Substantive Principles of Administrative Law: Developments since 1987

The Public Law lecture, to be given at the LSE on 11 March 2026

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Introduction

1. In this lecture I will take as my point of departure the seminal article by Jeffrey Jowell and Anthony Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law'.[2] I will consider what has happened in English public law in the almost forty years since that article was published.

2. In their article Jowell and Lester argued that "the recognition and application of substantive principles would satisfy the need in a fast-developing area of law for clarity and coherence. Far from encouraging judges to meddle with the merits of official decisions, it would … promote consideration of the proper role of the courts in the growing common law of public administration."[3]

3. They observed that, every now and again, judges claim that judicial review is concerned not with the decision itself but with the decision-making process. They cited, for example, the then recent decision of the House of Lords in *Chief Constable of North Wales v Evans*,[4] where Lord Brightman had said that, unless the court observed that restriction on its power, it would "under the guise of preventing the abuse of power, be itself guilty of usurping power." Jowell and

[1] I would like to thank my judicial assistant, Eve Loveman, for her assistance with research for this lecture. All errors are mine.
[2] [1987] Public Law 368.
[3] Pp 368-369.
[4] [1982] 1 WLR 1155, p 1173.

Lester noted in a footnote that Lords Hailsham and Brightman expressly disapproved of Lord Denning MR's view when the case had been in the Court of Appeal, that the appellant "must not only be given a fair hearing, but the decision itself must be fair and reasonable."

4. But of course, as Jowell and Lester pointed out, judicial review has never been confined to review of the decision-making process alone. For example, Lord Diplock's famous trilogy of the grounds of judicial review in the *GCHQ* case,[5] included not only "procedural impropriety" but also "illegality" and "irrationality". The concept of illegality, one can readily understand, is consistent with the conventional view of judicial review, which is that it is concerned with the lawfulness of public decision-making and not with the merits of the decision made. Upholding the law is the fundamental purpose of the courts.

5. But the principle of "irrationality", as described by Lord Diplock, included "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." This begs the important question of what are those "accepted moral standards" and how are judges to discover them.

6. Jowell and Lester suggested that the term "irrationality" did not accurately reflect what the courts had actually been doing, for example in planning cases like *Hall v Shoreham UDC*.[6] Nor, perhaps more importantly, did it offer an adequate guide to what *ought* to be a ground for judicial intervention with a

[5] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, pp 410-411.
[6] [1964] 1 All ER 1.

public decision. As they said,[7] the term irrationality, "while appropriate to cover arbitrary or capricious conduct, is not a satisfactory way of describing the more normal types of abuse of public power that give rise to judicial review while being within the scope of a statute and procedurally satisfactory. It is the judicial review of these abuses that call for substantive principles of law derived from standards of administrative propriety and the basic rights and liberties of the individual and of citizenship."

7. They suggested that the traditional doctrine of *Wednesbury* unreasonableness[8], that is a decision which is so unreasonable that no reasonable body could have reached it, was unsatisfactory for three reasons. First, it is inadequate. Intellectual honesty requires a further and better explanation as to why an act is unreasonable. Secondly, it is unrealistic. Attempting as it does to avoid judicial intervention in the merits of decisions, it seeks to prevent review except in cases where the official has behaved absurdly or has "taken leave of his senses." Thirdly, the *Wednesbury* test is confusing because it is tautologous. They gave the analogy of a law which allows the demolition of unfit houses and then defines "unfit" in the sense that "no fit house could so be".

8. Jowell and Lester suggested that there could be a principled development of the law, in accordance with the traditional method of the common law, that is through incremental development by reference to traditional legal sources. Those sources could include national statutory and private law analogies, international sources (such as the European Convention on Human Rights (ECHR), which at that time had not been incorporated into domestic law) and

[7] P 371.
[8] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] KB 223.

other sources of "accepted moral standards." They considered three principles in particular: those of proportionality, certainty and consistency. They then turned to fundamental human rights. They also suggested that "the time is surely over-ripe for recognition of equality of treatment as a general principle of English administrative law."[9]

9. In their concluding section headed 'General principles and judicial restraint', Jowell and Lester made it clear that they were not advocating that judges should have the power to review decisions on their merits. On the contrary, they said, the *Wednesbury* test, because of its vagueness, "allows judges to obscure their social and economic preferences more easily than would be possible were they to be guided by established legal principles."[10] They suggested that the search for principle, based as it is upon accepted standards of justice, fairness and other dimensions of morality, steers the courts away from policy or personal preference. Some people would query whether that is really so. I will return to the potential problem of subjectivity towards the end of this lecture.

10. Jowell and Lester concluded their important essay by making it clear that they did not want courts "to usurp the functions of public authorities on matters of fact, judgment or policy, all of which lie outside the appropriate function of judicial review."[11] Nor did they suggest that the general category of unreasonableness should be abandoned, since its retention as a residual category would always prove valuable. What they did suggest was that judicial review of the exercise of a discretionary public power should be subject to "those

[9] P 378.
[10] P 381.
[11] P 382.

independent principles of justice that are appropriate for judicial application in all other areas of the common law. In the interest of the integrity of the law, these principles should now be clearly articulated by the courts."

The distinction between procedure and substance

11. I considered the distinction between procedural and substantive fairness in *R (Talpada) v Secretary of State for the Home Department*.[12] In particular, I said the following:

> "64. Normally public law is not concerned with the substance of public decisions. Judicial review has a very important role to play in the maintenance of the rule of law in this country but the role of the courts, however important, is a limited one. Our role is principally to correct errors of law made by public authorities and ensure that fair procedures have been complied with. This is why the courts will correct, for example, a misdirection of law by a public authority; will ensure that all relevant considerations are taken into account; that irrelevant considerations are not taken into account; and will insist upon procedural fairness where the duty to act fairly applies. …
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> 65. … in appropriate cases, the court will and must be able to correct an abuse of power. The doctrine of substantive fairness is an important tool which enables the court to ensure that a public authority acts lawfully and, in particular, does not abuse the powers which have been entrusted to it by Parliament. However, that doctrine does not and should not give the court a wide-ranging discretion to overturn the decision of a public authority where it considers it to be unfair. This is not only because that risks blurring the important dividing line between the function of the court and the function of the executive. It is also because the doctrines according to which a court will interfere with the decisions of the executive need to be set out in reasonably clear and predictable form so that everyone can arrange their affairs accordingly. This (the principle of legal

[12] [2018] EWCA Civ 841, paras 56-65.

> certainty) is as much an important aspect of the rule of law as is the need to correct abuse of power."[13]

12. My judgment in *Talpada* was cited more recently by Sir Geoffrey Vos MR in *R (Thomas) v Judicial Appointments Commission*, where he said that it had "helpfully explained the difference between procedural and substantive unfairness, the need to distinguish between the two and, in the case of substantive unfairness, the need to avoid what [he] might call judicial overreach".[14]

The development of substantive legitimate expectations

13. Perhaps surprisingly, Jowell and Lester did not mention the development of the law of substantive legitimate expectations, which was already beginning to emerge in 1987. The leading case at that time was *R v Inland Revenue Commissioners, ex parte Preston*.[15] Lord Templeman said that the respondents would be guilty of "unfairness" amounting to an abuse of power if they took action which would, in the case of an authority other than Crown authority, entitle the appellant to an injunction or damages based on breach of contract or estoppel by representation.[16] The case failed on its facts but the doctrine was established. This was clearly an example of substantive unfairness, not procedural unfairness.

[13] Paras 64-65.
[14] [2025] EWCA Civ 912; [2025] ICR 1635, para 47.
[15] [1985] AC 835.
[16] Pp 866-867.

14. In 1986, Taylor J had decided *R v Secretary of State for the Home Department, ex parte Ruddock*.[17] This concerned telephone tapping. The argument for the claimant was that a warrant had not been issued in accordance with the criteria for the interception of communications, which had been published by the Government of the day on six occasions between 1952 and 1982. Again the case failed on the facts but Taylor J was willing to hold that the doctrine of legitimate expectation could have a substantive aspect and was not confined to an expectation of being consulted or given the opportunity to make representations before an adverse decision was made. The judgment, which was an unreserved one, did not cite *Preston* but did cite a number of earlier decisions, in particular the decision of the Court of Appeal in *R v Secretary of State for the Home Department, ex parte Khan*.[18] Dunn LJ had said:

> "… Although the circular letter did not create an estoppel, the Home Secretary set out therein for the benefit of applicants the matters to be taken into consideration, and then reached his decision on a consideration which on its own showing was irrelevant. In so doing, in my judgment, he misdirected himself according to his own criteria and acted unreasonably."[19]

15. It will be apparent that the reasoning of Dunn LJ in *Khan* was not to do with legitimate expectation as such but was couched in more traditional language of misdirection, irrelevant considerations and unreasonableness. Nevertheless, Taylor J concluded "that the doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned … with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where *ex hypothesi* there is no right to be heard, it may be thought the more

[17] [1987] 1 WLR 1482.
[18] [1984] 1 WLR 1337.
[19] P 1352.

important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept."[20]

16. The courts then began to develop the specific criteria needed for the doctrine of substantive legitimate expectations in *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd*,[21] in a judgment of the Divisional Court, which included Bingham LJ. Bingham LJ said that the doctrine of legitimate expectation is rooted in fairness. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would "often" be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or be estopped from so acting, a public authority should generally be in no better position. He stressed that what was required was nothing less than "a clear, unambiguous and unqualified representation."[22]

17. In the subsequent case of *R v Inland Revenue Commissioners, ex parte Unilever plc*,[23] Sir Thomas Bingham MR said that "the categories of unfairness are not closed and precedent should act as a guide not a cage" but that "unfairness" in public law is not used "in a loose general sense".[24] "Where substantive unfairness is alleged, it is necessary to show a recognised form of unfairness, such as departure from a ruling on which the taxpayer has relied or inconsistency prejudicial to the taxpayer …" In the extreme, arguably unique,

[20] *Ruddock*, at p 1497.
[21] [1990] 1 WLR 1545.
[22] Pp 1569-1570.
[23] [1996] STC 681.
[24] P 690.

circumstances of that case the Court of Appeal was prepared to hold that there had been a breach of public law even though there had not been a representation made as such.

18. Briefly, in the mid-1990s, the courts took a wrong turn because it was thought that the idea that the doctrine of legitimate expectation could have a substantive aspect was a "heresy": see *R v Secretary of State for the Home Department, ex parte Hargreaves*.[25]

19. This debate was laid to rest by the decision of the Court of Appeal in *R v North and East Devon Health Authority, ex parte Coughlan*.[26] The Court was careful to explain that the doctrine of legitimate expectation did have a substantive aspect and, moreover, that it was not simply an aspect of *Wednesbury* unreasonableness but "it is for the court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power."[27]

20. That left open the question: on what basis is the court to decide whether the frustration of a substantive legitimate expectation is lawful or not? This was considered in *R (Nadarajah) v Secretary of State for the Home Department*,[28] when Laws LJ explained the basis on which the court will decide whether departure from a legitimate expectation is unfair in that sense. He explained that where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise

[25] [1997] 1 WLR 906, p 921 (Hirst LJ).
[26] [2001] QB 213.
[27] Para 82 (Lord Woolf MR, Laws LJ and Sedley LJ).
[28] [2005] EWCA Civ 1363; [2005] All ER (D) 283.

or practice to be honoured unless there is good reason not to do so.[29] He preferred to ground this not so much in the notion of fairness but rather more broadly "as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public." Accordingly, a public body's promise or practice as to future conduct may only be denied in circumstances where to do so is the public body's legal duty or is otherwise "a proportionate response", having regard to a legitimate aim pursued by the public body in the public interest. And of that question of proportionality, he said, the court is the judge. "The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances." It will be apparent that this is a context therefore in which the principle of proportionality has become accepted in English administrative law.

Compliance with policies

21. In 1987 the modern law relating to the relevance of policies promulgated by a public authority to govern the exercise of its discretion was just beginning to emerge. In particular, in *In Re Findlay*,[30] the House of Lords held that the individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute.

[29] Para 68.
[30] [1985] AC 318, p 338.

22. In *Lumba v Secretary of State for the Home Department*,[31] Lord Dyson JSC said that there is a correlative right to know what that current existing policy is, so that the individual can make relevant representations in relation to it. Further, he said, the rule of law calls for a transparent statement by the executive of the circumstances in which a broad discretionary power will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the Immigration Rules, so too immigration detention powers need to be transparently identified through formulated policy statements.

23. In *Mandalia v Secretary of State for the Home Department*,[32] Lord Wilson JSC considered the legal effect of policies. He noted that in early case law, such as *R (Saadi) v Secretary of State for the Home Department*,[33] Lord Phillips MR had suggested that the lawful exercise of statutory powers can be restricted by Government policy and the legitimate expectation to which such a policy gives rise. But Lord Wilson observed that, since 2001, there had been some departure from the ascription of the legal effect of policy to the doctrine of legitimate expectations. It was particularly strained in circumstances in which those who invoke it, as in *Mandalia*, were unaware of the policy at the time the decision was taken. So, he said, a person's right to the determination of their application in accordance with policy is now generally taken to flow from a principle which is freestanding but related to the doctrine of legitimate expectations which was best articulated by Laws LJ in *Nadarajah*.[34] This is the requirement of good

[31] [2011] UKSC 12; [2012] 1 AC 245, paras 34-35.
[32] [2015] UKSC 59; [2015] 1 WLR 4546, paras 29ff.
[33] [2002] 1 WLR 356, para 7.
[34] *Nadarajah*, para 68.

administration, by which public bodies ought to deal straightforwardly and consistently with the public.

24. In *R (A) v Secretary of State for the Home Department*[35] Lord Sales JSC and Lord Burnett CJ noted that policies can be an important tool in promoting good administration. Policies are, however, different from law. They do not create legal rights as such. However, in an important development in public law the courts have given policies greater legal effect. In certain circumstances a policy may give rise to a legitimate expectation that a public authority will follow a particular procedure before taking a decision and it may give rise to a legitimate expectation that the authority will confer a particular substantive benefit when it decides how to exercise its discretion. In those cases, the courts will give effect to the legitimate expectation unless the authority can show that departure from its policy is justified as a proportionate way of promoting some countervailing public interest. So we can see that the proportionality test suggested by Laws LJ in *Nadarajah* has now received the approval of the Supreme Court.

25. Lord Sales and Lord Burnett then turned to the situation where the policy has not been made public and an affected individual is unaware of its relevance to their case and in that sense has no actual expectation arising from it. They observed that the authority may still be required to comply with it unless able to justify departing from it, citing *Mandalia* for this proposition. They noted that under some conditions the holder of a discretionary power may indeed be

[35] [2021] 1 WLR 3931, paras 2-3.

required to formulate a policy and then to publish it, citing *Lumba*. Thus, they said, "policies have moved increasingly centre-stage in public law."

26. In this context it is also important to recall that it is now firmly established that the interpretation of a policy is a matter of law, and is therefore for the court to determine. It is not enough that a public authority's own interpretation of a policy was a reasonable one: see *Tesco Stores Ltd v Dundee City Council*.[36]

27. However, it is also important to note that, more recently, both the Divisional Court and the Court of Appeal have said that not all administrative policies become enforceable as a matter of law. Policies come in various forms and their content is wide-ranging. Some policies are essentially inward-facing and govern the way in which a public authority will conduct its own affairs and do not concern the exercise of public powers: see *R (All the Citizens) v Secretary of State for Digital, Culture, Media and Sport*;[37] and (on appeal) *R (Good Law Project Ltd) v Prime Minister*.[38]

28. What unites both the development of the doctrine of substantive legitimate expectations and the need for compliance with a public authority's policies is that they are founded on statements or actions of the public authority itself. In that sense the courts are not imposing standards devised by themselves on public authorities; rather they are requiring a public authority to comply with the standards which it has chosen to impose upon itself, in the interests of good administration and fair dealing with the public. Furthermore, both areas of law

[36] [2012] UKSC 13; [2012] PTSR 983.
[37] [2022] EWHC 960 (Admin); [2022] 1 WLR 3748, para 102 (Singh LJ and Johnson J).
[38] [2022] EWCA Civ 1580; [2023] 1 WLR 785, para 59 (Sir Geoffrey Vos MR, and Dingemans and Elisabeth Laing LJJ).

demonstrate that the constraints on public authorities are not absolute. However, departure from legitimate expectations or from policies will need to be justified by a public authority and that justification will be assessed by the court, applying the principle of proportionality.

29. This is important because it shows that, outside the context of fundamental rights and outside the context of European law, the courts have in the last 20 years or so developed a doctrine of proportionality. To that extent, at least, English administrative law does recognise a principle of proportionality.

Human rights

30. Jowell and Lester were very interested in the protection of human rights at common law. This was clearly the subject of considerable judicial development in the 1990s, particularly the principle of legality. It is also clear that the common law does regard certain rights as being fundamental even though they do not emerge from a written text, for example the right to freedom of expression. The common law has always been jealous in its protection of personal liberty. More recently, courts and tribunals have recognised freedom from torture as a fundamental right in the common law. On the other hand, as writers like Kirsty Hughes and Gavin Phillipson have observed, the common law has not always regarded rights such as the right to privacy or the right to freedom of assembly as being fundamental rights.[39] These have come to be recognised in English law more directly as the consequence of the introduction

[39] Mark Elliott and Kirsty Hughes (eds.), Common Law Constitutional Rights (Hart, 2020), Chs 5 and 7.

of the Convention rights into the domestic legal system by the Human Rights Act 1998 (HRA). Furthermore, there was never a common law principle against use of the death penalty: to the contrary, the death penalty was practised in this jurisdiction until 1965, when Parliament chose to abolish it for murder, initially on a temporary basis and this was made permanent by the HRA.[40]

31. The 1990s did not begin auspiciously for those who, like Jowell and Lester, wished to see greater protection for human rights in domestic administrative law. The House of Lords gave judgment in *R v Secretary of State for the Home Department, ex parte Brind*,[41] in which it appeared firmly to reject the idea that the then unincorporated ECHR could constrain the exercise of a discretionary power in domestic law, even in the context of a fundamental right like freedom of expression. Furthermore, the House of Lords appeared to reject any doctrine of proportionality even in the context of fundamental human rights. Nevertheless, there were nuanced differences between the different members of the Appellate Committee. For example, Lord Roskill expressed the view that the day might come when proportionality would come to be recognised as a doctrine of domestic law but this was not the right case in which to do that. Other members of the House of Lords, in particular Lord Bridge and Lord Templeman, acknowledged that, although the primary judgment was that of the Secretary of State, the court had to form a secondary judgment about whether an interference with a fundamental human right could be regarded as being necessary. Lord Bridge expressed the point in this way:

[40] Strictly speaking the death penalty remained available after 1965 for certain offences in the armed forces but this possibility was abolished by the HRA, which incorporated the 13th Protocol to the ECHR into domestic law.
[41] [1991] 1 AC 696.

> "Any restriction of the right to freedom of expression requires to be justified and … nothing less than an important competing public interest will be sufficient to justify it. The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment."[42]

Lord Templeman made a similar point:

> "It seems to me that the courts cannot escape from asking themselves whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable. In terms of the Convention, as construed by the European Court, the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent."[43]

32. This laid the seeds for what was then to be said by the Court of Appeal in *R v Ministry of Defence, ex parte Smith*,[44] by Sir Thomas Bingham MR, endorsing the submission made by counsel in the case (David Pannick QC):

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

[42] Pp 748-749.
[43] P 751.
[44] [1996] QB 517, at p 554.

Nevertheless, as is well-known, the Court felt unable to regard the absolute ban on any gay person from serving in the armed forces to be unreasonable even in that human rights context.

33. The case subsequently went to Strasbourg, where the European Court of Human Rights held that the ban was incompatible with Article 8 of the ECHR, in *Smith and Grady v United Kingdom*.[45] The Court considered that the aim relied on, in particular the operational effectiveness of the armed forces, was a legitimate one, but the perceived problems which were said to justify the ban on gay people were founded solely upon the negative attitudes of heterosexual personnel toward those of homosexual orientation.[46] The Court concluded that those negative attitudes could not of themselves be considered to amount to sufficient justification for the interference with the applicants' rights any more than similar negative attitudes towards those of a different race, origin or colour.[47]

34. Furthermore, the Court found that there was a breach of Article 13, the right to an effective remedy in domestic law for an arguable violation of Convention rights. The Court concluded that the threshold at which the Court of Appeal could find the policy to be irrational was placed so high that it effectively excluded any consideration by domestic courts of the question whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued.[48]

[45] (2000) 29 EHRR 493.
[46] Para 96.
[47] Para 97.
[48] Para 138.

The principle of legality

35. The other main development which took place in the 1990s in the context of human rights before the enactment of the HRA was the express recognition of what has become known as "the principle of legality." In some ways this may be a misnomer since what it really concerns is a presumption that Parliament does not legislate to infringe fundamental rights in the common law unless it makes that intention clear, either expressly or by necessary implication. In particular, it has led to a principle of statutory interpretation that general words in primary legislation will not be construed to confer power on the executive to infringe basic rights protected by the common law. With hindsight it might be better if the phrase "the principle of legality" were used for another purpose, to reflect the principle in human rights law that an interference with a fundamental right must be "prescribed by law" or "in accordance with law". But in any event the phrase "the principle of legality" has now become an accepted part of the lexicon in human rights law.

36. An early example of the principle at work is to be found in *R v Secretary of State for the Home Department, ex parte Pierson*.[49] Lord Browne-Wilkinson said that the starting point is that it is well-established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to express statutory provisions.[50] As a result, Parliament is presumed not to have intended to change the common

[49] [1998] AC 539.
[50] P 573.

law unless it has clearly indicated such intention either expressly or by necessary implication. Where wide powers of decision-making are conferred by statute it is presumed that Parliament has not conferred power on the executive to intrude upon basic rights. Lord Browne-Wilkinson gave the example of *Raymond v Honey*[51], where Lord Wilberforce had said that there was nothing in the Prison Act 1952 that conferred power to make regulations which would deny or interfere with the right of a prisoner to have unimpeded access to a court. A similar principle had been applied by the Divisional Court in *R v Lord Chancellor, ex parte Witham*.[52] In an important judgment given by Laws J, that Court had held that the statutory power conferred on the Lord Chancellor to prescribe fees to be paid to a court did not authorise the setting of fees at such a level as to preclude access to the courts by litigants. The general words of the statutory provision did not authorise the abrogation of such a basic "constitutional right" as the right of access to the courts.

37. Lord Browne-Wilkinson derived the following proposition from those authorities:

> "A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

Nevertheless, it is also important to note that Lord Browne-Wilkinson went on to say that there is "no general principle yet established that the courts have any right to quash administrative decisions on the simple ground that the decision is

[51] [1983] 1 AC 1, pp 12-13.
[52] [1997] 2 All ER 779.

unfair." If the courts were to seek to limit the ambit of such powers so as to accord with an individual judge's concept of fairness, they would be "indirectly arrogating to the court a right to veto a decision conferred by Parliament on the Secretary of State. Only if it can be shown that a general principle of the law would be infringed by giving the statutory words their literal meaning is it legitimate for the courts to construe the statutory words as being impliedly limited."

38. The most famous enunciation of the principle of legality is to be found in *R v Secretary of State for the Home Department, ex parte Simms*,[53] where Lord Hoffmann said:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … But the principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

39. It is debatable whether the principle of legality is "little different" from the principles that apply in a jurisdiction where there is a written constitution which

[53] [2000] 2 AC 115, p 131.

limits the power of the legislature but, nevertheless, it is an important principle of statutory interpretation.

40. It would be a mistake to think that this principle of statutory interpretation was new in the 1990s, even if the phrase "the principle of legality" was. It goes back to cases at least from the time of the First World War, e.g. *Re Boaler*,[54] where Scrutton J said that, when the legislature has used general words capable of a larger and narrower meaning, those words may be restricted by innumerable presumptions. One of those presumptions was a strict construction of statutes encroaching on rights, especially the liberties of the subject.

41. The principle of legality may have a powerful role to play even in legal systems where there is a written constitution. An example can be seen in my judgment for the Judicial Committee of the Privy Council in *Attorney General of Trinidad and Tobago v Maharaj*,[55] where the Privy Council distinguished its earlier judgment in a colonial-era case, *Wallace-Johnson v R* (a case concerning sedition legislation in what was then the Gold Coast).[56] Having referred to the principle of legality in *Simms*, the Board expressed the opinion that there would be much to be said for the proposition that, applying the principle of legality, and quite apart from any constitutional considerations, the true interpretation of the Sedition Act is such that there is implied into it a requirement that there must be an intention to incite violence or disorder.

42. But the principle of legality, being a presumption about statutory interpretation, begs the question what are these basic rights to be found in the common law.

[54] [1915] 1 KB 21, pp 38-39.
[55] [2023] UKPC 36; [2024] 1 LRC 252, paras 43-47.
[56] [1940] AC 231.

They seem to be different in character from rights as traditionally understood in domestic law. Indeed, historically, the common law tended not to speak in terms of rights but rather in terms of remedies. The forms of action have long since been abolished (by the Judicature Act 1873) but the principles of much of the common law were fashioned at a time when it mattered which writ was used to commence proceedings in the royal courts. Even more recently, there was a well understood principle of the common law that spoke in terms of liberty rather than rights. Anything which was not prohibited by law was permitted. And the state had to be able to point to some specific power conferred on it by law in order to infringe such liberties. Certainly it could not be said that violation of the so-called basic rights in the common law would give rise to an action for damages. Contrast that with the statutory position now created by section 8 of the HRA. It would be different if there was a well-established cause of action known to the common law, such as trespass to land or personal property or trespass to the person. In principle invasion of an interest protected by the common law would give rise to an action for damages. Conversely, something like a right to privacy was said not to exist in the common law and did not give rise to any legal remedy, let alone damages.

43. However, what is now tolerably clear is that the basic principles of the common law will constrain the exercise of administrative power and so will give rise in principle to a remedy in public law.

44. Time does not permit me to go through each of the rights which might be said to be fundamental at common law but let me mention two of the most basic: the right to life and freedom from torture.

45. It was in *R v Secretary of State for the Home Department, ex parte Bugdaycay*[57] that Lord Bridge famously said that the most anxious scrutiny is required when a court is reviewing the decision of the executive in the context of the right to life. Lord Bridge said:

> "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."[58]

46. More recently, in *R (Elgizouli) v Secretary of State for the Home Department*,[59] Lord Reed PSC said that the authorities do not vouch the existence of a right to life in the sense in which that term is used in the law of obligations. Nevertheless, the authorities do support the recognition of what might more aptly be described as "a value to which the courts attach great significance when exercising their supervisory jurisdiction."

47. In *Al-Hawsawi & Anr v Security Service & Ors*,[60] the Investigatory Powers Tribunal (of which I was then the President) gave a judgment distinguishing *Elgizouli*. The Tribunal found to be of particular importance the decision of the House of Lords in *A v Secretary of State for the Home Department (No 2)*.[61] The central question in that case was whether the Special Immigration Appeals Commission (SIAC) could receive evidence which has or may have been procured by torture inflicted by officials of a foreign state without the complicity of the British authorities. The House of Lords was unanimous in its

[57] [1987] AC 514.
[58] P 531.
[59] [2020] UKSC 10; [2021] AC 937, para 175.
[60] [2025] UKIPTrib 11.
[61] [2005] UKHL 71; [2006] 2 AC 221.

decision that evidence which was known to have been obtained by torture could not be admitted, but was divided on the issue whether it was admissible if there was a risk that it had been obtained by torture. The majority held that SIAC should adopt the test of admissibility in Article 15 of the UN Convention Against Torture and consider whether it was established on the balance of probabilities that the evidence had been obtained by torture. If they were doubtful they should admit the evidence bearing in mind their doubt when evaluating it.

48. Although he was in the minority in the result, Lord Bingham noted that, from its very earliest days, the common law of England set its face against the use of torture, and its rejection of it for a long time stood in contrast to the lawful use of torture in continental Europe. It will be apparent that the actual issue in *A (No 2)* concerned the admissibility of evidence before a judicial body. But the opinions of members of the Appellate Committee also touched on the question whether such evidence could be received and acted upon by the executive. Those dicta, in particular those of Lord Brown, were found to be helpful by the Tribunal in arriving at its conclusion as to the governing public law principles in this regard.

49. The submission advanced on behalf of the claimants in *Al-Hawsawi* was that (i) there is nothing unlawful in principle if the respondents receive information which has been obtained by the torture of a detainee by the authorities of another state (what might be called merely passive receipt of the information); but (ii) they must not do anything actively to encourage the obtaining of information by torture, for example by providing questions to be asked by those authorities of

the detainee in circumstances where the respondents are aware, or ought reasonably to be aware, that torture is being used (this is not mere passive receipt but involves positive action by the respondents).

50. Counsel for the respondents sought to persuade the Tribunal that there is no such principle of public law and placed particular reliance on the majority judgment in *Elgizouli*. The Tribunal distinguished *Elgizouli*.[62] Although the Tribunal did not wish in any way to diminish the high value which the common law attaches to human life, it noted that the death penalty was not unlawful at common law, as torture has been for centuries.

51. Further, although the Tribunal accepted that the prohibition of cruel, inhuman or degrading treatment in international law was not as absolute as the abolition of torture, it held that, as an aspect of the public law principle of rationality, if a respondent were to share information with a foreign intelligence service, it would be unlawful for it to do so in circumstances where it either knew or ought reasonably to have known that the detainee was likely to be subjected to such treatment.

52. In this way therefore we can see the modern development of the concept of fundamental rights in the common law at work through the principles which govern judicial review. That is so even in the sensitive context of national security and international relations with foreign intelligence services.

[62] Para 72.

Equality

53. I want to turn to consider Jowell and Lester's suggestion that there should be a distinct principle of equality recognised in public law. The Supreme Court's decision in *Gallaher Group Ltd and others v Competition and Markets Authority*[63] is usually taken to decide that the principle of equality is not a standalone ground of review but rather something to be considered as an aspect of rationality.

54. It is arguable that the apparently wide statement of principle in *Gallaher*, that there is no freestanding principle of equality in administrative law, was *obiter* as it was not strictly necessary to explain the actual decision in that case. Moreover, the Court did not have before it a case of egregious discrimination, as might arise in a case of purely racial or sex discrimination. In any event, if such a case did arise, it might well be said that, even applying the concept of reasonableness, and no freestanding principle of equality, such discrimination cannot withstand judicial scrutiny, unless it has an objective justification.

Reasonableness in public law

55. This leads me on to the concept of proportionality, which Jowell and Lester were keen should be adopted in English public law, and its relationship to reasonableness.

56. In recent years the concept of rationality has started to be replaced by the older concept of reasonableness, which has re-emerged in English public law. It has

[63] [2018] UKSC 25; [2019] AC 96.

also become clear that reasonableness is a flexible standard of review and, depending on the context, may be as powerful a tool of judicial review as the doctrine of proportionality.

57. Reasonableness has had a role to play in public law for many centuries, as has been shown by Professor Paul Craig in his history of English Administrative Law from 1550.[64] It long predated the decision in *Wednesbury*. A well-known example is *Kruse v Johnson*.[65] Reference can also be made to *Short v Poole Corporation*.[66] The redheaded school-teacher (who had been mentioned by Warrington LJ in *Short*) re-emerged in *Wednesbury* to illustrate the kind of extreme and hypothetical instance of what would qualify as being so unreasonable that no reasonable body could have reached that decision.

58. The concept of the reasonable person (in the past reasonable "man") has long been known to the common law. In *Healthcare at Home Ltd v Common Services Agency*,[67] this was described as follows by Lord Reed JSC:

> "1. The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Among the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years.
>
> 2. The horse-drawn bus between Knightsbridge and Clapham, which Lord Bowen is thought to have had in mind, was real enough. But its most famous passenger, and the others I have mentioned, are legal fictions. … As Lord Radcliffe observed in

[64] (OUP, 2024), Ch. 13.
[65] [1898] 2 QB 91.
[66] [1926] Ch 66.
[67] [2014] UKSC 49; [2014] 4 All ER 210, paras 1-3.

Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696, 728:

> 'The spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.'"

59. One manifestation of the reasonable person is the "reasonable parent" in the context of family law. In *Re A (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)*,[68] Sir James Mumby P posed the question:

> "What are the characteristics of the reasonable man or woman in contemporary British society?"

He said that the answer for present purposes is provided by *In re G (Children: Religious Upbringing)*:

> "If the reasonable man or woman is receptive to change he or she is also broad-minded, tolerant, easy-going and slow to condemn. We live, or strive to live, in a tolerant society increasingly alive to the need to guard against the tyranny which majority opinion may impose on those who, for whatever reason, comprise a small, weak, unpopular or voiceless minority. Equality under the law, human rights and the protection of minorities, particularly small minorities, have to be more than what Brennan J in the High Court of Australia once memorably described as 'the incantations of legal rhetoric'."[69]

60. It seems to me that there may there be lessons for what the reasonable person in the context of public law also would think and do.

61. *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* ("*ABCIFER*")[70] concerned the lawfulness of criteria that limited

[68] [2017] EWCA Civ 2164; [2018] 4 WLR 60, para 48.
[69] [2013] 1 FLR 677, para 34.
[70] [2003] EWCA Civ 473; [2003] QB 1397.

access to a compensation scheme for those interned by the Japanese during the Second World War to those born in the UK or who had a parent or grandparent who had been born in the UK. Counsel for the claimant had argued that proportionality exists as a separate ground of review even in a case that did not involve European Community law or ECHR rights. Dyson LJ suggested that there was a strong case for accepting this argument but the idea that the proportionality test had replaced *Wednesbury* unreasonableness was not reflected in the case law of the House of Lords and that would be a matter for the House of Lords to decide.

62. In *Kennedy v Information Commissioner*,[71] the Supreme Court was considering the lawfulness of the Charity Commission's decision to refuse to disclose documents related to three inquiries it had conducted under the Charities Act 1993. Lord Mance JSC suggested that scrutiny of the Charity Commission's decision would not be significantly different whether applying proportionality review in relation to Article 10 of the ECHR, or common law principles. Lord Mance said that the intensity of review varies in accordance with the nature of the right or principle at stake. He stated:

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle … The nature of judicial review in every case depends on the context.
>
> 54. […] As Professor Paul Craig has shown (see eg 'The Nature of Reasonableness' (2013) 66 CLP 131), 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

[71] [2014] UKSC 20; [2015] AC 455

> appropriateness, necessity and the balance or imbalance of benefits and disadvantages. …
>
> 55. … But the right approach is now surely to recognise, as *de Smith's Judicial Review* , 7th ed (2013), para 11-028 suggests, that it is inappropriate to treat all cases of judicial review together under a 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."

63. In *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs*,[72] a five-justice panel of the Supreme Court refused to accept or reject the argument that *Wednesbury* rationality should be replaced with proportionality review. The Supreme Court held that it would require a nine-justice panel of the court to decide such an issue because replacing rationality review with proportionality review would have potentially profound constitutional implications. However, the Court held that re-hearing the appeal before a nine-justice panel was unnecessary because the claim would fail even applying the proportionality test.

Conclusions

64. In conclusion let me try to draw some of the threads together. I will consider what are the proper foundations for substantive judicial review given the important constitutional principles which rightly prevent judges from interfering unduly with the merits of governmental decisions or policies.

[72] [2015] UKSC 69; [2016] AC 1335.

65. In the last forty years some but not all of what Jowell and Lester hoped for has been achieved by developments in substantive principles of public law. Other developments have taken place which they did not expressly anticipate, in particular the law on substantive legitimate expectations and conformity with a public authority's own policies.

66. I would suggest that, as well as their points about the importance of transparency and intellectual honesty in the setting of judicial standards in public law, there are the following important considerations which need to be borne in mind as the law develops in this area.

67. First, there is the need for objectivity and the need to avoid subjectivity. As Cardozo said more than a hundred years ago, a judge is not "a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles."[73]

68. Secondly, there is the need for legal certainty. Absolute certainty is unattainable but principles of law do need to be reasonably certain and predictable, so that all concerned, including public authorities and those affected by their decisions, can regulate their affairs accordingly. The rule of law applies to judges as it does to the other branches of the state.

69. Thirdly, there is the need for legitimacy in judicial decision-making. This follows from my earlier points.

70. Fourthly, there is the need to respect the institutional competence and democratic accountability of other branches of the state. These have become

[73] Benjamin Cardozo, The Nature of the Judicial Process (Yale, 1921), p 141.

familiar concepts when courts assess proportionality under the HRA and have to be given appropriate weight in that context.[74] There is no reason in principle why they should not play an important part as the courts develop purely domestic law principles of public law such as reasonableness. As we have seen, the principle of reasonableness is increasingly doing the work that a principle of proportionality might do and, even if proportionality is not as such a principle of domestic administrative law, these are lessons which have been learned in the context of human rights law that can be applied elsewhere.

71. I want to end with two examples from the case law of the last century. The first is *Short v Poole Corporation*. That case was decided exactly 100 years ago. It is remembered for the dictum about the red-headed schoolteacher but what it actually concerned was a policy by a local education authority of automatically dismissing any woman teacher when she got married. The other case is *Smith*, decided in 1996 and upholding the policy of automatically discharging any gay person from the armed forces. Both policies were upheld by the courts as being reasonable and lawful. Even leaving aside more recent legislative developments, it is hard to believe that they would be decided that way today, if one were simply applying substantive principles of public law. This may illustrate the fundamental point that law does not exist in a vacuum and that concepts like reasonableness take their colour and shape from the evolving values of society.

[74] These are concepts that owe a great deal to Sir Jeffrey Jowell KC himself, who developed them in his writings after the seminal article by Jowell and Lester which has provided the starting-point for this lecture, e.g. 'Proportionality and Unreasonableness: Neither Merger nor Takeover' in Hanna Wilberg and Mark Elliott (eds.), The Scope and Intensity of Substantive Review (Bloomsbury, 2015), Ch 3.