craig and R Rawlings (eds) *Law and Administration in Europe—Essays in Honour of Carol Harlow* (Oxford, Oxford University Press, 2003), 107.

[118] JAG Griffith, 'The Political Constitution' (1979) 42 *MLR* 1.

[119] C Harlow and R Rawlings, *Law and Administration* (2nd edn, London, Butterworths, 1997), 82. For JAG Griffith's recent views on Lord Greene, see 'Judges and the Constitution' in R Rawlings (ed), *Law, Society, and Economy: Centenary Essays for the London School of Economics and Political Science 1895–1995* (Oxford, Oxford University Press, 1997), 289, 290–91.

[120] See, eg *R v Lord Chancellor, ex parte Witham* [1998] QB 575 (QB). See also the scepticism of Lord Hoffmann: 'A Sense of Proportion' in M Andenas and F Jacobs (eds), *European Community Law in English Courts* (Oxford, Clarendon Press, 1998), 149.

[121] Laws, above n 64, at 201. But in a recent case Laws LJ appears to turn his back on *Wednesbury* in favour of the flexibility of proportionality: *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2002] EWCA Civ 297; [2002] 2 All ER 756, at 767, per Laws LJ (CA). In a similar vein, see *R (Farrakhan) v Secretary of State for the Home Department*, above n 100, at 500–1, per Lord Phillips of Worth Matravers MR (CA); *R v Secretary of State for the Home Secretary, ex parte Daly*, above n 79, at 547 (Lord Steyn) and 549 (Lord Cooke of Thorodon).

infringements.[122] While acknowledging many of the advances made in recent times towards flexible, rights-respecting applications of *Wednesbury*, their worry is the atavistic tendencies of some judges to revert back to *Wednesbury* non-transparency when the going is perceived to get tough.[123]

Will this mean that the name *Wednesbury* will disappear from the lips of lawyers and from the law reports? If it does, in my view, it will simply be replaced by another term, likely contenders being proportionality or 'margin of appreciation,' expressing much the same ideas. The central idea behind *Wednesbury* is that judges are not, and should not pretend to be, ready, willing and able to adjudicate upon every dispute between citizen and the state. Some of these disputes are not justiciable in the strict sense, nor do many of the others fall within the training or expertise of the judges. The trick, as Goldilocks learnt the hard way, is to get the temperature of constitutional porridge 'just right.'[124]

Inevitably, as seems now to be recognised on all sides, this involves a sliding scale, with non-justiciability at one end and close scrutiny at the other, and the development of criteria to pin a dispute accurately on the scale.[125] What this requires is the articulation of a theory of deference—with fine calibrations of democratic legitimacy, expertise and comparative competence—for the first time in UK public law.[126] This would allow, for instance, in a case like *Wednesbury*, the democratic credentials of an elected council to be balanced with the democratically evidenced wishes of the majority of local electors wanting Sunday cinema.

TOWARDS A CULTURE OF JUSTIFICATION

As hinted at earlier, the classic model of administrative law never lived up to the Rule of Law rhetoric. The law presupposes that there are reasons for the decisions reached and that the administrative process is rational and not arbitrary, but did not insist on the statement of findings of fact and reasons for decisions.[127] It is only in the last decade or two that any progress has been made in changing the common law in this regard. The English courts (and for that matter those in Australia and New Zealand) have not yet gone as far as the Supreme Court of Canada in recognis-

[122] Hunt, above n 88, at 241.

[123] *Ibid* at 25.

[124] The allusion to Goldilocks was suggested by a heading in Martin Shapiro's 'The "Globalization" of Judicial Review' in LM Friedman and HN Scheiber (eds), *Legal Culture and the Legal Profession* (Colorado, Westview Press, 1996), 119, 132.

[125] The case law and literature is increasing rapidly. See generally P Craig, 'The Courts, the Human Rights Act and Judicial Review' (2001) 117 *LQR* 589; I Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' [2002] *PL* 265; M Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' [2001] *CLJ* 301.

[126] Hunt, above n 88, at 215; Craig, above n 125; J Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *PL* 671. For a discussion of some of these issues outside the United Kingdom, see M Taggart, 'The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective' in Rishworth, above n 92, at 189.

[127] See above n 7 and accompanying text.

ing a generally applicable common law duty to give reasons on administrative decision-makers,[128] but it seems only a matter of time before the exceptions swallow the hoary general rule that reasons need not be given.[129] The constitutionalisation of administrative law requires this step.[130]

That will not please everyone.[131] Some view requiring reasons for discretionary decision-making (or the imposition of lawyers' reasoning processes) as threatening the very nature of discretion.[132] On one positivistic view, there is a tension between administrative decision-making and the giving of reasons. Frederick Schauer has argued that giving reasons involves a commitment to the generality of the reason and its application in similar circumstances.[133] He points out that on this conception 'giving a reason is like setting forth a rule'[134] and that makes it problematic to require reasons in circumstances where the power of particularism is strong—where 'case-by-case decision making and flexibility are thought important.'[135] That describes exactly the orthodox conception of discretionary power in administrative law that underpins the 'no fettering' rule, and views notions of review for inconsistency and an estoppel doctrine as anathema.

Moreover, many lawyers view the sphere of discretion as a lawless void, and they are quite happy about that.[136] Discretion is the hole in the middle of the doughnut, to use Dworkin's metaphor,[137] where 'culture, tradition and myth' rather than rationality determine outcomes.[138] If law intruded, then judges would be on a slippery slope to determining, for example, the merits of such trivia (or 'high policy,' depending on your point of view)[139] as conditions on opening cinemas on Sunday: about which they know nothing and care less, and would be needlessly redoing what has been done by those that do know and care. There is a strong resonance here with what was said and done in the *Wednesbury* case.

[128] *Baker v Canada (Minister of Citizenship and Immigration*, above n 110.

[129] See P Craig, 'The Common Law, Reasons and Administrative Justice' [1994] *CLJ* 282. For an overview of the then current state of the law in the United Kingdom, Canada, Australia and New Zealand as to the common law requirement on administrators and judges to give reasoned decisions, see M Taggart, 'Administrative Law' [2000] *New Zealand Law Review* 439, 439–42.

[130] See Jowell, above n 126, at 680–81.

[131] This section draws upon D Dyzenhaus, M Hunt and M Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5, 27–29.

[132] Cf R MacDonald and D Lametti, 'Reasons for Decision in Administrative Law' (1990) 3 *Canadian Journal of Administrative Law & Practice* 123.

[133] F Schauer, 'Giving Reasons' (1995) 47 *Stan LR* 633, 642–44.

[134] *Ibid* at 651.

[135] *Ibid* at 659.

[136] David Dyzenhaus got me to see this clearly.

[137] R Dworkin, *Taking Rights Seriously* (Cambridge, Harvard University Press, 1977), 31: 'Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.'

[138] JL Mashaw, 'Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State' (2001) 70 *Fordham LR* 17, 26: 'The [administrative state] ... is the institutional embodiment of the enlightenment project to substitute reason for the dark forces of culture, tradition, and myth.'

[139] In *Wednesbury*, above n 4, at 230 Lord Greene MR referred to the dispute as 'a matter of high public policy.'