The Reformation of English Administrative Law

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Abstract: This article examines the process of constitutionalisation that is ongoing in English administrative law. It does so by focussing on two key questions which, although hitherto largely overlooked by commentators, are beginning to receive attention in the courts. The first question – the 'sin' of omission – relates to the question of how the courts should respond when an agency has not consciously approached a decision through a rights-based framework. The second question – the 'sin' of commission – asks how courts should respond when an agency explicitly reaches a decision on the basis of rights and proportionality. The answers we give to these questions will help to define the nature of the emerging 'culture of rights'. Staking out a position against 'hardline' proponents of rights-based judicial review, I suggest, first, that agencies should not be placed under a duty to articulate decisions through a rights-based framework and, second, that some provisional weight should be accorded to an agency's own assessment of the rights issues at stake.

governance.[2] Two specific questions concerning the relationship between courts and agencies are addressed: first, whether courts should impose a general duty on public authorities to articulate their decisions in the language of rights and proportionality; second, whether courts should give any weight to public authorities' proportionality and rights-based assessments. The way we respond to these questions will do much to determine the kind of 'culture of rights' we expect the new order of administrative law to foster.[3]

THE 'CONSTITUTIONALISATION' OF ADMINISTRATIVE LAW

Dyzenhaus, Hunt and Taggart argued that we are experiencing an epochal moment within administrative law, [4] central to which is the development of a general 'principle of legality'.[5] This principle imposes 'both a duty on administrative decision-makers to give reasons for their decisions and a duty on judges to defer to those reasons to the extent that they refrain from reviewing on a correctness standard', and it functions 'as a constitutional principle, one that will in a sense constitutionalise administrative law.' While these observations are intended to apply to much of the common law world, the thesis has particular resonance in the domestic sphere, especially since the introduction of the Human Rights Act 1998. This new mode of 'constitutionalised' judicial review calls, the authors say, for a 'different methodology' which has at its heart the idea of instilling a 'culture of justification' within government and public administration: 'The notion of justification, as distinct from explanation, implies that the reasons supporting a decision be "good" reasons, and this in turn requires norms or rules for determining what counts as a "good reason"'.[6] The substantive turn in

[2] In doing so, I adopt a broad conception of administrative law as the body of law which 'establishes both primary rules governing how the administration is authorized to work (its organization, powers, and procedures), as well as the secondary rules governing remedies (judicial and other) available in cases of a failure to observe the primary rules.' (J.S. Bell, 'Comparative Administrative Law' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 1261.) See also, e.g., R.A. Stewart, 'Administrative Law in the Twenty-First Century' (2003) 78 *New York University Law Review* 437, 438: 'In liberal democratic societies, administrative regulation is itself regulated by administrative law. This law defines the structural position of administrative agencies within the governmental system, specifies the decisional procedures those agencies must follow, and determines the availability and scope of review of their actions by the independent judiciary. It furnishes common principles and procedures that cut horizontally across the many different substantive fields of administration and regulation.'

[3] See, e.g., C. O'Cinneide, 'Democracy, Rights and the Constitution – New Directions in the Human Rights Era' (2004) *Current Legal Problems* 175, 187-188: 'the HRA [Human Rights Act 1998] not only enables courts to consider rights arguments, it also induces a "rights orientation" in how democratically derived powers are interpreted and applied.'

[4] D. Dyzenhaus, M. Hunt and M. Taggart, 'The Principle of Legality in Administrative Law: Internationalisation and Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5.

[5] See, e.g., *R* v *Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, at [131] (per Lord Hoffmann).

[6]

administrative law undermines any pre-existing 'hard-and-fast distinction between process and substance' and generates a process of 'constitutional balancing' in which rights are weighed against the reasons offered in defence of governmental action that might be said to infringe them. International law also has an increased role within this new administrative law, since international legal norms both offer a 'good steer' as to the nature of the values that underpin the culture of justification and provide a 'powerful legitimating force'.[7]

Aspects of this analysis have been developed elsewhere. Taggart has argued that the new methodology outlined in the co-authored article is now 'firmly in place': administrative law in countries like the UK and New Zealand is 'in the throes of adjusting' to an enhanced role. The classic model is being reinvented, the emblematic move being the replacement of *Wednesbury* unreasonableness with the doctrine of proportionality.[8] In place of review based ostensibly on *ultra vires*,[9] courts now demand 'justification of alleged rights-infringing behaviour and the adoption of a constitutional methodology of proportionality, balancing of rights and interests, and reasoned elaboration.'[10]

principle of institutional separation but as 'the realisation of, in Kantian terms, a republican ideal', a process that entails in its application that 'violations of the rule of law are to be determined by looking at the substantive values that the separation of powers are supposed to protect rather than to whether the particular arrangement of powers in a legal order has been disturbed.'[13]

This article accepts the central thrust of this constitutionalisation thesis. It works from the assumption that there has been a substantial reworking of the traditional English model of judicial review,[14] a central feature of which has been a 'normative turn'[15] and a concomitant shift in emphasis from procedural to substantive review.[16] The primary doctrinal move in this development – for which the Human Rights Act was the catalyst – has been the adoption of the proportionality test and the (at least partial) abandonment of *Wednesbury* unreasonableness.[17] Commentary on this development, both academic and judicial, has tended to revolve around the idea of 'deference': that is, the leeway or discretionary room for manoeuvre that the court grants a public authority on account of its expertise or authority. The development of notions of deference, as Hunt explains, can be seen as the flip-side of the courts' 'unequivocal embrace' of proportionality.[18] In what follows, I address two questions which, as well as being central to the specification of the 'culture of rights', require us to consider the relationship between public authorities and the courts in this new context.

PROBLEM 1: THE "SIN" OF OMISSION?

The first problem, which I call the (putative) sin of omission, centres on the question of how the courts should respond when an agency has not consciously

[13] *ibid*, 151-2.

[14] See C. Harlow, 'A Special Relationship? American Influences on Judicial Review in England' in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (Oxford: Clarendon Press, 1995) 83-86, which lists the features of the classic English model as: absence of any substantive distinction between public and private law; restricted grounds of review coupled wit a strict application of the doctrine of precedent; highly individualistic orientation and conspicuously marked by judicial restraint; interest-oriented, a fact reflected in the law of *locus standi*; remedy-oriented. See also 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* (Oxford: Oxford University Press, 2003) 116-118.

[15] D. Dyzenhaus, 'The Politics of the Question of Constituent Power' in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2007) 135.

[16] See, e.g., T.R. Hickman, 'The Reasonableness Principle: Reassessing its Place in the Public Sphere' (2004) 63 CLJ 166, 185-188.

[17] See, e.g., *Daly*, n 8 above; *The Association of British Civilian Interests – Far Eastern Division* v *Secretary of State for Defence* [2003] EWCA Civ 473, [34] & [35], where Dyson LJ remarked that it will not be long before someone steps up to perform the burial rites for *Wednesbury*. Cf *R* v *Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418 (where the House of Lords applied both proportionality and *Wednesbury*); M. Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' [2002] Judicial Review 97.

[18] M. Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs a Concept of "Due Deference"' in Bamforth and Leyland, n 1 above, 340-341. Hickman (n 16 above, 171-172) argues that *Wednesbury* unreasonableness and ultra vires 'were employed to conceal the development of administrative and public law in a cloak of moral neutrality'.

The issue of justification under Art. 9(2) was also considered, and the court held that the limitation on Begum's right to manifest her religion was justified. Lord Bingham criticised the procedural approach of the Court of Appeal to this question. The focus of decision-making under the HRA, he said, was not on whether a decision is the product of a defective process, but on whether the applicant's rights have been violated. Proportionality must be judged objectively by the court, and a proceduralist approach would introduce a new formalism into administrative practice.[25] Lord Hoffmann's criticism was more direct: Article 9 is concerned with substance, not procedure and it confers no right to have a decision made in any particular way. 'What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2?' Public authorities – in this instance, headteachers and school governors – 'cannot be expected to make such decisions with textbooks on human rights law at their elbows.'[26]

The issue has been considered elsewhere. *Kay v Lambeth* involved a number of appeals against dispossession orders issued by certain local authorities. In each of these cases, claimants had raised a defence on the basis that their occupancy was protect by the right to respect for the home guaranteed by Article 8 of the Convention. A central issue before the House of Lords was whether local authorities must prove in every case for dispossession that domestic law meets the requirements of Article 8. The House of Lords rejected this contention, their Lordships making it clear that local authorities should not be placed under an obligation in this context to make decisions through an ECHR prism. Lord Bingham said that, where a public authority seeks to evict a person from premises, 'that person must be given a fair opportunity to contend that the excepting conditions in article 8(2) have not been met on the facts of his case.' He did not accept, however, 'that the public authority must from the outset plead and prove that the possession order sought is justified. That would, in the overwhelming majority of cases, be burdensome and futile. It is enough for the public authority to assert its claim in accordance with domestic property law.'[27] Lord Nicholls agreed, rejecting the claimant's proposal on the basis that it 'would be a recipe for a colossal waste of time and money'. Courts should proceed, he said, on the assumption that domestic law is compatible with Art. 8.[28] Sensitivity towards the political context in which housing policy is made played a part in the decision. Lord Bingham observed that 'housing legislation strikes a balance between the competing claims to which scarcity gives rise, taking account, no doubt imperfectly but as well as may be, of the human, social and economic considerations involved.' The legal framework under which local authorities operate is therefore 'likely to satisfy the article 8(2) requirement of proportionality

[25] *ibid*, at [29-31].
[26] *ibid*, at [68].
[27] *Kay* v *London Borough of Lambeth* [2006] UKHL 10, at [29].
[28] *ibid*, at [55].

Another target of Allan's criticism is Laws LJ's judgment in *International Transport Roth GmbH*. In what amounts an attempt to create a framework for the calibration of deference, Laws LJ specified four principles for determining the level of deference owed by a court to a public authority. First, more deference should be shown an Act of Parliament than to a subordinate measure or executive decision. Second, there is more scope for deference 'where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified'. Third, greater deference is owed where the subject-matter is within the constitutional responsibility of the decision-maker, and less when it lies within the constitutional responsibility of the courts. Fourth, the degree of deference also depends on whether the subject-matter lies within the expertise of the decision-maker or the court.[35] Allan finds this and like approaches objectionable largely because he sees the very notion of deference as 'non-justiciability dressed in pastel colours.'[36] Judicial deference, he says, is either an empty or a pernicious doctrine. It is empty if it 'purports to implement a separation of powers between the courts and other branches of government', since such a separation is secured by 'the proper application of legal principles defining he scope of individual rights'. It is pernicious if 'it permits the abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific cases may well be wrong.'[37] Thus, a judge who allows her own view of a case to be displaced by the contrary view of public officials should be considered to have 'forfeit[ed] the neutrality that underpins the legitimacy of constitutional adjudication.'[38] Considerations not directly related to the right in question – for instance, those that relate to 'characteristics of the decision-maker

a culture of justification is the central objective, then requiring public authorities to

human agency for the objects of regulation. Scott's thesis is that 'each modality of control (with the exception of the fourth) brings with it an accountability template as a more or less spontaneous incidence of the control modality.'[62]

Those who would seek to impose a general duty on public authorities to approach decisions through an ECHR prism call in effect for the imposition of a uniform pattern on the complex structure of contemporary governance, a pattern in which legalistic human rights reasoning would become a primary 'benchmark'. In this new operative framework, other issues and concerns that might justifiably interest agencies (efficiency, policy delivery, risk assessment, innovation, redistributive justice, fairness to all, and so on) would be relegated. This solution may appeal to those who share the *über*-liberal dream of realising 'in Kantian

conclusion about rights and proportionality? When a public authority has examined and reached a decision at least partly through a consideration of its impact on Convention rights, the reviewing court is faced with a choice: either it can ignore the authority's own assessment of rights and proportionality, or it can give some – at least provisional – weight to that assessment.

This issue – which I will call this problem the (putative) *sin of commission* – has also received attention in the cases. Much of the discussion to date has been conducted in the language of *deference*.[66] The most elaborate analysis of this sort was Laws LJ's painstaking attempt in *International Transport Roth* to delineate general principles of deference, referred to in the previous section.[67] The House of Lords has generally been more reticent. Lord Hoffmann, while noting the 'current popularity of the word 'deference' to describe the relationship between courts and other political bodies', did not think that 'its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening.'[68] These comments are echoed in the recent Report of the House of Lords in *Huang v Secretary of State for the Home Department*, where the weighing of various factors was said to be not 'aptly described as deference' but rather the 'performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.'[69]

But remarks of this sort only scratch the surface of the 'sin of commission' question, since they relate more to questions of semantics than substance. (The position adopted by the House of Lords to the relevant authorities in its decisions in *Rehman* or *Gillan*, for instance, can only plausibly be described by the word 'deference' or a close synonym.[70]) The substantive issue was explored in *Belfast City Council v Miss Behavin' Limited*, which involved a challenge to the Council's decision to prevent the claimants from opening a sex shop in an area of Belfast. The argument that the decision violated the claimants' Article 10 right to free expression was swiftly rejected.[71] The House was divided, however, on the separate question of what weight should be accorded to the views of public authorities involved in making decisions which are alleged to infringe Convention rights. On one side, Lord Hoffmann sought to extend the scope of the post-*Denbigh* orthodoxy:

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[66] See, e.g., *R* v *DPP, ex p Kebilene* [2002] 2 AC 326, 381B-D (per L Hope); *A* v *Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, at [37-42] (per L Bingham).
[67] *International Transport Roth GmbH*

> A construction of the Human Rights Act which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous. Either the refusal infringed the respondent's Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of article 10 or the First Protocol.[72]

Other members of the court adopted a different approach. Baroness Hale said that the court is 'bound to acknowledge' that the local authority is better placed to

agency's Act or subordinate legislation is sufficiently unclear to admit of at least two interpretations, and where Congress can be taken to have delegated to the agency the task of filling in the statutory gaps with formal interpretive rulings'. In that situation, 'the court must defer to the agency's interpretation if that is formally promulgated, even if the net effect is to allow an agency interpretation to overturn an earlier and hitherto binding judicial interpretation'.[76] By contrast, English courts have traditionally assumed that it was the duty of superior courts of general jurisdiction to ensure that public power is exercised according to law, an assumption which entailed that courts generally refused to accord any authoritative status, edge or weight to legal rulings from non-judicial officers.[77] The analogy is not intended to be exact: the *Chevron* doctrine applies to vague terms of operative legislation, whereas our focus is on the constitutional or jurisprudential frame in which administrative action should take place.

But supporters of the Hoffmann approach might that the alternative would introduce an unwarranted deviation from English orthodoxy. Some commentators – particularly the e coTJrati

since it removes any legal incentive for an authority to consider and articulate its decisions in rights-conscious terms.

The alternative solution, in which courts attach presumptive weight to an agency's human rights calculations, rejects the 'top-down', court-centred model proposed by Lord Hoffmann and favoured by the hardliners. Sometimes this approach may be justified by arguments relating to constitutional competence. As Lord Bingham expressed it in *R* v *Lichniak* – a case involving a challenge to the mandatory life sentence for murder under the Murder (Abolition of Death Penalty) Act 1965 – '[t]he fact that [the Act] represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled.'[78] It may sometimes be supported on grounds of what Jowell calls 'institutional competence': that the decision-maker under review, for reasons of capacity or expertise, is better placed than the court to consider the issues at stake.[79] But perhaps the strongest argument in its favour is more pragmatic in nature and relates to the objective of developing a culture of rights. While this approach by no means precludes a hardening of the standard of review in suitable cases – in relation, say, to reviewing counter-terrorism laws[80] – it creates a direct incentive for agencies to think through the ECHR prism, since decisions are less likely to be struck down by a court if they are articulated in rights-based terms. Not only would this create a space in which an agency could assume responsibility for the initial translation of rights discourse into the specific administrative context in which the agency operates. It would also take an agency's assessment of rights and proportionality seriously, thereby opening up the possibility of some sort of exchange – or 'dialogue' – on human rights matters between courts and administrators, [81] an unlikely prospect if Lord Hoffmann's top-down model were preferred. Baroness Hale's approach should be favoured, then, mainly because it represents the best route towards inculcating a plausible culture of rights within the structures and pathways of governance. While some might mourn the loss of juridical control that is inherent to this solution, the watering down of legal control should be seen as the price to be paid for securing an administrative culture of rights-conscious justification.

[78] *R* v *Lichniak* [2002] UKHL 47, at [14]. See also, e.g., *Kay* v *Lambert*, n 27 above, at [33] & [35] (per L Bingham); *R* v *Lambert*

TOWARDS A CULTURE OF RIGHTS: BUT WHICH?

This article has examined two questions, the answers to which will help determine the shape of the emerging 'culture of rights'. The first question asks whether a public authority's silence on the question of rights at the decision-making stage

assimilated by human rights, while the other approach articulates a conception of administrative law that seeks to accommodate rights and the doctrines that relate to them within a wider conception of administrative justice. These different perspectives generate different understandings of the basic elements of the new order. While some hardliners might re-imagine due process requirements as centring on the duty to articulate one's decisions in rights-based terms, the alternative approach rejects such a course, arguing that the judicial assessment of procedural requirements remains inescapably contextual,[82] and may or may not involve rights. And while hardliners tend to stigmatise considerations other than rights as 'external' to judicial decision-making, the alternative approach insists that (even in cases involving rights) the immediate political and administrative context surrounding impugned decisions remains vital for judicial consideration.[83] More significantly, these two models also tell different stories about the process of juridification that necessarily accompanies the introduction of legally enforceable human rights.[84] For the hardliners, the court stands at the heart of a system of rights-based constitutional politics and any public authority can in principle be called before the court to give an account of its decision-making in terms relating to the rule of law, understood in its 'thick' or value-laden sense.[85] From this hub, principles of legality and equality are expected to radiate outwards (or downwards) across the range of public administration. Objecting to a court-dominated model that would turn the age of rights into an 'era of scholasticism'[86] in which public administrators are obliged to work their way through a legalistic maze, advocates of the other approach tend to be more empiricist in outlook and ecumenical in attitude. They suggest, that is to say, that the starting point for courts developing the new administrative law should be an awareness both of the difficulty of trying to situate rights within the multiplicity of existing governance structures and of the desirousness of taking seriously the agency's attempt to work out for itself what rights mean.

[82] See, e.g., *Bushell* v *Secretary of State for the Environment* [1981] AC 75.
[83] See also T. Poole, 'Legitimacy, Rights and Judicial Review' (2005) 25 OJLS 697.
[84] See M. Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003) 131, in which juridification is defined is 'the tendency to conceptualize extensive spheres of public life in legal terms.' See also J. Habermas, *The Theory of Communicative Action, Vol. 2* (Cambridge: Polity, trans. T. McCarthy, 1989).
[85] See, e.g., *Constitutional Justice*, n 32 above.
[86] M. Loughlin, 'Rights, Democracy, and Law' in T. Campbell, K.D. Ewing and A. Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001), 59.