Reconciling the protection of human rights with the principles of administrative law

My Lords, I stand before you this morning with some trepidation. I have addressed larger audiences in the past; I have addressed audiences of judges in the past but I have never addressed an audience of Chief Justices before. Indeed, I have whiled away an idle hour considering what the collective noun of Chief Justices should be. There is, of course, already a "wisdom" of owls. But to the Greeks the owl attended and was the symbol of the goddess Athena, the goddess of wisdom and heroic endeavour. So perhaps the chief justices will accept the appellation "wisdom" for the administration of justice is an heroic endeavour that requires wisdom. A wisdom then of chief justices.

My trepidation flows not only from the distinction of this audience but from its diversity. The SADC states have such different legal systems: legal systems based in or at least very strongly influenced by the modern civil law, the English common law and Roman-Dutch systems will all be found amongst the SADC members. Even more importantly, these legal system vary greatly in their constitutional arrangements; and in particular in the mechanisms their constitutions create for the protection of human rights. What can I say to such a diverse audience that will be relevant to all without at the same time being so general as to attract the reproach that I was teaching my grandmothers to suck eggs.

The position is made worse by the fact that my particular expertise lies these days in English law; and I can talk readily about administrative law and human rights in the United Kingdom. But the United Kingdom's constitution is different in one fundamental respect from, I believe, every SADC constitution: the United Kingdom still recognises the supremacy of Parliament. This means that no court has the "testing right" the power to pronounce a statute as unconstitutional and this has the corollary that, in the final analysis, if this is truly the intent of Parliament, legislation can override even the most fundamental of rights. So in the United Kingdom even our most fundamental rights lie at the mercy of the sovereign Parliament and have been at its mercy

for many centuries. I could spend some time now explaining how the Human Rights Act 1998 ingeniously provided a mechanism for the protection of fundamental rights – by imposing through the wand of legislation an obligation on the courts to interpret legislation "as far as possible" in a way that is consist with the protection of fundamental rights (section 3(1)) – without threatenting legislative supremacy. So when it is not possible to interpret legislation consistently with fundamental rights then the court may do no more than make a declaration of incompatibility …. which may assist the remedying of the incompatibility but does not touch the validity of the legislation. But all this lies only on the periphery of the interests of this audience.[1]

But there is, it seems to me, one vital and common issue that arises in all constitutional orders that seek to uphold human rights. Let me explain it. In addition to the growth of human rights protection that has characterised constitutional developments across the world since the end of the Second World War, the twentieth century has also seen the growth of administrative powers in all constitutions. The modern administrative state across the world reflects the view that it is the duty of government to provide remedies for social and economic evils of many kinds. This is in large measure the consequence of the growth of democracy; the enfranchised population can now make its wants known, and through the ballot box it had acquired the power to make the political system respond. These are sweeping generalisations about constitutional developments and there are many examples of constitutional regression with the breakdown in the rule of law, state repression of human rights, etc, etc...some rather too close to home. But this is the direction of development in which, despite setbacks, the world as a whole is heading.

[1] Until recently, human rights were either protected by the common law, whose principles enshrined many of the rights which are contained in constitutional documents, or alternatively individuals had to take cases to the European Court of Human Rights in Strasbourg, which is the supreme court for the European Convention on Human Rights and Fundamental Freedoms. The UK has been a signatory to the Convention since 1952 and has therefore been obliged under international law to safeguard the rights contained in that document. In 1998 the Government passed the Human Rights Act, which gave individuals the right to challenge breaches of their human rights in the national courts. Like the constitutions of most African countries, the European Convention provides for certain limitations and restrictions of many of the rights it contains. UK judges are now required under the Human Rights Act to decide whether a particular action or decision limited the right in a lawful and permissible way, or whether the limitation was impermissible and the right was violated.

If the state is to care for its citizens from the cradle to the grave, to protect their environment, to educate them at all stages, to provide them with employment, training, houses, medical services, pensions, and, in the last resort, food, clothing, and shelter, it needs a huge administrative apparatus. Relatively little can be done merely by passing legislation. There are far too many problems of detail, and far too many matters that cannot be decided in advance. Under most legal orders no one may erect a building in an urban area without permission, but no system of general rules can prescribe for every case. There must be discretionary or administrative power. And in the modern state vast duties and burdens are cast upon administration and as a consequence vast discretionary powers are vested in ministers, civil servants or other public authorities.

The task of administrative law, in general, is to impose the values of the rule of law upon that exercise of discretionary powers to ensure that that the powers vested in public authorities are not abused. But the particular task of administrative law in the era of human rights protection is to ensure that those powers are not exercised in a way that impinges upon the human rights of those affected.

This can be put more subtly in this way. The relationship between the individual and the state in the area of human rights is paradigmatic of public law. Human rights guarantees are primarily vertical legal obligations - I shall say something further below about the extent to which protection may under some constitutional orders be in part horizontal - owed by the state to the individual. One of the key grounds for judicial review is illegality and the clearest example of this is a failure to comply with express legislative requirements. Administrative actions which do not respect constitutionally or legislatively guaranteed rights are therefore subject to judicial review on this simple basis. Moreover, the concept of the rule of law means that judges are placed constitutionally higher than the executive arm of the state – it is for judges to ensure that the executive complies with the law, and this includes human rights laws. Thus it is ultimately left to the judges to determine whether or not an action or decision of the state complies with legally protected human rights, and judges are therefore at the front line in ensuring human rights protection by virtue of their constitutional roles.

Now at first sight it might appear to be straightforward and easy for the courts simply to police the state's duties to uphold human rights. In the UK

context, for instance, section 6 of the Human rights Act provides that it "is unlawful for a public authority to act in a way which is incompatible with a Convention right." So, it seems, all that is necessary to do is to hold the public authority's conduct up against the clear measure of a Convention right. If it passes that text the public authorities decision stands; if it fails the public authority's decision is quashed. Similar analyses could follow under all constitutional orders that uphold human rights.

But there are two reasons why the judgment of whether an administrative decision in fact should be quashed for breach of human rights is not straightforward. In the first place, there is very often no such thing as a "clear measure" of a Convention right. Views may differ and may differ sharply on whether the right has been breached in particular circumstances. Let me give an example. Article 9(1) of the European Convention on Human Rights and Fundamental Freedoms provides that "Everyone has the right to freedom of thought, conscience and religion...[and the right] to manifest his religion or belief in worship, teaching, practice and observance".

Was article 9 (1) then breached when a school (a public authority) adopted a school uniform policy which denied girl pupils the right to wear the *jilbab* (the long and loose fitting garment worn by some Muslim women that covers the whole body (but does not veil the face)). Instead they could wear the *shalwa kameeze* (including a head scarf). When this question arose in *R (Begum) v. Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100 the House of Lords was divided. The majority (Lord Bingham, Lord Hoffmann and Lord Scott) took the view that there was no breach of Article 9(1). The reason for this was that the girl challenging the school uniform policy had known of the policy when she enrolled at the school and there were other schools which she could attend which would have allowed her to wear the *jilbab*. On the other hand, Baroness Hale and Lord Nicholls took the view that there was (or at least potentially was) a breach of article 9(1). This was essentially on the ground that the choice of school was often not that of the child but the parent, so that the child had not had a free choice of school and so should not have imputed to her the consequence of that choice.

Now it not my task to say which group of their Lordships was right. I give this example simply to show that there is "no clear measure" of what amounts to a breach of a right. Judicial (and other views) can and do differ on whether a right has been breached; and all that will depend upon the detailed

consideration of the detailed facts. So uncertainty abounds; and the judicial task in bringing both justice to the individual and predictability of outcome so that public authorities can order their affairs appropriately in the public interest is very challenging. Of course, it is the common task of a judge in an apex court to have to strike the balance between individual justice and predictability of outcome. But this is particularly difficult in the protection of fundamental rights for these are often phrased in broad general terms leaving much to be filed in by the judiciary.

But, secondly, there is a greater challenge that arises in this area. Where human rights are legally guaranteed, the constitutional order as a general rule allows the right to be limited. This is particularly necessary in the context of second and third generation rights, which are often subject to the availability of the relevant resources. Take the example of the right to "sufficient food and water", contained in section 27(1) the South African Constitution. This is plainly dependant on the availability of resources. To make such a right absolute would place such a large burden on the state as to be impossible to achieve in the short term, making it meaningless. For this reason, the right to sufficient food and water (and rights of a similar nature) in the South African Constitution is subject to the obligation on the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights." We shall return to this issue later.

Even in the context of widely-protected, first generation rights civil and political rights such as liberty, freedom of expression and privacy, it is necessary and inevitable that there will be some permissible limitation or restriction of those rights. One only needs to consider the possible consequences which would flow if limitations could never be permitted to see that restrictions and qualifications are inevitable.

Take first the right to liberty. If no exceptions or limitations could ever be countenanced, one consequence would be that criminals who pose a significant danger to other members of society could never be imprisoned. It would also not be possible to quarantine individuals who have highly contagious diseases. This would clearly be undesirable and would put the rights of other individuals at risk. Second, consider the right of freedom of expression. If it were subject to no limitations this would inevitably result in a denial of any privacy rights, since it would be impossible to restrain publication of any information whatsoever. It would also be impossible to impose criminal sanctions for clearly harmful

forms expression, such as defamatory publications or speeches inciting violence..

Thus there must be some limitations to rights. As the second example just given suggests, sometimes different rights pull in opposite directions, and it may then be necessary to reach a compromise or balance which gives some protection for both rights rather than denying one at the expense of the other. But makes these judgments may be very difficult. A prohibition on making false reports of fire in a crowded theatre will be readily justified in order to protect public safety. But a restriction on the discussion in the press of controversial litigation may sometimes be able to be justified as necessary in the interests of national security (protection of the identity and methods of the intelligence services) or to maintain the impartiality of the judiciary

Of course, some rights are considered to be so important that no limitations can ever be permitted. The most obvious example is the prohibition of torture. Where states have legislated to prohibit torture, it is invariably stated in absolute terms and is not subject to any derogations or limitations that might be otherwise permissible under the relevant law. This is the case under the European Convention of Human Rights as well as under the constitutions of Angola, DRC, Malawi, Seychelles, South Africa, Swaziland, and Zambia. The constitutions of Mauritius, Botswana provide absolute protection, but subject to savings clauses for laws in force before the constitution came into effect.

Given that many human rights which are guaranteed in domestic law must inevitably be subject to some limitations, the question then arises: how do judges decide whether a particular limitation of an individual's right is lawful in the circumstances? Rights are usually limited in order to take into account and respect the competing rights and interests of other members of society, so judicial decision in this context making will tend to involve some way of balancing the competing interests. The task of striking that balance between the competing interests inevitably falls to the judges to decide. Let it be noted that this task is some considerable distance from the task of determining the common law and interpreting statutes that fell to the judiciary in pre-human rights days.

Of course, the judiciary of each different state has to balance these interests in the context of its own constitutional order and, in particular, in the context of the limitation clause in its own constitution. But here is a taste of the

limitation clauses in several SADC constitutions.[2] Angola (article 52): "restrictions shall always be limited to necessary and adequate measures to maintain public order, in the interest of the community and the restoration of constitutional normality." The Constitution of Malawi provides that: "no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society"(section 44(2)). And the South Africa Constitution provides : "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose." (Article 36(1)).

Without wishing to ride roughshod over the diversity of constitutional provision there is much in common in the few limitations clauses mentioned here. The concept of a limitation of a right being "reasonable and necessary" in a democratic society, for instance, is prominent. The purpose of the limitation is obviously also to be subjected to close scrutiny. Express in the South African provision is the requirement that the availability of "less restriction means to achieve the purpose" should be taken into account. Behind the differences of constitutional provision is, it is here suggested, a common challenge. It is the challenge to find a structure within which the judge can decide whether a particular limitation is justified. How is the judge to decide whether a limitation on a constitutionally protected right is justified? It is here that the UK's courts have made a contribution with the development of the "structured proportionality test". And I hope that I can devote some time to consideration of it.

[2] In terms of the structure of fundamental rights legislation, African countries may be divided into two groups: those having a distinct limitation clause in their constitutions (e.g. Angola, Malawi, Mozambique, Seychelles and South Africa) and those without a distinct limitation clause (including Botswana, Mauritius, Swaziland, Zambia and Zimbabwe). In the first group, fundamental rights are drafted in apparently absolute terms and must be read in conjunction with the limitation clause, which sets out conditions for restrictions on fundamental rights. Constitutions adopting this method are also likely to contain a list of rights to which the limitation clause does not apply, setting up the familiar distinction between absolute and qualified rights. In the second group, permissible restrictions and limitations are included within the rights themselves, and one can therefore look at the way the right has been drafted and immediately see whether or not it is absolute and if not, when it can be restricted.

Throughout its history, administrative law in the UK has generally been concerned with procedure rather than substance – in classical administrative law the only way in which the substance of, or justification for, a decision may be challenged on the grounds that it is irrational, or *Wednesbury* unreasonable. The judge must decide whether the decision is 'within the broad range of reasonable responses open to the decision-maker'[3]. As a tool for assessing administrative decision-making, the *Wednesbury* test sets a very high threshold for a claimant to reach (despite the fact that it has been somewhat watered-down since it was first expounded). Although administrative law generally shuns substantive review, in the UK there has been a move towards a more substantive notion of fairness and good administration. Examples of this trend include the recognition of substantive legitimate expectation, increasing emphasis on the provision of reasons and the recognition of material error of fact as a ground for judicial review. The question whether a human right is unlawfully restricted by a particular measure is often likely to be a substantive rather than a procedural question. In deciding whether a limitation is justified, judges have to balance competing interests and are usually required to engage in consideration of reasons and justifications as well the impact of the resulting decision or action. It will not usually be enough to say that the procedures for reaching a decision were unimpeachable – if the decision has the effect of limiting human rights unjustifiably, there will still be a violation. As a result, in the UK the *Wednesbury* test has been largely pushed aside in the human rights context. It has been held by the European Court of Human Rights that the classic formulation of irrationality provides insufficient protection for fundamental rights.[4] It does not permit sufficient scrutiny of administrative decisions and actions. UK judges instead use the tool of proportionality to assess whether there has been a violation of a qualified Convention right.

Proportionality is hinted at by article 36(1)(e) of the South African Constitution but there is not need for the concept to be expressly mentioned.[5] It

[3] The phrase has been used in numerous authorities. See e.g. *Edore v SSHD* [2003] EWCA Civ 716, [2003] 1 WLR 2979; *R (Razgar) v SSHD (NO. 2)* [2003] EWCA Civ 840, [2003] Imm AR 539 [40]-[41]

[4] *Smith and Grady v UK* (1999) 29 EHRR 493 [138]-[139]

[5] Significant similarities between the structured proportionality test applied in the UK and Article 36 of the South African Constitution, which provides that fundamental rights may only be limited by laws of general application to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Although there is a reference to reasonableness, it is clear that Article 36 cannot be equated with the *Wednesbury* formulation of this standard. The test to be applied under Article 36 is a great deal more structured and detailed than the reasonableness test in English public law, and it is fleshed out by a list of factors which must be taken into account when assessing whether a limitation is 'reasonable and

is not, for instance, mentioned in the European Convention or in the Human Rights Act 1998 yet it forms a crucial part of the flesh of each of these. The principle of proportionality is easy to state at the abstract level (an administrative measure must not to more drastic than necessary) or to sum up in a phrase (not taking a sledgehammer to crack a nut), applying the principle in concrete situations is less straightforward. But the 'structured proportionality' test has emerged from several decisions of the House of Lords[6] for use when assessing whether a decision limiting a right protected under the Human Rights Act 1998 should be upheld or not. It is typically deployed in determining whether a limitation on the rights protected by Articles 8-11 of the European Convention is justified. Each of these articles has two paragraphs and the second expressly recognises that the right protected in the first may be limited. Thus Article 10(2) provides that the freedom of expression protected in Article 10(1) 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'. It is here that proportionality comes into its own in determining whether the restriction is justified or not.

Under the 'structured test' there are four questions which the decision-maker must address. The questions are cumulative in that every one must be satisfactorily answered if the decision is to survive scrutiny. The questions are:

First, whether the legislative objective is sufficiently important to justify limiting a fundamental right.

Secondly, whether the measures designed to meet the legislative objective are rationally connected to it.

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justifiable'. These include: the importance and purpose of the limitation; the relation between the limitation and its purpose; and in particular "less restrictive means to achieve the purpose". It is clear that these factors invite the same balancing exercise as is performed under the structured proportionality test, and in fact implicitly include the standard of necessity applied under that test by requiring judges to consider whether less restrictive means to achieve the purpose could have been adopted.

[6] The formulation of the test set out below is based upon the advice of the Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[6][1999] 1 AC 69 at 80 which was adopted by the House of Lords in *R (Daly) v Home Secretary* [2001] UKHL 26, [2001] 2 AC 532, para. 27 (Lord Steyn) and in many other cases. The fourth element in the test set out below is not adopted in these cases but follows from *Huang v Home Secretary* [2007] UKHL 11, [2007] 2 AC 167, para. 19 (adopting the approach of *R v Oakes* [1986] 1 SCR 103) and *R (Razgar) v Hone Secretary* [2004] UKHL 27, [2004] 2 AC 368 , para. 17 and 20.

Thirdly, whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective. (This is the 'necessity question'.)

Fourthly, whether a fair balance has been struck between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. (This is sometimes called 'narrow proportionality'.)

Applying the test is plainly not a mechanical task since each element requires the making of a judgment by the primary decision-maker. But the decision-maker (or the judicial review court when his decision is challenged) can not avoid these difficult substantive judgments by taking refuge in procedure. The relevant articles of the Convention, Lord Hoffmann has said, are 'concerned with substance, not procedure. [The Convention] confers no right to have a decision [made] in a particular way. What matters is the result'.[7] This shows the extent to which the principle of proportionality departs from classical judicial review where the emphasis falls upon process rather than outcome.

The difficulties of making these judgments are somewhat ameliorated by Lord Bingham's description of the principle. He said:[8] '[I]t is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting…. There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test… The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time'.

It is clear that the structured proportionality test will require judges to engage more closely with the substance of a decision and the justifications provided by the decision-maker than is usual in the public law sphere. It explicitly requires judges not only to consider the aims of a decision or action (thus striking a balance between the rights of the individual and the interests of the community), but also to take into account the different options open to decision-makers and to determine whether a different option could have been chosen which would be less restrictive of human rights. The judge is not assessing the reasonableness of the decision-maker's conclusions, but is required to make his own findings on these points.

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[7] *R(SB) v Denbigh High School* [2006] 2 WLR 719. See also Lord Bingham approving the analysis of

Davies in ((2005)1:3 European Constitutional Law Review 511). *Denbigh* was followed in *Belfast City Council* v. *Miss Behavin' Ltd (Northern Ireland)* [2007] UKHL 19; [2007] 1 WLR 1420 (licensing of sex shops).

[8] *Denbigh High School*

But were it possible to calibrate with sufficient precision the extent to which a right was impaired, it would be clear that there would be only one impairment that was 'no more than is necessary to accomplish the objective'. And if only one outcome passes the test of the proportionality,[9] there is only one right answer and the test is a test of the merits.

But this is not the end of the matter. We have yet to consider the doctrine of deference.[10] It is widely recognised that that the primary decision-maker enjoys 'a discretionary area of judgment', i.e. an area into which the court in applying the test of proportionality will not intrude.[11] This is sometimes referred to as according a 'margin of appreciation' to the national authority[12] or a 'margin of discretion'.[13] The word commonly used to describe this (although it is itself controversial)[14] is, however, 'deference'; the court is said to show deference to the primary decision-maker. But howsoever it may be phrased this discretionary area marks the extent to which the decision-maker may exercise an autonomous judgment, i.e. the extent to which the test of proportionality is not a merits review.

Elementarily, judicial review of administrative action is concerned with the lawfulness of administrative action not with the merits of the decision in question. The judges have nothing to say about whether the decision challenged was a wise or sensible decision at all. This is consistent with the doctrine of the separation of powers in which the executive administers the law and the judiciary simply enforces it. It is consistent with traditional approaches of institutional competence: the judiciary lacks the expertise to balance the competing interests that arises (particularly when resources are involved). It is also consistent with democratic principle. The judiciary does not have the

[9] Those outcomes that intrude on the right less would obviously not accomplish the objective and so are unacceptable outcomes.

[10] There is again a voluminous literature on this topic. See, in particular, 'Deference: A Tangled Story' [2005] PL 346 (Lord Steyn), [2003] PL 592 (Jowell) and see (2006) 65 CLJ 671 (Allan) (criticism of the concept as either 'empty' or 'pernicious')

[11] The phrase derives from Lester and Pannick, *Human Rights Law and Practice* (1999), para. 3.21 and was approved by Lord Hope in *R v. DPP,ex parte Kebilene* [2000] 2 AC 326 at 381.

[12] This is the phrase used in Strasbourg. It is inappropriate to use in a domestic rather than an international context.

[13] Used by Laws LJ in *R (Pro Life Alliance)* v. *BBC* [2002] EWCA Civ 297, para. 33.

[14] See Lord Hoffmann in *R (Pro Life Alliance)* v. *BBC* [2003] UKHL 23, paras. 75,76 deprecating the 'servility' attached to the word deference.

see

mantle of legitimacy that in a democratic age vests in the executive. Where the executive acts with the imprimatur of the demos, how can the judiciary gainsay that?

Views differ on the breadth of deference and the justifications for it. On one hand, decisions taken by an elected decision-maker or a decision-maker accountable to elected representatives are said to be entitled to deference on the ground of democratic principle. And the principle is graduated, with greater deference being accorded to an Act of Parliament and less to a decision of the executive.[15] Lord Phillips MR has also remarked that a decision of the Home Secretary refusing to leave for a controversial speaker leave to enter the UK in respect of which he was 'democratically accountable' was entitled to a 'a wide margin of discretion'.[16] Others hold that that the reason for deference (without any connotation of servility) is one of institutional competence. Where the matter raised is one that the courts are institutionally incompetent to decide, i.e. it concerns the allocation of scarce resources or competing individual needs which the public authority is in a better position to assess than the court, then judicial intervention is inappropriate.[17] Clearly there is considerable overlap between the approach of democratic principle and that of institutional competence since, on the whole, Parliament will allocate powers to institutionally competent decision-makers with the allocation of resources being accorded to democratically accountable decision-makers and the determination of rights to judicial decision-makers. So the debate may not be of great moment although those who insist upon institutional competence as the only justification doubtless consider this justifies only a narrow doctrine of deference.

Elliott[18] has argued persuasively that the different justifications for deference apply to different questions in the structured test. The third question (the necessity question), for instance, is a question of fact and practicality. A measure of expertise, which the court will generally lack, will be required to assess whether a particular measure is no more intrusive than necessary and yet will achieve the objective. In these circumstances, it is appropriate to defer to

[15] See Laws LJ (dissenting) *International Transport Roth GmbH* v. *Secretary of State for the Home Department* [2002] EWCA Civ 158.

[16] *R(Farrakhan)* v. *Home Secretary* [2002] EWCA Civ 606 (para. 74). But the decision was also based on institutional competence (para. 73).

[17] This approach is said to rest on a change in the conception of democracy now applicable following the enactment of the Human Rights Act 1998. Under the new conception fundamental rights trump 'even the overwhelming popular will' ([2003] PL 592 at 597 (Jowell)). But the public 'have not spoken yet' on this curbing of their will.

[18] Elliott (2008), as above.

the expertise of the official taking the decision. Thus in assessing whether it was necessary to make a 'control order' in a particular case and whether the particular restrictions placed upon the suspect's rights were necessary to protect the public from the risk of terrorist attack, deference was shown to the assessment of the Home Secretary 'because she is better able than the court to decide what measures are necessary to protect the public from the activities of someone suspected of terrorism'.[19]

On the other hand, in assessing the fourth question (narrow proportionality (to use Elliott's phrase)) the court is not assessing a factual or practical question but is making a value judgment as to where the balance lies between individual rights and the interests of the community. There is often no right answer to such questions and the issue is one of the legitimacy of the decision-maker to make that judgment. Where the democratic process has led the legislator to adopt a particular compromise between the contending interests that compromise deserves to be respected and deference shown to it.[20] Similarly, where that value judgment is made with due care by a democratically accountable decision-maker the court should not substitute its value judgement for that of the decision-maker.

Elliott's subtle distinctions just described are valuable but the fact remains that the test of proportionality is complicated and the outcome of its application unpredictable.[21] In well known words Laws LJ has spoken of 'the search for a principled measure of scrutiny which will be loyal to the Convention rights, but loyal also to the legitimate claims of democratic power'.[22] That search is not yet over.

The emergence of the structured test of proportionality is doubtless a big step forward but it is surrounded by swirls of contested concepts - "deference" to the decision-maker, "the margin of discretion", etc - and overlapping

[19] *HomeSecretary* v. *AP* [2008] EWHC 2001, para 66 (Keith J)..

[20] E.g., *Kay* v. *London Borough of Lambeth* [2006] UKHL 10; [2006] 2 AC 465 (striking the balance between article 8 rights of occupiers of property and the rights of the owners to possession: 'Courts should proceed on the assumption that domestic law strikes a fair balance and is compatible with article 8' (para 37 (Lord Bingham)).. Similarly in *R(Animal Defenders International*) v. *Secretary of State For Culture, Media and Sport* [2008] UKHL 15; [2008] 2 WLR 781. The limitations on political advertising in s. 321(2) of the Communications Act 2003 were found to be 'necessary' (and so no breach of article 10 found) on account of the 'great weight' given to the approach adopted by Parliament (para. 33 (Lord Bingham)).

[21] And Elliott's distinctions are not as stark as they have been represented here. For instance, there is an element of legitimacy based deference even when addressing the necessity question. See the discussion of *Clays Lane Housing Co-Operative Ltd*, above.

[22] *R(Mahmood)* v. *Home Secretary* [2000] EWCA Civ 315; [2001]1 WLR 840,para. 33.

justifications for these concepts ("democratic principle", "institutional competence" and the like).[23] These bring much uncertainty in their wake. The beneficent influence of precedent introduces some certainty but more is needed. The search for 'a principled measure of [judicial] scrutiny which will be loyal to the Convention rights, but loyal also to the legitimate claims of democratic power' is not yet over.[24] Indeed, it remains a major challenge for administrative law.

Perhaps the most delicate example of the challenged posed to the judiciary by the protection of human rights lies in the field of socio-economic rights. And this issues has been most concretely addressed by the South African Constitution in articles 26 ("access to adequate housing") and article 27 "health care services…sufficient food and water; and social security". The duty that rests on the state in respect of these rights is to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of [these rights]".

The foundation stone of the protection of these rights and the delineation of the extent of the state's duty is to be found in the decision of the Constitutional Court of *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC). Slightly simplified (I exclude the position of minor children with an qualified right to shelter under article 28) what had happened was that Grootboom and the other applicants had been evicted from their informal homes situated on private land which had been set aside for formal low-cost housing. They claimed that article 26 (2) imposed an obligation upon the State to take reasonable legislative and other measures to ensure the progressive realization of this right within its available resources; and that the state was in breach of this duty. The appellants placed evidence before the Court of the legislative and other measures they had adopted concerning housing. But it was clear that implemented plans did not make provision for persons in crisis need. Counsel argued that "provision for people in desperate need would detract significantly from any integrated housing development" (headnote).

[23] See the discussion at pp. 306-9.

[24] *R. (Mahmood)* v. *Home Secretary* [2000] EWCA Civ 315; [2001]1 WLR 840, para. 33 (Laws LJ).

The Constitutional Court, however, held that socio-economic rights were justiciable in South Africa the only question was how they were to be protected. This difficult issue was to be explored to on a case by case basis. The question was whether the measures taken by the State to realise the right afforded by s 26 was reasonable. (Paragraph [33]) (headnote). At the very least section 26 cast a negative obligation upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The manner in which the eviction in the present circumstances had been carried out had resulted in a breach of this obligation.(Paragraphs [34] and [88] at 66G/H and 84I - 85A.) However, the obligation imposed upon the State was not an absolute or unqualified one. The extent of the State's obligation was defined by three key elements which had to be considered separately: *(a)* the obligation to take reasonable legislative and other measures; *(b)* to achieve the progressive realisation of the right; and *(c)* within available resources. (Paragraph [38] at 67H - I.) *Held*, further, that reasonable legislative and other measures (such as policies and programs) had to be determined in the light of the fact that the Constitution created different spheres of government and allocated powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks.

In the end, in these particular circumstances, the relief granted was a declaratory order should be issued stipulating that s 26(2) of the Constitution required the State to act to meet the obligation imposed upon it by the section to devise and implement a comprehensive and co-ordinated program to progressively realise the right of access to adequate housing. This included the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need within its available resources.

For the most recent case see City of Johannesburg and others v Mazibuko and others. [25]

And so to end. As we have seen the limitation of constitutionally protected human rights inevitably draws the judicial review court into the substance of decision-making. Administrative law does not discard its traditional concern with procedure but adds to it concern with substance. But in doing so the court must proceed with caution for it ventures onto constitutionally sensitive terrain. What the court is doing in such cases beating

[25] 2009(3) SA 502 (SCA). Right in the circumstances to 42 litres of water per day to live a life of dignity.

out the boundaries of the doctrine of the separation of powers: it is marking the points at which the legislature and the executive may say to the courts: "This is my concern; it has nothing to do with you". In carrying out this task the court faces an onerous burden. It must remain faithfully to is constitutional duty to uphold fundamental rights but at the same time it must not usurp the functions of the legislature and the executive. This is an heroic endeavour requiring great wisdom.

Finally, a sombre fact. Irene Grootboom, the plaintiff in the great case discussed above that bears her name, died in August 2008, eight years after the Constitutional Court had found in her favour. She was still living in a shack. This is not criticism of the Constitutional Court's judgement - after all it was the court's judgment that prevented her eviction from that shack. But it does exemplify the limitations of coercive remedies in getting the executive to do the right thing. "A spoonful of honey" runs the proverb "will catch more flies than a gallon of vinegar." An honest and efficient public servant mindful of his constitutional duties will house more of the indigent than a coercive remedy. It is better to train civil servants in effective administration, to teach them and their political masters their constitutional duties, than to have judicial remedies issued against housing authorities. The judges must be loyal to their constitutional duties to protect rights but they must also proceed with caution and insight.