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

HART PUBLISHING
OXFORD AND PORTLAND, OREGON
2003

appropriate degree of restraint in cases arising in that area is bound to lead to overdeference to national decision-makers. It may well be the case that, often, the conflicting rights in issue in that area of decision-making will be of the sort where it is not appropriate for the Court to become embroiled in the balancing of local interests. But fundamental rights can cut across all manner of subject matter areas, and the margin of appreciation needs to be sensitive enough to accommodate that.

Rather than automatically assume a wide margin of appreciation in particular subject matter areas, subject only to possible narrowing by having regard to other factors, contemporary commentators on the Strasbourg case law favour the adoption of a more sophisticated criteria-based approach. This would involve the European Court in avoiding any presumption about the width of the margin of appreciation, and instead identifying what Paul Mahoney has called 'some practical criteria for situating the bounds of the margin of appreciation in concrete cases.' This criteria-based approach is more sensitive to the many different features of the context, and does not start by ascribing great weight to a particular factor, by presuming a wide margin of appreciation on the basis of the subject matter area alone. As Schokkenbroek has said:

> a sufficient degree of flexibility can be maintained as long as the Court bases the exercise of its supervisory function on a series of relative factors which may properly determine the scope of the review it will carry out, not on a straightjacket of absolute rules.

'DUE DEFERENCE' AS AN ALTERNATIVE APPROACH

If, as seems to be the case, the doctrine of the discretionary area of judgment, or the margin of discretion, has now effectively become the direct domestic equivalent of the Strasbourg doctrine of the margin of appreciation, the question arises whether there is any alternative approach which would avoid the pitfalls identified above. One alternative is that advocated by Jeffrey Jowell, who has sought to chart something of a middle course between, on the one hand, those arguing for recognition of a discretionary area of judgment whenever the courts are called upon to decide a matter of 'public interest' or 'policy' and, on the other hand, those who see Convention questions as a matter of hard-edged legality which is always a question for the court and therefore see little or no room for a discretionary area of judgement.[34] Jowell argues that both of these extreme views are erroneous, because they rest on a mistaken notion of the relative competence of courts and other institutions in the new constitutional order which he considers to have been introduced by the HRA. He argues for an intermediate position, in which there is some limited room for deference by the courts, but which is a function not of the courts' relative *constitutional* competence (which on Jowell's account has been transformed at a stroke by the enactment of the HRA), but of their relative *institutional* competence to decide certain types of question. The argument is that, now

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

that the courts enjoy a new constitutional competence which they have never previously had, it is never justifiable for them to defer on democratic grounds alone, but *only* on institutional grounds.

Jowell's rejection of the two extremes, one of which requires courts to defer submissively and the other of which leaves no room for deference at all, is entirely correct. His suggested alternative, however, concentrates on one important and undoubtedly relevant factor (relative institutional competence) to the exclusion of all others. In particular, it excludes from the deference inquiry important normative considerations about what the court's proper role is, by assuming that those normative questions have been settled by the HRA itself. So, for example, by saying that it is never justifiable for a court to defer to a primary decision-maker on democratic grounds (the democratic legitimacy of judicial interference for the protection of human rights having been settled by the HRA), Jowell appears to factor out democratic considerations from deference theory altogether. But a rich conception of legality and of the rule of law should not only be able to legitimate a role for courts in enforcing legal standards on public decision-makers; it ought, at the same time, to have space for a proper role for democratic considerations, including a role for the democratic branches in the definition and furtherance of fundamental values. This brings us back to one of Lord Steyn's important insights in *Daly*: an acceptable approach to articulating the limits of judicial review in a constitutional democracy is crucial to defending the legitimacy of its very basis.

By the same token, Jowell's approach rules out normative considerations which pull in the opposite direction, away from deference. Institutional constraints on judicial decision-making ought not necessarily to constrain a court to defer if it considers it to be its constitutional role to decide a particular question. Questions of institutional competence are inseparable from deeper normative questions of institutional design. Courts as institutions are designed in a particular way because of an underlying notion of their function. If, as Jowell suggests, courts now have the constitutional competence to decide all questions concerning compatibility of public action with fundamental rights, they ought not to be constrained by institutional limitations: rather, institutional considerations ought to follow from the answer to the underlying normative question about the court's function. Institutional competence constraints can often be resolved, in that procedures can be changed (as they sometimes are) in order to accommodate what is required procedurally in order for the court to fulfil its constitutional function.[35]

Jeffrey Jowell's focus on institutional competence, therefore, whilst certainly identifying one important and relevant factor in the deference inquiry, ultimately

[35] See eg the indications in the House of Lords decision in *R v Shayler* [2002] UKHL 11, [2002] 2 WLR 754 that, in a judicial review of a refusal to authorise disclosure by a former member of the security services, the High Court should use its inherent power to devise a procedure for enabling it to see material too sensitive to be disclosed to the individual's legal advisers, for example by the appointment of a special advocate to represent the individual, even where there was no statutory provision for such a procedure: see Lord Bingham at 776, para 34 and Lord Hutton at 800, para 113; and see to the same effect Lord Woolf MR in the Court of Appeal in *Secretary of State for the Home Department v Rehman* [2000] 3 WLR 1240 at 1250–51, para 31.

cannot on its own be determinative of when courts should and when they should not pay a degree of deference to a decision. It cannot be a matter solely of institutional competence, divorced from deeper normative questions of what courts ought or ought not to be doing in a modern constitutional democracy. Deference theory needs grounding in something more explicitly normative, in which courts are encouraged not only to articulate their reasons for deferring or not deferring, but to theorise them in terms of what justifies or limits judicial intervention. This requires nothing less than reconfiguring public law in terms of a culture of justification, as argued for by Mureinik and Dyzenhaus.[36] In a culture of justification, as Lord Steyn recognised in *Daly*, all exercises of power require justification, but the very nature of 'justification' dictates the court's role in reviewing legality. Justification requires reasons, that is, rational explanations for why a particular decision has been taken. The task of a court reviewing for legality in a culture of justification is to subject those reasons to careful scrutiny and to decide whether or not the decision is *justifiable*. In deciding how much weight it should accord to the primary decision-maker's justificatory arguments it should have regard to a variety of different factors which might be in play and which are relevant to the question of whether any and if so how much deference might be due from a judicial decision-maker. On this approach, one of the explicitly normative considerations to be taken into account in assessing the appropriate degree of deference is the degree of democratic accountability of the primary decision-maker, and the extent to which the affected interests have already had the opportunity of genuinely participating in a democratic process directed at balancing the competing interests.

Democratic arguments, however, must not be treated as determinative of the justification question, as reasons which pre-empt judicial involvement altogether, because the court would then be abdicating its task of deciding whether justification has been made out. The whole notion of 'precluded areas,' to which the spatial approach gives life, is quite at odds with the very concept of 'review' for legality: invocation of the discretionary area of judgment amounts to a claim of non-justiciability, an argument that the decision is not suitable for judicial resolution at all, rather than an argument that the decision is *justifiable* in a democratic society. An argument that an issue is within the decision-maker's discretion is the very opposite of justificatory. It amounts to telling courts that a matter is none of their business, which is difficult to reconcile with modern conceptions of legality and the political branches' own professed commitment to the rule of law and to respect for fundamental rights and values. Dyzenhaus seeks to incorporate this important point into his theory of deference by arguing for recognition of a concept of due deference which distinguishes between 'deference as submission' and 'deference as respect.'[37] Submissive deference is what happens in the Diceyan model of constitutionalism: judges submit to the intention of the legislature, on a positivist

[36] See D Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *SAJHR* 11.

[37] D Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997), ch 13, 286.

understanding of that intention. Deference as respect, on the other hand, requires judges to pay 'a respectful attention' to the reasons which are offered by a primary decision-maker as justifications for a particular decision.

But at the same time as distinguishing respect from submission, and therefore abstention, following review for legality, from non-justiciability, the concept of due deference also, and crucially, distinguishes review for legality from review for correctness. It does so by preserving an important distinction between a decision which is justifiable and one which is justified. As Dyzenhaus says:

> in the administrative law context, there is an important distinction between a judicial test which asks whether a non-judicial decision-maker's decision can be shown to be justifiable and one which asks whether it is justified. When a judge asks whether the decision-maker's decision is justified, he is usually asking whether the decision coincides with the decision the judge would himself have given. Here the reasons of the decision-maker hardly matter since the issue is coincidence of content rather than the relationship between reasons and content. But when the judge asks whether the decision is justifiable, he is asking whether the decision-maker has shown it to be defensible, taking all the important considerations into account. And that of course makes the reasons for decision very important.[38]

Any theory of deference must not only avoid the submissive approach which flows if one starts from the premise of parliamentary sovereignty, but must also preserve this important distinction between judicial and primary decision-makers on which the very existence of a coherent public law depends. Many of the attempts to grapple with this difficult problem have started by asking the wrong question. The debate about whether proportionality is a question of law or fact, or mixed law and fact, for example, is not helpful, and merely substitutes one set of labels for another without getting to the difficult underlying normative question of why it is that courts ought sometimes to feel constrained in substituting their own decision for that of another decision-maker. Similarly, characterisation of the question of whether an interference is proportionate as being an 'objective' question does not get to the real question. Whether the question of the proportionality of an interference is a question for the court or for the decision-maker is simply the wrong question to ask. It is a question for both of them. The amount of deference which ought to be given to the decision-maker on the various constituent elements of the decision taken should be built into the correct approach to assessing proportionality. Even the language of intensity of review or differential standards of review is not enough in itself, because it too expresses a conclusion about the appropriate degree of intrusion. What is needed instead is a vocabulary which flushes out the underlying, inescapably normative considerations which explain the court's inclination or disinclination to interfere with any particular decision.

How, then, without resorting to the spatial approach, should courts approach the deference question in a way which steers between the two extremes of judicial submission and judicial supremacism? Because of the transcendent quality of

[38] (1998) 14 *SAJHR* 11, 27–28.

rights and values, capable in principle of cutting across all substantive areas of public decision-making, and the large number of variables which are in play which interact with each other in different ways, courts should approach the deference question in a focused, issue-specific way, asking first what is the specific issue on which the primary decision-maker has made a decision to which a claim for deference is being made. Having carefully identified the issue in respect of which the claim for deference is made, the court should ask, in relation to each specific issue which it has identified, how much, if any, deference it ought to give the primary decision-maker who has made a decision on that particular question. At the stage of determining the degree of deference which is due to the decision-maker on the relevant aspects of its decision, the court should articulate the sorts of factors which might warrant a degree of deference from a judicial decision-maker, and identify the specific factors which are in play when deciding how much deference is due in the particular circumstances of the case.

A number of different factors are likely to be relevant to this inquiry into the appropriate degree of deference, though no single factor is likely to be determinative: the outcome of the inquiry is likely to depend on the interaction of a number of different factors. The nature of the right in question and the nature of the particular context are certainly relevant factors: naturally courts feel a greater legitimacy in pronouncing on fair trial rights and other procedural guarantees which are considered to be at the core of the judicial function, and feel a very real diffidence in relation to issues which involve striking balances between a variety of different interests or between different groups, which they consider to be more in the nature of a 'political' judgment. To focus exclusively on these two considerations, however, would be too narrow and would prevent articulation of the underlying considerations which inform received ideas about the respective functions of the judicial and the political branches.

The relevant factors would certainly include the relative expertise of the decision-maker in the subject matter in question: does the primary decision-maker possess some expertise in the particular subject matter, for example in scientific, technical or academic matters, which is central to the issue to be decided and which a reviewing court cannot pretend to possess? They would include also the relative institutional competence of the primary decision-maker to determine the type of issue in question: is the court's adjudicative decision-making process simply not equipped to conduct the type of decision-making which preceded the primary decision-maker's decision? Again, this question must be closely tied to the issue which has to be decided: for example, if one of the issues is a highly factual question such as the degree of impact on visual amenity, which the primary decision-maker decided after actually visiting the site in question itself, that is an issue on which appropriate deference ought to be paid to the finding of the primary decision-maker. This should not be a particularly controversial proposition: it is well established, even in the context of the exercise of a full appellate jurisdiction in which an appeal court has jurisdiction over fact and law, that allowance should be made by the appellate court for the advantage which the first instance decision-

maker had in actually seeing the witnesses in question give their live evidence. To this extent, due deference on grounds of relative institutional competence is a well established feature of even appellate adjudication.

The relevant factors in the deference inquiry should also include the degree of democratic accountability of the original decision-maker, and the extent to which other mechanisms of accountability may be available in the increasingly layered context in which power is exercised in contemporary conditions. The mere fact that a decision has been taken by a democratically accountable decision-maker should never in itself be determinative, but in a democratic society a reviewing court should give careful consideration to whether other avenues of accountability are available and more appropriate, and to how well democratic mechanisms are working in practice when deciding the degree of deference which is due to a decision-maker.[39] A similar and to some extent overlapping consideration which is also relevant to the deference inquiry is the extent to which the primary decision-maker has conscientiously conducted a thorough compatibility inquiry: without reducing scrutiny of justification to a merely procedural protection by making this factor determinative, the degree of respect which is due to a measure should be influenced by the seriousness of the engagement with the proportionality question by the primary decision-maker, and the opportunities which have been afforded to the various interests in the process leading to the decision.

There is a limit, however, to how far it is possible to go in describing an approach or methodology in the abstract. The real test of the above critique of the spatial approach to deference and the advocacy of a 'due deference' alternative is whether it would make any difference in practice. The remainder of this chapter therefore turns to consider recent decisions in 'contexts' where courts have been traditionally submissive to primary decision-makers, in particular immigration control, town and country planning, and social and economic policy, to illustrate the operation of the two approaches in practice.

PRACTICAL EXAMPLES OF WHY 'DUE DEFERENCE' MATTERS

Immigration Control

One context in which it is instructive to compare the two approaches is that of immigration control, an area of government action in which the courts have traditionally been mainly deferential to the executive. Indeed, it was this context that yielded the formulation of the approach to be adopted to assessing the proportionality of an interference with Convention rights which was the subject of the

[39] The degree of deference which is due may well therefore be contingent on the strength of democratic institutions at a particular point in time, and the extent to which Parliament is performing the role envisaged for it in the HRA, of giving proper scrutiny to executive claims that legislation is compatible with Convention rights; a point made by Nick Blake, 'Importing Proportionality: Clarification or Confusion' [2002] *EHRLR* 19, 26.

House of Lords' unanimous clarification in *Daly*. *Mahmood* was a challenge by way of judicial review to the Home Secretary's decision to remove an illegal entrant who was married to a British citizen.[40] One of the grounds of challenge was that the decision to remove was in breach of the illegal entrant's right to respect for his family life under ECHR Article 8. It was in the context of explaining how the court should now approach the issue of whether the Secretary of State's decision contravened Article 8, compared to before the HRA was in force, that Lord Phillips MR formulated the approach that the House of Lords in *Daly* felt required clarification.

Lord Phillips MR held that even after the HRA, where the court reviews an executive decision which is required to comply with the ECHR as a matter of law, it remains the case, as before, that the role of the reviewing court is supervisory: the court would only intervene where the decision fell outside the range of responses open to a reasonable decision-maker.[41] In performing the exercise of deciding whether the decision of the executive was permitted by the HRA, he held, invoking Lord Hope in *Kebilene*, that the court had to bear in mind that, just as individual states enjoy a margin of appreciation under the ECHR, 'so there will often be an area of discretion permitted to the executive of a country before a response can be demonstrated to infringe the Convention.' It was therefore on this explicitly spatial approach, drawing a direct analogy with the Strasbourg margin of appreciation, that Lord Phillips MR adopted the formulation in terms of the reasonableness of the decision-maker's conclusion that the interference was necessary,[42] and went on to conclude that 'there were reasonable grounds' for the Secretary of State's conclusion that deportation was necessary in the interests of an orderly and fair control of immigration and that there had been no violation of the right to respect for family life.[43]

The approach in *Mahmood* can be contrasted, however, to the approach taken by a differently constituted Court of Appeal in the same context in *B v Secretary of State for the Home Department*, which is much closer to the 'due deference' approach advocated above.[44] *B* was a statutory appeal on a point of law from a decision of the Immigration Appeal Tribunal (IAT), dismissing an appeal against the Home Secretary's decision to deport the appellant on grounds that it was conducive to the public good, following B's conviction for offences of indecency. The appellant had been in the United Kingdom since the age of seven, had grown up here, and lived the whole of his adult life here. One of the grounds on which he challenged the decision to deport him was that it was in breach of ECHR Article 8 because it was a disproportionate response to his offending.

The Court of Appeal unanimously held that the question of the proportionality of an interference with an Article 8 right was a question of law, and as such it was a

[40] *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840.
[41] *Ibid* at paras 37–38.
[42] *Ibid* at para 40.
[43] *Ibid* at para 67.
[44] [2000] Imm AR 478.

question for the court to decide afresh, even if answering it involved taking a much closer look at the merits than was usual on such an appeal.[45] Significantly, however, the Court of Appeal in *B*, like the House of Lords in *Daly*, was also careful to distinguish this greater intensity of review from a full 'merits review,' by accepting that within the court's own assessment of proportionality, a degree of deference might be due to the IAT's appraisal of certain aspects of the merits of the decision.[46] Characterising proportionality as a question of law for the court to decide was not inconsistent with paying 'proper regard' to the IAT's view. The question, however, was what such a 'proper regard' involves. The Court of Appeal in *B* began to answer this important question by distinguishing between different aspects of the IAT's decision according to whether it (the court) was 'as well placed as that tribunal' to evaluate them.[47] It held that findings of primary fact derived chiefly from oral testimony were to be treated with the respect always accorded to such findings by appellate courts,[48] but in relation to all the other aspects of the IAT's decision (inferences of fact, propositions of law, and reasoning leading to its conclusion), it held that the court was as well placed as the tribunal to decide what to make of them.

The approach adopted by the Court of Appeal in *B* is a good example of the 'due deference' approach being applied in a context, deportation for the public good, in which traditionally courts have generally preferred to adopt a submissive stance rather than subject decisions to proper scrutiny for justification.[49] Although proceeding on the premise that the proportionality of an interference with a Convention right is a question of law for the court, it nevertheless preserves the notion of 'due deference' to a primary decision-maker where it is warranted, and seeks to articulate the reasons why some degree of deference may be due to a decision-maker on certain aspects of its decision.[50] This, not the spatial approach, is the approach which follows from the House of Lords decision in *Daly*.[51]

[45] *Ibid* at paras 6, 18, 31, 36 and 47.

[46] *Ibid* at para 18.

[47] *Ibid* at paras 25–27.

[48] See Sedley LJ at para 26; Simon Brown LJ at para 47: in forming its own view on whether the proportionality test is satisfied, the court 'will give such deference to the IAT's decision as appropriately recognises their advantage in having heard the evidence.'

[49] In *R v Secretary of State for the Home Department, ex parte Isiko* [2001] UKHRR 385 at paras 30–31, the approach in *Mahmood* was expressly preferred by the Court of Appeal over the approach in *B*; but this does not survive *Daly*, as *Isiko* is one of the examples cited by Lord Steyn, [2001] 2 WLR 1622 at 1634F, para 25, of the passage from *Mahmood* being followed by other courts.

[50] See in particular Sedley LJ's formulation at [2000] Inn AR 478, para 18, in terms of 'how much deference is due to the IAT's appraisal of [the merits].'

[51] However, notwithstanding the very clear correction of the *Mahmood* and *Isiko* approach by the House of Lords in *Daly*, the Court of Appeal in *R (on the application of Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2001] UKHRR 1139 has reverted to this context to the approach of recognising a 'discretionary area of judgment' or a 'margin of discretion' in the statutory decision-maker (see paras 29–30 and 35), the effect of which goes a long way towards rehabilitating the *Mahmood* approach. Whether the Court of Appeal's approach in *Samaroo* is compatible with *Daly*, particularly in light of its approving citation of the very passages from the High Court's decision in *Samaroo* that were cited by Lord Steyn in *Daly* [2001] 2 WLR 1622 , at 1634F para 25, as examples of the erroneous *Mahmood* passage being followed by other courts, has yet to be considered by the House of Lords.

The immigration control context also affords one of the most considered attempts so far by an English court to grapple with the question of due deference under the HRA. *International Transport Roth v Secretary of State for the Home Department*[52] concerned a challenge by road hauliers to the penalty regime contained in Part II of the Immigration and Asylum Act 1999 imposing fixed financial penalties on those responsible for clandestine entrants to the United Kingdom (those who arrive concealed in a vehicle). The measures were a response to the large increase in the number of clandestine entrants to the United Kingdom, which had increased from less than 500 in 1992 to more than 16,500 in 1999.[53] The challenge was to the legality of the legislative scheme itself, on the ground that it was in breach of ECHR Article 6(1) and Article 1 of Protocol 1, and it rested on features of the scheme which it was argued were disproportionately burdensome on carriers: first, the burden of establishing blamelessness lies on them; secondly, the penalty was fixed, there being no flexibility whatever either for degrees of blameworthiness or mitigating circumstances; and thirdly, there was no provision for compensation even where a carrier was eventually determined not to be liable but his vehicle had been detained in the meantime.[54]

The Court of Appeal, by a two to one majority, upheld the declaration of incompatibility awarded by Sullivan J below. Not surprisingly, in a case involving a direct assault on the compatibility of primary legislation in an area of great political sensitivity, and in which the evidence of the effect of the legislation showed that it had been effective in achieving its goal of reducing the number of clandestine entrants, the case produced a careful consideration of the question left open in *Daly*: when should courts defer to democratic decision-makers and when is it appropriate for them to interfere with their decisions? On this question, although Laws LJ's dissent contains the most detailed treatment, it will be argued that his analysis, while containing certain truths, ultimately fails to escape the conundrums in which the modern day Diceyan remains trapped, whereas the analysis of Simon Brown LJ contains important insights which begin to lay the foundations for the future development of a 'due deference' approach.

The prominence given to the question of deference in Laws LJ's dissent reflects his entirely correct perception that the development of principle to assist in determining the degree of deference which ought to be paid to democratic decision-makers[55] is one of the most important challenges which the common law must meet.[56] For him, the issue at the heart of the case was what was the quality of any deference owed by the courts to the legislature in deciding whether the legislation

[52] [2002] EWCA Civ 158, [2002] 3 WLR 344.

[53] *Ibid* at para 1.

[54] *Ibid* at para 24.

[55] Laws LJ's analysis focuses exclusively on *democratic* decision-makers. The problem of when to accord due deference in administrative law generally is much wider than this, including as it does administrative tribunals and other primary decision-makers (eg planning inspectors, special educational needs tribunals) who may not be democratic or otherwise politically accountable but have an expertise in their area.

[56] [2002] 3 WLR 344 at para 75.

violated the carriers' Convention rights, and this was therefore an opportunity to try to identify the principles according to which the proper degree of deference to the legislature falls to be measured. After reviewing some of the formulations in the main cases to have considered the question,[57] Laws LJ sought to draw together 'the principles now being developed by the courts for the ascertainment of the degree of deference which the judges will pay, or the scope of the discretionary area of judgment which they will cede, to the democratic powers of government.'[58]

He identified four such principles:[59] first, greater deference will be paid to Acts of Parliament than decisions of the executive or subordinate measures; secondly, there is more scope for deference where the right at stake is qualified and therefore the ECHR itself requires a balance to be struck; thirdly, greater deference will be due where the subject matter is peculiarly within the constitutional responsibility of the democratic powers; and fourthly, greater or lesser deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts. Applying these principles to the case at hand, he held that the assessment of the evidence as to the pressing need for effective control on clandestine entrants to the United Kingdom is 'obviously far more within the competence of government than the courts.'[60]

There is much in Laws LJ's analysis in *Roth* which would be present in a proper 'due deference' approach. He correctly identifies the centrality of the deference question for contemporary public law. He begins to identify some of the sorts of factors that are undoubtedly of great relevance to the deference inquiry: what is the degree of democratic accountability of the decision-maker being reviewed; what is the nature and importance of the right which is at stake; and what is the relative expertise of courts and decision-makers in the particular context? He also explicitly talks in terms of 'degrees of deference,' making clear that the amount of deference which ought to be paid to any particular decision is likely to vary according to a number of different factors.

Yet Laws LJ's approach leads him to a conclusion which is striking in its submissiveness to Parliament and the executive: in concluding that the assessment of these matters ('the social consequences which flow from the entry into the UK of clandestine illegal immigrants in significant numbers') is obviously far more within the competence of government than the courts,[61] and that the principles of deference in this case require the balance struck by the democratic powers to be accepted,[62] Laws LJ effectively abandoned his scrutiny of the justification for the measure before it had begun in any meaningful sense. Whatever the proper outcome to the case ought to have been, it was clearly the sort of case which required the application of a judicial methodology for carefully testing its justification in

[57] *Kebilene* (above n 27), *Brown v Stott* (above n27), *Lambert* (above n 28) and *Poplar v Donoghue* [2002] QB 48 (none of them, it will be noted, administrative law cases in the classic sense).

[58] [2002] 3 WLR 344 at para 81.

[59] *Ibid* at paras 83–87.

[60] *Ibid* at paras 87, 109.

[61] *Ibid* at para 87.

[62] *Ibid* at para 107.

order to determine its legality. If 'the principles of deference' operate to pre-empt effective scrutiny of justifications for decisions interfering with Convention rights, we shall indeed have lost Lord Steyn's important first insight in *Daly* that the key to the effective protection of Convention rights in our contemporary constitution is to subject the exercise of all public power to a rigorous process of public justification of the reasons for that decision.

This raises the question whether there is something about Laws LJ's approach to deference which leads inevitably to an unduly submissive approach by courts. The answer, it is suggested, lies in the premises from which he proceeds, which are set out in the preamble to his judgment and reveal a strong attachment to an ultra-Diceyan universe of co-existing supremacies, separation of powers and territorial divisions between constitutional actors.[63] Laws LJ's entire analysis in *Roth* is posited on a supposed antithesis between a system based on parliamentary supremacy on the one hand and a system based on constitutional supremacy on the other. In the former, which it is said the British system was, pure and simple, until not very long ago, Parliament is sovereign and constitutional rights cannot exist. In the latter, the Constitution, of which the courts are guardians, is sovereign, and parliamentary supremacy cannot exist. The British system in its present state of evolution is said to be at an 'intermediate stage' between these two: Parliament remains the sovereign legislature, but the common law has come to recognise and endorse the notion of constitutional or fundamental rights, now given a democratic underpinning by the HRA. This is said to give rise to an inevitable tension between the maintenance of legislative sovereignty and the vindication of fundamental constitutional rights. Deference is one of the means by which courts seek to mediate between these respective claims in our 'intermediate Constitution.'

As an eloquent exposition of the modern-day Diceyan position this could not be bettered: it rests upon a conception of the rule of law which seeks to accommodate within the same account both the sovereignty of Parliament and the sovereignty of judges in upholding constitutional rights. But these premises are a fundamentally unstable basis on which to attempt to construct a coherent theory of judicial review, and, it is suggested, they inevitably commit the modern-day Diceyan to an approach to deference which is likely to pre-empt effective scrutiny, for at least two reasons, both of which are apparent from Laws LJ's reasoning in *Roth.*

First, the prior assumption of an antithesis between constitutional rights and parliamentary sovereignty leads to a mischaracterisation of the nature of the adjudicative task when a court has to decide whether power has been exercised incompatibly with a constitutional right. Laws LJ describes this adjudicative task as a matter of balancing the claims of the democratic legislature on the one hand and the claims of the constitutional right on the other. But in rights adjudication, properly understood as Lord Steyn envisaged it in *Daly*, there is no such antithesis: assessment of the claims of the democratic powers is integral to the court's assess-

[63] *Ibid* at paras 69–79.

ment of whether the right has been violated. The court does not decide, first, the claim of the individual constitutional right (independently of democratic considerations) and then, having done so, weigh them against the claims of the democratic legislature. To proceed from this assumption is to overlook one of the single most important features of current constitutional arrangements, which is that Parliament, in the HRA, has committed itself and also the executive and the administration to act compatibly with Convention rights in everything they do. In short, the deference question arises as an integral part of the court's assessment of legality.

Secondly, Laws LJ's premises commit him to an explicitly territorial approach to the constitutional division of powers between the courts and democratic decision-makers: certain subjects, such as the defence of the realm and the security of the state's borders (including immigration control), are said to fall within the special constitutional responsibility of the executive, and certain other matters, such as criminal justice, within the special responsibility of the courts.[64] The amount of deference which is appropriate will be influenced by whether the content of the measure in question is within one or other of these areas of special responsibility. The problem with this approach is that the areas of special responsibility are defined by reference to subjects which cut across each other: so, for example, the question of what is required for a fair hearing (which is peculiarly within the province of the courts) may arise in the area of immigration policy which is peculiarly within the province of the executive.[65] Indeed, the questionable utility of this attempt to differentiate areas of responsibility is shown by the fact that one of the special constitutional responsibilities that Laws LJ attributes to the courts is 'the maintenance of the rule of law'.[66] A more transcendent responsibility it is hard to imagine.

By contrast, Simon Brown LJ's approach to the question of deference in *Roth* is much less threatening to the *Daly* commitment to law as justification, because it does not pre-empt effective scrutiny. Crucially, Simon Brown LJ regards the question of how much deference ought to be accorded to a decision-maker as an integral part of determining legality. His starting point in *Roth* was that he recognised a high degree of deference due by the court to Parliament in determining the legality of the scheme, but against the background assumption that under the HRA courts cannot abdicate their function as the guardian of human rights and accordingly must interfere if satisfied that the legislature has overstepped the limit of what is justifiable.[67] But crucially, and in keeping with Lord Steyn's landmark judgment in *Daly*, the court can only know if Parliament has overstepped that limit if it conducts a proper scrutiny of the justifications for the decisions (some-

[64] The underlying territorial notion manifests itself in the language used: at one point, for example, (*ibid* at para 86) Laws LJ states that 'there are no tanks on the wrong lawns.'

[65] As pointed out by Jonathan Parker LJ, *ibid* at para 139. In *Carson v Secretary of State for Work and Pensions* [2003] EWCA Civ 797 (17 June 2003) at para 73, Laws LJ appears to have accepted this: 'the powers of the courts and the powers of the other branches of government, if they do not overlap, at least may operate in the same field, they are not marked off by walls without windows.'

[66] *Ibid* at para 85.

[67] *Ibid* at paras 26–29.

thing which Laws LJ's approach prevented him from doing). Having carried out that scrutiny, and 'affording all such deference as I believe I properly can to those responsible for immigration control and for devising and enacting the legislation necessary to achieve it,' Simon Brown LJ felt that he had no alternative but to find the legislative scheme unfair to carriers in the sense that it imposed an excessive burden on them for the pursuit of the social goal, and he therefore agreed that a declaration of incompatibility should be granted.

In stating that he had accorded all such deference to Parliament and the executive as he believed he properly could, Simon Brown LJ was clearly presupposing that deference is not a matter of submission to democratic decision-makers in areas of policy which are peculiarly within their responsibility, but rather is something which has to be earned by the primary decision-maker, and the degree to which it is earned depends on a variety of factors which the court has to weigh carefully in reaching its overall decision as to how much respect is deserved. Although by no means articulated exhaustively, the factors which Simon Brown LJ clearly took into account in reaching his conclusion on deference included the importance of the social goal being pursued and the fact that Parliament and the executive are democratically accountable.[68] Ultimately, however, although these factors appeared to lean in favour of upholding the balance struck by Parliament, they were not sufficiently weighty to earn the court's respect given the extent of the interference with the rights of the carriers.

Gypsies and the Law of Town and Country Planning

Another context in which the question of how courts should approach the deference question arises in an acute form is that of the law of town and country planning as applied to Gypsies. On the one hand, town and country planning is a context (in the broad sense) in which the courts have traditionally been reluctant to interfere with decisions of planning inspectors, for a combination of reasons including the extent of public participation in the modern plan-making process, the further opportunities to challenge decisions in a well-developed appellate structure, the expertise of planning inspectors, and the democratic accountability of both local planning authorities and the Secretary of State responsible for the planning system. On the other hand, important and fundamental rights of Gypsies are at stake in planning decisions concerning where they may station their caravans. Because their traditional way of life involves an itinerant lifestyle, which has

[68] In deciding on the degree of deference which was due, Simon Brown LJ does not appear to have explicitly taken into account as a factor the degree to which ministers in Parliament had sufficiently considered the possibility of achieving the same objective by other means. This was a factor which was, rightly, taken into account by Sullivan J at first instance at paras 170–73. Laws LJ, on the other hand, at [2002] 3 WLR 344, para 114, expressly ruled it out as a relevant factor on the basis that for a court to evaluate the quality of ministerial evaluation of the policy options would contravene Article 9 of the Bill of Rights 1688, a position now approved by the House of Lords in *Wilson and Others* v *Secretary of State for Trade and Industry* [2003] UKHL 40.

now been recognised as being an integral part of their ethnic identity,[69] administrative decisions about whether or not to grant them permission to station their caravans in a particular place, or whether or not to enforce against them if they are camped on land without authorisation, are decisions which unavoidably impinge on the important cultural rights of a minority as well as on the fundamental right of the individuals themselves to respect for their home and family life. Given these competing pulls towards and away from deference, how should courts approach their task of deciding such cases?[70] Two recent decisions in this context demonstrate well the contrast between the possible approaches to the deference question.

Buckland and Boswell v Secretary of State for Environment, Planning and the Regions was an appeal by two Gypsy families under section 288 Town and Country Planning Act 1990 against a refusal to grant temporary planning permission for the use of a Green Belt site for the stationing of caravans.[71] An inquiry was held, and the planning inspector visited both the site itself and other Gypsy sites. The inspector defined the main issue in the appeal as being:

> whether general or personal need for Gypsy accommodation and the personal circumstances and rights of the Appellants as Gypsies amount to very special circumstances sufficient to outweigh the degree of harm due to inappropriateness in the Green Belt and any other harm in relation to the rural location of the site [which was in a Special Landscape Area], the safety of the road access and noise from the M42.[72]

At the beginning of the inquiry, the inspector apparently circulated what the judge described in his judgment as 'a list of the considerations which he believed needed to be covered.' These included (under the sub-heading 'Case Law'), 'Rights as defined in ECHR, especially Arts 2 on education and 8 on respect for family life and home.'

The inspector adopted the conventional framework for making decisions about proposed development in the Green Belt, incorporating the Convention rights of the Gypsies as, in effect, material considerations to be weighed in the overall balance along with other planning factors. Since it was common ground that the proposed development was inappropriate to its location in the Green Belt, the Inspector proceeded on the basis that the proposed development could only be justified by very special circumstances sufficient to override harm by inappropriateness and any other adverse planning effects. He concluded that there were:

> no very special circumstances, by way of need for Gypsy accommodation or the personal needs or circumstances of the Appellants, sufficient to outweigh the harm that would

[69] *Chapman v United Kingdom* (2001) 33 EHRR 399 at para 73.

[70] The issue may come before a court in a number of different ways: for example, on an appeal against an enforcement notice (under the Town and Country Planning Act (TCPA) 1990, s 288) or a refusal of planning permission (under TCPA, s 289) where an inspector has refused the first level appeal; on an application for an injunction to restrain a breach of planning control (under TCPA 1990, s 187B); on an application for a possession order under CPR Pt. 55; on an application to commit for contempt for breach of an injunction or other order. Although there are many procedural routes, the issue will very often be the same.

[71] [2001] EWHC Admin 524, [2001] 4 PLR 34.

[72] *Ibid* at para 4.

> occur for the duration of the permission sought due to inappropriateness in the Green Belt, the detrimental impact on the Special Landscape Area, and the threat to road safety.[73]

One of the grounds of appeal to the High Court was that the inspector had misdirected himself on the issue of proportionality. It was argued that the inspector had to consider whether the interference with the claimant's Article 8 rights was proportionate, and that it was a consequence of the House of Lords decision in *Daly* that on a section 288 or 289 appeal the High Court should satisfy itself that the right balance had been struck by the inspector. Sullivan J unequivocally rejected that submission.[74] Relying on the elliptical paragraph 28 of Lord Steyn's speech in *Daly*, he held that town and country planning was a different 'context' from that of prisoners' rights, and one in which it was not appropriate for the appellate court to decide for itself whether the right balance had been struck:

> 'Striking that balance was a matter for the inspector, using his own planning expertise in the light of all the evidence, including, most importantly in so many planning cases, the site visit'.[75]

Invoking the House of Lords decision in *Alconbury*, upholding the limited scope of rights of appeal to the courts in planning cases, and the approach of the European Court in *Chapman*, he held that it was entirely compatible with Article 8 for the inspector to adopt the conventional Green Belt approach to the case, because the balancing exercise required by that Article was incorporated into the balancing exercise which was carried out in the application of the conventional approach. What mattered was not whether the word 'proportionality' was mentioned in the decision letter, but whether the inspector had in fact carried out the requisite balancing exercise.

The decision in *Buckland and Boswell* is a practical example of the approach to deference grounded in a formalistic notion of the separation of powers. The reason for Sullivan J's unhesitating rejection of the argument that the court should satisfy itself that the right balance had been struck was that he considered that it would be 'to embark on a merits review.'[76] He could see nothing between forbidden merits review and the traditional approach. As a result, he treated the question of compatibility (whether there had been a violation of Convention rights) as a matter exclusively for the inspector.[77] The reasons he gave for this were a combination of reasons of institutional competence and constitutional legitimacy. The considerations articulated by the European Court in *Chapman*, which underpinned its recognition of a presumptively wide margin of appreciation, were said by Sullivan J to apply equally to the ability of the High Court to review inspectors' decisions.[78] Like the European Court, the High Court does not do site visits, does

[73] *Ibid* at para 15.
[74] *Ibid* at paras 46–59.
[75] *Ibid* at para 59.
[76] *Ibid* at para 56.
[77] *Ibid* at para 59.
[78] *Ibid* at para 57.