

**Lord Carnwath at the joint UCL-HKU conference 'Judicial review in a changing society', at Hong Kong University  
From Rationality to Proportionality in the Modern Law  
14 April 2014**

**Abstract:** The *Wednesbury* case (1948) established a high threshold for review of actions of public authorities, which was reinforced by Lord Diplock in *CCSU* (1984) in formulating his “rationality” test. In practice judges in the UK courts from 1970 applied a more flexible approach, also developing specific principles for judicial review. In 1987, Lord Bridge introduced the concept of “anxious scrutiny”, implying a more intrusive review in cases involving the right to life or other basic rights. By 2000 the courts recognised the concept of a “sliding scale” of rationality review depending on the nature and gravity of the case. At the same time the Human Rights Act 1998 required judges to apply a test of “proportionality”, derived from the European Court of Human Rights. This lead has been followed in the Hong Kong courts under the Basic Law. There is now little to choose between the two principles. The actual decision in *Wednesbury* would be difficult to justify under the modern law, and its days as an authority may be numbered.

In my early days at the English Bar, back in the early 1970s, *Wednesbury* ruled. I remember being a little surprised that this somewhat obscure town in the West Midlands should have come to play such a central part in our public law. The concept of “*Wednesbury* unreasonableness” had become (and still is) so ingrained in our thinking that we have tended to forget what the case was about.

The *Wednesbury* council had taken upon itself to decree by a licence condition that children under 15 should not be allowed to attend the local Gaumont cinema on Sundays, even if accompanied by their parents, and whatever the nature of the film. That was in spite of the fact that Parliament in the Sunday Entertainments Act 1932 had authorised cinemas to open on Sundays “notwithstanding anything in any enactment relating to Sunday observance.” The council had a general power to impose conditions on

cinema licences. But one might have thought that was intended to allow it to lay down safety standards and the like, rather than impose the council's view of how parents should entertain their own children in their free time.

The cinema's case failed in the Court of Appeal. Counsel for the authority was not even called upon. In a somewhat rambling judgment, Lord Greene MR explained why he thought the argument hopeless. It was based on a misconception of the powers of the court to intervene in such decisions. "Unreasonableness" as a ground of review meant that the authority must direct itself properly in law, calling to its attention matters which it is bound to consider, and excluding irrelevant matters, and it must not reach a decision "so unreasonable that no reasonable authority could ever come to it". It required "something overwhelming". The Wednesbury council were far from that high threshold. "No-one" said Lord Greene "at this time of day could say that the well-being and the physical and moral health of children is not a matter which a local authority... can properly have in mind..."<sup>1</sup> And that was it.

There is no mention in the judgment of any evidence from the council. Apparently the court did not think it necessary to inquire what business it was of the council to be telling parents what to do with their children in their free time - or what expertise the authority had in the matter, or why they thought that Sunday cinema with their parents was such a bad thing for children, or indeed what the children should be doing instead. (Nowadays I think it might be thought to society's advantage if children were prepared to spend time accompanying their parents to cinema on a Sunday, rather than doing their own thing.)

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<sup>1</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223, 229-30

The high point of the *Wednesbury* test – at its most restrictive - can be fixed at November 1984, in Lord Diplock’s restatement in the *CCSU* case of the grounds of judicial review. *Wednesbury* unreasonableness became the second in his trilogy of “illegality, irrationality, and procedural impropriety”.<sup>2</sup> The subject matter was rather more weighty than *Wednesbury* – national security as a reason for removing, without prior consultation, the trade rights of workers at the government’s GCHQ communications centre. The challenge failed. But this time at least the government was expected to provide convincing evidence in support of its case that advance notice would attract disruptive action prejudicial to national security.<sup>3</sup>

There are of course many things in Lord Diplock’s speech to admire. But, as I thought then, his definition of “irrationality” made very little sense at all. Let me remind you:

“By ‘irrationality’ I mean what can by now be succinctly referred to as ‘*Wednesbury* unreasonableness’. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...”

I found this all very odd. “So outrageous”? How, I wondered, could such a subjective and emotional reaction as “outrage” be an appropriate part of the judicial armoury? Dispassionate and objective appraisal are our watchwords. And why “moral standards”? There may be many ways in which the conduct of public authorities can be morally objectionable -

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<sup>2</sup> *CCSU v Minister for Civil Service* [1985] AC 374, 410 (delivered Nov 1984)

<sup>3</sup> *Ibid* p 412H.

bribery, corruption, and so on. Such activities may be illegal, but not because they are “irrational”, still less because judges find them outrageous.

On any view Lord Diplock was setting a very high threshold. In an article in 1993, John Laws (as a very new High Court judge) criticised the irrationality test as unacceptably “monolithic”, memorably equating it with “a crude duty not to emulate the brute beasts that have no understanding”.<sup>4</sup> Professor Paul Craig has observed that, if one takes the Diplock test at face-value, there can be “no pretence of any meaningful substantive review and it is difficult to think of a single real case in which the facts meet this standard”<sup>5</sup>. Even Lord Greene’s famous example of the teacher, sacked by an education authority because he has red hair, does not need judicial outrage to explain it. It is a simple example of taking account of a factor which is irrelevant to the authority’s statutory functions.

Fortunately perhaps judicial outrage did not survive as a test of legality. The word “irrationality” itself has often been used as a synonym for *Wednesbury* unreasonableness, but usually ignoring Lord Diplock’s definition.<sup>6</sup> In the first cases in which the House returned to this subject-matter nothing was said of irrationality, let alone of judicial outrage. In *Preston* (April 1985)<sup>7</sup>, Lord Scarman and Lord Templeman resorted to the language of “unfairness” and abuse of power. In *Wheeler v Leicester CC* (July 1985) Lord Roskill went back to “unreasonable in the *Wednesbury* sense”.<sup>8</sup> In

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<sup>4</sup> Laws *Is the High Court the Guardian of Fundamental Constitutional Rights?* [1993] PL 59, 69, 74

<sup>5</sup> Craig *The nature of reasonableness review* Current Legal Problems (2013) p 1, 31

<sup>6</sup> But see Lord Sumption’s formulation in *Hayes v Willoughby* [2013] 1 WLR 935 paras 14: “A test of rationality... applies a minimum objective standard to the relevant person’s mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse....” The insertion of the word “outrageous” reads as a deferential nod towards Lord Diplock, but adds nothing to the sense of the formulation. He might as well have said “absence of arbitrariness, capriciousness or perversity”.

<sup>7</sup> [1985] AC 835, 851H (Lord Scarman) 866H (Lord Templeman)

<sup>8</sup> *Wheeler v Leicester CC* [1985] AC 1054.

*Brind* (1991) Lord Ackner applied a novel hybrid, what he called “the *Wednesbury* ‘irrational’ test”, but he said nothing about outrage or logic or morals.<sup>9</sup>

It is also clear that in practice judges at least in more recent times have not felt unduly constrained by Lord Diplock’s definition. In an article in 2004<sup>10</sup>, Professor Andrew Le Sueur looked at a sample of 41 judicial review cases decided in the English courts between January 2000 and July 2003 where decisions were challenged on the grounds of unreasonableness. He found a surprisingly high success rate – 18 out of 41 were successful. I can take one colourful example, involving the somewhat esoteric subject a statutory scheme designed to compensate farmers whose businesses were damaged by the Fur Farming Prohibition Act. The scheme provided compensation for breeding females but not for breeding males. This was challenged by a mink-farmer who pointed out that the former were not much use without the latter, and it was unfair and illogical to distinguish between them. The court agreed. As the judge (Stanley Burnton J) said succinctly: “to state the obvious, breeding requires both male and female animals, (the) justification is irrational”. If the judge was outraged he did not find it necessary to say so. Le Sueur cites plenty of other decisions where the court was able to reach a sensible result without overstating the test.

The editors of the new *De Smith*<sup>11</sup> have similarly signalled a move away from the line taken in earlier editions that unreasonableness “required something ‘overwhelming’ and was therefore rather rare”:

“Trawling through the case law that had developed by the 1990s, we found that there were a relatively large number of cases where the

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<sup>9</sup> *Ibid* p 762E-763A

<sup>10</sup> Professor Andrew Le Sueur *The rise and ruin of unreasonableness?* (2004) : <http://www.adminlaw.org.uk/docs/ALBA-A%20Le%20Sueur%20paper>.

<sup>11</sup> *De Smith’s Judicial Review*, 7<sup>th</sup> Ed (2013) para 11-024

decision was held to be unreasonable. Deeper analysis revealed that in virtually every instance the decision could have been held unlawful on the ground of a much more specific tenet or principle of substantive judicial review (occasionally, but not often, then articulated independently.”<sup>12</sup>

Lord Diplock’s attempted restatement was not in any event a true reflection of how the law had in fact developed in the preceding years since Lord Greene’s judgment. Those were indeed the years of fruitful development of the principles of administrative law. The judges had been finding practical solutions to real cases, and finding distinct legal hooks to hand them on. I can still remember the cases that made a particular impact in my early years in the law. *Padfield* (1968)<sup>13</sup> established the principle that there are no unfettered discretions in public law, and that statutory powers must be used to promote the policy and objects of the statute, to be determined by the courts as a matter of law. Much of what follows can be traced back to that fundamental principle. Others that I remember from that period are: *Lavender* (1970)<sup>14</sup> (no fettering of planning discretion); *Coleen Properties* (1971)<sup>15</sup> (decisions must be supported by substantial evidence); *Congreve* (1976)<sup>16</sup> (abuse of licence revocation powers); *Tameside* (1977)<sup>17</sup> (duty of authorities to inform themselves); the *Hong Kong* case (1983)<sup>18</sup> (legitimate expectation).

In these cases the judges were not applying some generalised test of irrationality or illegality. There was no need to seek to squeeze the cases into one of Lord Diplock’s three categories. Rather the judges’ approach was

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<sup>12</sup> *Ibid* para 11-028

<sup>13</sup> *Padfield v Minister of Agriculture* [1968] AC 997; see also *R v Tower Hamlets LBC ex p Chetnik Developments Ltd* [1988] AC 858, 872 per Lord Bridge.

<sup>14</sup> *Lavender & Sons v MHLG* [1970] 1 WLR 1231

<sup>15</sup> *Coleen Properties v MHLG* [1971] 1WLR 433

<sup>16</sup> *Congreve v Home Office* [1979] QB 629

<sup>17</sup> *Secretary of State for Education v Tameside BC* [1977] AC 1014

<sup>18</sup> *AG of Hong Kong v Ng Yuen Shui* [1983] 2AC 629

much closer to the characteristically pragmatic approach suggested by Lord Donaldson in 1988, by way of a response to Lord Diplock: “the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take”.<sup>19</sup>

That in effect was what we did much more recently in the Court of Appeal, in considering mistake of fact as a ground of judicial review, in *E v Secretary of State* (2004)<sup>20</sup>. We saw that judges at first instance had in practice been overturning administrative decisions for mistake of fact, particularly in planning and immigration cases, without going as far as to say the decisions were perverse or outrageous; and that the higher courts and the academics had not cried foul. So we decided to formulate some principles, based not on unreasonableness or irrationality, but, taking our cue from Lord Templeman in *Preston*, simple unfairness<sup>21</sup>.

Of more interest to modern eyes was Lord Diplock’s suggestion in *CCSU* that further development of the law on “case by case basis” might lead to new additions to his trilogy, such as “the principle of proportionality” as recognised in the laws of other members of the European community.

The seeds of such a development, although not apparent at the time, were sown two years later in the use of another emotion-based phrase, this time by Lord Bridge in an asylum case - *R v Secretary of State ex p Bugdaycay*.<sup>22</sup> What he said was this:

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<sup>19</sup> *R v Take-over Panel ex p Guinness plc* [1990] 1QB 146, 160C

<sup>20</sup> [2004] QB 1044

<sup>21</sup> Taking our cue from Lord Templeman in *Ex p Preston* [1985] AC 835, 865-6 (see above)

<sup>22</sup> *R v Secretary of State ex p Bugdaycay* [1987] AC 514, 531E

“The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.”

The attention later given to this passage might I think have surprised Lord Bridge. Given the care with which his judgments were constructed, I doubt if he intended such an imprecise and subjective term as “anxious scrutiny” to acquire the status of a definition or legal principle. The next important case on this theme in the House of Lords was *Brind* (1991), involving an alleged restriction on free speech.<sup>23</sup> Lord Bridge himself did not say anything about “anxious scrutiny”. Rather he spoke of the need, where “fundamental human rights” are at stake, to “start from the premise that any restriction requires to be justified”, and that “nothing less than an important competing public interest will be sufficient to justify it”.<sup>24</sup> That in modern terms seems very like the language of proportionality, even he did not use that word, and the majority rejected the invitation of counsel to embrace proportionality into the common law.

It is worth reminding ourselves of what was actually decided in *Bugdaycay*. As so often, a particular phrase has acquired a life of its own without regard to its context. It was relevant to only one of the cases, that of Mr Musisi a Ugandan citizen who had come to the UK from Kenya. The Secretary of State accepted that he could not safely be returned to Uganda, but proposed to return him to Kenya. The issue, raised for the first time in the House of Lords, was whether the Secretary of State had reasonably satisfied himself that Kenya would not itself return him to Uganda, as on the applicant's evidence had happened in previous cases. It was not enough for

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<sup>23</sup> *R v Home Secretary ex p Brind* [1991] 1AC 696. The majority declined an invitation by counsel, following Lord Diplock's lead, GCHQ, to apply a proportionality test: pp762E-763A per Lord Ackner.

<sup>24</sup> *Ibid*, 748H-749A



the Home Office's affidavit to express confidence that Kenya would not knowingly act in breach of the Refugee Convention, without addressing the occasions when, according to the applicant's evidence, it had apparently done just that.

Lord Bridge concluded that the Secretary of State's decisions had been taken on the basis of a misplaced confidence in Kenya's performance of its obligations under the Convention. Since the fact of such breaches in the past was very relevant to the assessment of the danger facing the appellant if returned to Kenya, and since the decision of the Secretary of State appeared to have been made without taking that fact into account, it could not stand.

Thus, Lord Bridge was not applying some special, more intrusive version of *Wednesbury* unreasonableness<sup>25</sup>. Rather he was following the conventional approach of asking whether the Secretary of State had taken account of all relevant factors. As Lord Diplock had said in the *Tameside* case, that involves the decision-maker not just asking himself the right question, but taking “reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly”<sup>26</sup>. In that case the Secretary of State was held to have acted unlawfully in interfering with an education decision of the local authority on inadequate information. The case had nothing to do with human rights, but I doubt if Lord Diplock would have regarded his scrutiny of the Secretary of State's action in that case as any less anxious or intense than that of Lord Bridge in *Bugdaycay*.

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<sup>25</sup> See eg *R (Puga) v IAT* [2001] EWCA Civ 931, para 31 per Laws L.J.: “As is well known, in 1987 Lord Bridge said... that these cases need to be approached with anxious scrutiny, given what may be involved. And so they must. But as a reading of his Lordship's speech in that case readily demonstrates, the court's role remains one of review for error of law...”

<sup>26</sup> *Secretary of State for Education v Tameside BC* [1977] AC 1014, 1065B

Whatever Lord Bridge himself intended, the expression “anxious scrutiny” began to acquire a special status in the law. Initially it was picked up by government lawyers, who found it a convenient phrase in seeking to persuade the European Court of Human Rights in Strasbourg of the effectiveness of judicial review as a remedy for human rights violations under the Convention.<sup>27</sup> By 2002 it was being described by Lord Bingham as a “fundamental principle”<sup>28</sup>. It quickly spread beyond cases where the right to life was at stake as in *Bugdaycay*, to human rights in general,<sup>29</sup> including for example the right not to be disturbed in one’s home by aircraft noise.<sup>30</sup> Where it applied, apparently, it was supposed to add some form of potency or rigour to the rationality test. Thus, in a case about the interests of vulnerable children, Dyson LJ spoke of the court having to “consider the issue of irrationality with anxious scrutiny”<sup>31</sup> – an apparent contradiction in terms if he was using irrationality in Lord Diplock’s sense. Anxious scrutiny means little, if nothing short of the outrageous will qualify for intervention.

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By the end of the 1990s there were attempts to rationalise this more flexible approach in rather more sophisticated language. In *ex p Smith* (1996) the applicant was challenging the Ministry of Defence’s policy of barring homosexuals from the armed services<sup>33</sup>. David Pannick QC offered the

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<sup>27</sup> *Vilvarajah v United Kingdom* [1991] 14 EHRR 248, 292, para 126

<sup>28</sup> *R(Thangarasa) v Secretary of State for the Home Department* [2002] UKHL 36 (17 October 2002) [2003] AC 920 para 9

<sup>29</sup> See eg *R v Secretary of State ex p Launder (No 2)* [1997] 1WLR 1839, 867 per Lord Hope

<sup>30</sup> *R v Secretary of State for Transport ex p Richmond LBC (No 4)* [1996] 1 WLR 1460, 1480-1 per Brooke LJ

<sup>31</sup> *R(Hillingdon LBC) v Lord Chancellor* [2008] EWCA Civ 2683 para 67 per Dyson LJ.

<sup>32</sup> Professor Craig in a forthcoming article kindly supplied to me in draft identifies no less than 734 citations of the expression “anxious scrutiny” in Westlaw. He adopts my own explanation of the phrase: “it has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account...”: *R (YH (Iraq)) v Secretary of State for the Home Department* [2010] EWCA Civ 116, para 24.

<sup>33</sup> In the Divisional Court, Simon Brown LJ had observed that, while the Secretary of State’s justification for the ban might seem unconvincing to many, he was unable to find that it was either

court an attractive formulation, (distilled, so it was said, from *Bugdaycay* and *Brind*. It was adopted as such by the Court of Appeal. *Wednesbury* unreasonableness was transmuted into “beyond the range of responses open to a reasonable decision-maker”, but with a new and significant qualification. In the human rights context there was, it was said, a “variable standard of review”: “the more substantial the interference with human rights, the more the court would require by way of justification under the reasonableness test”.<sup>34</sup>

David Pannick’s formula seemed at the time no more than an ingenious way of bridging the gap between *Wednesbury* and Strasbourg, in that awkward period after the influence of the European Convention had begun to be felt in our domestic law but before the Human Rights Act 1998 (which came into force in 2000) had provided an appropriate statutory framework. Once we had the Human Rights Act, it might have been thought, the Pannick formulation was no longer needed. In the human rights context at least, we could have moved to a simple proportionality test in accordance with Strasbourg law.

However by this time the Pannick “variable standard” had grown deeper roots. It had apparently become a common law rule of general application, not confined to the human rights context. Thus in *Begbie* (2000) Laws LJ redefined the *Wednesbury* principle as “a sliding scale of review more or less intrusive according to the nature and gravity of what is at stake”.<sup>35</sup> Or as he put it in *Mahmood* (2001) it was now a “settled principle of the common law”, independent of the Human Rights Act, that “the intensity of

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“outrageous in its defiance of logic” or “wholly incompatible with moral standards”: [1995] 4 AllER 427.

<sup>34</sup> *R v Ministry of Defence ex p Smith* [1996] QB 517.

<sup>35</sup> *R v Department of Education ex p Begbie* [2000] 1 WLR 111, 1130 per Laws LJ.

review in a public law case will depend on the subject-matter in hand”.<sup>36</sup>

Lord Phillips MR (2003) described this process as the development by the courts of -

“...an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity.”

While they would not retake decisions on the facts, in “appropriate classes of case” they would “look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them.”<sup>37</sup>

The difficulty of course was to define the “appropriate cases”. Sliding scales only work if one has measurable standards to which they can be applied; otherwise it is a matter less of sliding scales than (to quote Professor le Sueur once more) of “slithering about in grey areas”.<sup>38</sup>

In parallel with these developments, from 2000 British judges and advocates were having to learn about the concept of “proportionality” as applied in the context of European law, and particularly of the European Convention itself which had become of direct application. I need not take time since the principles are now well settled, and are as familiar to Hong Kong lawyers in the context of the Basic Law,<sup>39</sup> as they are in Europe. Professor Chan explains the concept in his textbook on the Basic Law:

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<sup>36</sup> *R (Mahmood) v Home Secretary* [2001] 1 WLR 840 para 18-19 per Laws LJ. Lord Cooke was ready to abandon *Wednesbury* with its standards defined by the “capricious and the absurd”, recognising that “the depth of judicial review and the deference due to administrative discretion vary with the subject matter”: *R. v Secretary of State for the Home Department Ex p. Daly* [2001] 2 A.C. 532

<sup>37</sup> *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364 para 112, per Lord Phillips MR Cf the Canadian “spectrum of standards”, including inter alia “correctness”, “reasonableness simpliciter”, and “not patently unreasonable”: *Canada (Director of Investigation) v Southam* [1997] 1 SCR 748

<sup>38</sup> Le Sueur *op cit* p 6

<sup>39</sup> See Chan *Law of the Hong Kong Constitution* (2011) para 16.046ff: “Principle of Proportionality”

“It involves the following steps: (a) the identification of the legitimate objective(s) to be pursued by the restriction; (b) establishing a rational connection between the restriction and the achievement of one or more of those legitimate objectives; and (c) a proportionality test, namely that the restriction must be a proportionate response, and must be no more than necessary to accomplish the legitimate purpose in question.”<sup>40</sup>

The key element in this formulation is the third. The first two steps seem little different to the *Padfield* principle, that statutory powers must be exercised for purposes relevant to the objective for which they were conferred, So it is the third step which carries the main weight of the analysis. A striking example of proportionality in practice was the recent decision of the Court of Final Appeal – *Kong Yumming v Director of Social Welfare* (2013)<sup>41</sup>. As you will all know, the issue was the policy by which social security assistance was refused to people who had resided in Hong Kong for less than seven years. This was said to be inconsistent with article 36 of the Basic Law, under which “Hong Kong residents shall have the right to social welfare in accordance with law”. As was common ground<sup>42</sup> any restriction subsequently placed on that right was subject to constitutional review by the Courts “on the basis of a proportionality analysis...”. The challenge succeeded. The court rejected the government’s claim that the seven-year requirement pursued the legitimate purpose “of curbing expenditure so as to ensure the sustainability of the social security system”, in the absence of any convincing evidence as to the level of savings actually achieved and achievable as a result of adopting the seven-year rule (para 140)

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<sup>40</sup> *Ibid*, citing *Leung Kwok Hung v HKSAR* (2005) HKSAR 442

<sup>41</sup> CACV No 2 of 2013

<sup>42</sup> Para 36. (Lord Pannick QC was appearing for the Director)

What I find interesting is the close parallel between Ribeiro PJ's explanation of the proportionality test and the "variable intensity" model of reasonableness review developed by the recent common law cases. Taking his lead from the Strasbourg case-law<sup>43</sup>, he distinguished between cases involving "fundamental rights" or discrimination on grounds such as race, colour or sex, where the court has applied a "minimal impairment" test, subjecting the impugned measure to "intense scrutiny", and requiring "weighty evidence that it goes no further than necessary to achieve the legitimate objective in question". By contrast, where the disputed measure involves implementation of "the Government's socio-economic policy choices regarding the allocation of limited public funds" the Court has a duty to intervene only where the impugned measure is "manifestly without reasonable justification". This case fell into the latter category in which the courts acknowledge "a wide margin of discretion for the Government". However, even applying that test, and after an exhaustive examination of the justification advanced by the government and the evidence supporting it, the court found that it had not been justified.

These parallels between rationality and proportionality were acknowledged earlier this year by a majority of the Supreme Court, in a case about freedom of information under the common law rather than the Convention<sup>44</sup>. The court was at pains to emphasise that the incorporation of the European Convention into English law had not restricted the vigour of the common law, or its ability to develop its own parallel protections for human rights – and that remedies provided by traditional judicial review could be just as effective as those provided by the Human Rights Act. In the leading judgment Lord Mance adopted my own exposition of the variable

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<sup>43</sup> Citing the case-law under the European Convention, as summarised in by Lady Hale JSC in *Humphreys v HMRC* [2012] 1 WLR 1545 paras 16-22

<sup>44</sup> *Kennedy v Charity Commission* [2014] UKSC 20 (26 March 2014)

intensity model in a 2004 Court of Appeal case,<sup>45</sup> (ironically perhaps as I was one of the minority in this case). I had contrasted the high standard required in decisions affecting human rights with the “low intensity” review applied to cases involving issues “depending essentially on political judgment”<sup>46</sup> or on issues where judges are not “equipped by training or experience or furnished with the requisite knowledge or advice”<sup>47</sup>. Lord Mance continued<sup>48</sup>

“54. .... both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages...

55. Speaking generally, it may be true (as Laws J said...<sup>49</sup>) ‘Wednesbury and European review are two different models – one looser, one tighter – of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power’. But the right approach is now surely to recognise, as de Smith...<sup>50</sup> suggests, that it is inappropriate to treat all cases of judicial review together under a

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<sup>45</sup> *IBA Health Ltd v Office of Fair Trading* [2004] EWCA Civ 142, [2004] ICR 1364 para 91ff (agreed by Mance LJ)

<sup>46</sup> Citing *R v Secretary of State, ex p Nottinghamshire CC* [1986] AC 240, and *R v Secretary of State ex p Hammersmith and Fulham LBC* [1991] 1AC 521, where the decisions related to matters of national economic policy, and the court would not intervene outside of “the extremes of bad faith, improper motive or manifest absurdity” ([1991] 1AC at 596-597 per Lord Bridge)

<sup>47</sup> Citing *Brind* [1991] 1AC at 767, per Lord Lowry

<sup>48</sup> Citing Professor Paul Craig *The Nature of Reasonableness Review* (2013) 66 CLP 131),

<sup>49</sup> Quoted in *R v Ministry of Agriculture, Fisheries and Food, Ex p First City Trading* [1997] 1 CMLR 250, 278-279)

<sup>50</sup> De Smith *op cit*, para 11-028

general but vague principle of reasonableness, and preferable to look for the underlying tenet or principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation....”

So, it seems, almost 30 years after *CCSU*, proportionality has crept into the English common law by the back door - not by the explicit addition of a fourth ground to Lord Diplock’s trilogy, as he anticipated, but by the transmutation of the Lord Greene’s strict reasonableness test into something which I suspect neither he nor Lord Diplock would have recognised, a flexible but structured test which is much better adapted to the task of effective and practical judicial supervision of executive action.

To complete the circle, where does this leave *Wednesbury*? I like to think the result on the facts would have been different. True it is that the facts do not fit naturally into the rights/policy dichotomy discussed in the cases considered above. Sunday cinema is hardly a fundamental right, but conversely the decision was not one involving great issues of “socio-economic policy” on which the authority could show particular expertise and the courts should tread with caution. It is not quite clear where it would come in any sliding scale of review. With the help of the Human Rights Act, an English court might analyse it in terms of article 8 of the convention – as a disproportionate interference with the right to respect for family life, and the right of parents to decide how to entertain their own children. But I would like to think that the common law would have found its own solution. Attitudes may have been rather different in the immediate post war period. But nowadays I think we are surely entitled to expect public restrictions on ordinary life, even on something as relatively inconsequential as cinema-going, to be justified.



What of the principle? A lot has been said since then about *Wednesbury*, in recent years much of it critical, but it has never been overruled. In *Daly* (2001)<sup>51</sup> Lord Cooke thought the day would come when it would be recognised that *Wednesbury* was an “unfortunately retrogressive decision in English administrative law”. In *ABCIFER* (2003)<sup>52</sup> Dyson LJ had “difficulty in seeing what justification there is now for retaining the *Wednesbury* test”, but thought that it was for the House of Lords, rather than the Court of Appeal, to perform “its burial rites”. Eleven years on those rites remain unperformed.

I started this paper at the beginning of my professional career in 1970. Over 40 years on, I am now approaching the end. My statutory date of retirement is fixed in 2020, if I last that long. I cannot of course prejudge the cases that may come before us in the Supreme Court, or speak for my colleagues. But I will be interested to see whether by the end of that period we have not finally consigned *Wednesbury* to history.

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<sup>51</sup> *R(Daly) v Secretary of State* [2001] 1 AC 532.

<sup>52</sup> *R(Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] QB 1397