JUDICIAL REVIEW UNDER THE HUMAN RIGHTS ACT: A CULTURE OF JUSTIFICATION

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The approved function of the judiciary is consistently debated, especially since the introduction of the Human Rights Act 1998. The Act outlined that the courts were to review the actions of primary decision makers in light of convention rights. Arguably, the effect of this act has resulted in a culture of justification whereby the political branches of the government now have to justify their decision with reference to the Human Rights Act. However, this justificatory burden has been limited as the courts have discharged their role of protecting convention rights where they have to consider a case of political controversy through the concept of the discretionary area of judgement. This article prescripts the correct approach to which the court should take, outlining that a degree of appreciation for the political institutions can be made where it is justifiable for a degree of deference to be made to the political institution. This will allow the justificatory burden on decision makers to be fully established.

1 INTRODUCTION

As Dyzenhaus puts it, 'The role of judges in the legal order has always been controversial'.[1] Within the UK, that controversy has increased with the enactment of the Human Rights Act 1998 (HRA). The Act has given the judiciary the authority to review Acts of Parliament, assessing their compatibility with the European Convention on Human Rights (ECHR). Section 4 of the HRA permits judges to issue a 'declaration of incompatibility', an explicit statement of a statute's inconsistency with the Convention. Furthermore, Section 6 of the HRA requires public authorities, including the executive, to act in a manner compatible with Convention rights. The courts are charged with the responsibility of reviewing the decisions of both Parliament and the executive, the elected branches of government, to ensure they do not breach human rights. Therein lies the controversy. As Ewing argues, the HRA represents an 'unprecedented transfer of political power from the executive and legislature to the judiciary'.[2] The Act requires the courts, unelected and democratically unaccountable, to substantively review the actions and decisions of the elected branches.

How should judges review the actions and decisions of the elected branches under the HRA? It is to this question that this essay is dedicated. Firstly, the effect of the HRA upon the UK's constitutional order will be examined. It is to be argued that the HRA has cultivated a new culture at the heart of our constitution, a 'culture of justification'.[3] In this new culture, any act or decision of the elected branches that limits a Convention

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[1] David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997) 279.

[2] KD Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 M.L.R. 79, 79.

[3] Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 S.A.J.H.R. 31, 32.

right must be objectively *justifiable*; it must be supported by rational and cogent argument. The elected branches can no longer rely upon their democratic credentials or superior constitutional status to justify their actions. Central to this end is proportionality which has replaced *Wednesbury* irrationality as the standard of judicial review under the HRA. Proportionality allows for more rigorous review of primary decisions with a greater emphasis upon the reasons behind such decisions.

In light of the new culture, this essay will then consider the approach of the British courts in cases brought under the HRA. It will criticise the concept of the 'discretionary area of judgment'[4] which features heavily in the early case law under the HRA. It is to be argued that the concept has been used by the courts to avoid sufficiently robust review of decisions concerning issues of political controversy. In particular, some immigration cases will be examined to demonstrate how the discretionary area of judgment negates the requirement that any limitation of Convention rights be objectively justifiable. The cases have been chosen as in each the courts granted considerable discretion to the elected branches, simply on the basis of the subject matter of the impugned decision. Consequently the courts failed to discharge their duty of protecting Convention rights. The justificatory burden placed upon primary decision makers when limiting Convention rights was discarded.

Finally, the essay will offer a suggestion as to an appropriate approach to judicial review under the HRA that seeks to uphold the justificatory burden imposed on the elected branches, whilst ensuring that the courts are mindful of their own limitations. It is to be argued that the primary concern of the courts is proportionality. However, in applying proportionality, it is sometimes appropriate for the courts to display a degree of deference to the elected branches. The extent of judicial deference is not predetermined by the subject matter of the impugned decision. Instead the guiding principle is justifiability. The courts must ask whether it is justifiable to show deference to the primary decision maker. It will be justifiable where the primary decision maker enjoys an institutional advantage rendering it better placed than the courts to reach a reasoned decision. However it is not justifiable for the courts to defer on the basis of democratic concerns.

2 A NEW CONSTITUTIONAL ORDER

Before embarking upon an analysis of judicial review under the HRA, or prescribing an acceptable approach to such review, it is first necessary to consider the effect of the HRA upon our traditional constitutional order. In particular it must be asked: what environment are both the judiciary and the elected branches of government now operating in as a result of the Act? It is to this important question that this chapter is dedicated. It is to be argued that the HRA has introduced a new constitutional order in which any limitation of Convention rights must be objectively justifiable. Judges have been charged with the responsibility of assessing such justifications, but must also be mindful of their own institutional limitations. The HRA does not elevate the judiciary

[4] Anthony Lester and David Pannick, *Human Rights Law and Practice* (Butterworths 1999) 73.

to the position of primary decision maker. However, it does impose a justificatory burden upon primary decision makers that has not traditionally been a feature of English administrative law.

2.1 A Culture of Justification

Firstly, it is important to examine the concept of a culture of justification. It appears frequently in the academic literature relating to the HRA, particularly from those advocating more stringent judicial review.[5] However, it is not entirely clear what those invoking the concept mean when they argue that the Act has fostered a culture of justification. As it is to form an integral part of the argument it is necessary to dedicate some time to an analysis of the concept and an identification of its key features. In particular it must be asked what is meant by the term 'justification' within the context of judicial review.

A prominent advocate of the notion of a culture of justification was Etienne Mureinik, the South African human rights lawyer. Following the end of apartheid he wrote of his country's new Constitution:

> It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command.[6]

This provides the founding premise of the culture of justification. Any exercise of power must be supported with sound reason and not appeals to authority. Mureinik's vision was of a South Africa free from the 'culture of authority'[7] that had sustained the apartheid regime. The culture stemmed from Diceyan parliamentary sovereignty under which the legislature enjoyed unlimited law making power. Such sovereignty had fostered an 'ethic of obedience'[8], a system of government based upon power and coercion. Through it, he argued, 'The leadership of the ruling party commanded Parliament, Parliament commanded its bureaucracy, the bureaucrats commanded the people.'[9] It was a hierarchical system of command with limited scope for insubordination or questioning. The limited nature of the judicial role was laid bare as the Nationalist Party passed discriminatory statute after discriminatory statute.[10]

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[5] e.g. Richard Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859; Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003); Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671.

[6] Mureinik (n 4) 32.

[7] ibid.

[8] ibid.

[9] ibid.

[10] e.g. the Population Registration Act 1950 and the Group Areas Act 1950.

Departure from this damaging order was to be achieved by imposing upon those in power an obligation to justify the actions they took. Central to this end was the new South African Bill of Rights within the South African Constitution 1996 which, Mureinik argued, proclaims 'standards of justification.'[11] Significantly, the rights contained in the Bill are not absolutes that prevail in all circumstances. Each right is capable of restriction through the general limitation clause in s.36(1) which sets out the conditions upon which restrictions of a right can be justified. A restriction must be 'reasonable and justifiable in an open and democratic society'[12] and attention must be paid to the 'importance and purpose'[13] of the limitation and whether there is a less restrictive means of achieving the same end.[14] This model allows an examination of the rationale behind executive or Parliamentary action. As Mureinik put it, 'A challenge under the Bill opens up an inquiry into the justification of the decision challenged.'[15] The burden is placed upon the primary decision maker to demonstrate the necessity of any limitation of rights within the Constitution.

The Bill itself was not the only component of Mureinik's culture of justification. There was a second, less tangible, element. As Dyzenhaus points out, key features of the culture of justification were debate, criticism and challenge.[16] As well as a new legal instrument, a more inquisitive attitude was required from the courts. Rather than merely submitting to the will of the elected branches, the courts were to critically examine the justifications behind any limitation of the rights enshrined in the Constitution. It is important at this stage to introduce the distinction between justified and justifiable.[17] When reviewing the actions of the elected branches the courts ought to consider whether such actions are *justifiable*, not whether they are justified. Such a distinction preserves the secondary nature of the judicial role and ensures that the focus of the court's review is upon the reasoning offered in defence of a limitation.

If judges were to ask whether a decision is justified, they would be seeking convergence between the decision that has been made and the decision they would have made in the same circumstances. They would be assessing the primary decision by comparison with their own personal view as to the correct course of action. As Dyzenhaus argues, under this approach the reasons behind the decision are irrelevant. All that matters is 'coincidence of content rather than the relationship between reasons and content.'[18] Judges merely ask whether the decision made coincides with their own preferred decision. They do not consider the reasons behind a particular course of action. As such, judges are not engaged in review of the impugned decision. Instead, they are asked

[11] Mureinik (n 4) 33.
[12] Constitution of the Republic of South Africa 1996, s.36(1).
[13] ibid s.36(1)(b).
[14] ibid s 36(1)(e).
[15] Mureinik (n 4) 32.
[16] David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 SAJHR 11, 13.
[17] ibid 27-28.
[18] ibid.

whether they would have made the same decision were they in the position of primary decision maker.

In contrast, when considering whether a particular decision is justifiable, judges are asking 'whether the decision maker has shown it to be defensible'.[19] Under this approach the reasons behind the decision are of central importance. Judges are charged with the task of deciding whether the reasons offered constitute a plausible, but not necessarily the only, argument in favour of the decision. The courts are not asked whether they would have adopted the same course of action as the primary decision maker, but whether that course of action is objectively justifiable. As such, judges are charged with the secondary task of reviewing the primary decision and in particular the reasons offered in its defence. They are not considering whether they would have made the exact same decision.

There are, then, two key features of a culture of justification, as identified by Mureinik. Firstly there is a legal instrument protecting important rights recognised as integral to democracy. These rights, as is the case in the South African Bill of Rights, are not framed as absolutes. Instead they permit derogation in certain circumstances. This allows for an inquiry into the justifications behind a particular action. Secondly, a new approach from the courts is required, an approach that critically examines the justifiability of the actions of the elected branches. Using these two features as points of reference one must now return to the HRA. It will be argued that these two features exist in the context of the Act in the form of the ECHR and the doctrine of proportionality, which the UK courts have adopted in response to the ECHR. As such, the HRA has introduced a culture of justification, requiring any limitation of Convention rights to be justifiable.

2.2 The European Convention on Human Rights

The HRA incorporates most of the ECHR into UK law. In the language of the preamble, those rights are given "further effect" within the domestic legal order. Of particular importance is the structure of the rights set out in the Convention. As Singh points out, there are 'three kinds of rights in the ECHR'[20]. They are:

(1) absolute and unqualified rights;
(2) rights where an interference is permitted where it is 'necessary in a democratic society'; and
(3) rights where interference is permitted where some other interest outweighs the right in question.[21]

By nature the absolute rights permit no derogation. An example is the prohibition of torture in Article 3. In contrast, the rights found in the other categories are not absolute.

[19] ibid 28.
[20] Rabinder Singh, 'The Place of Human Rights in a Democratic Society' in Jeffrey Jowell and Jonathan Cooper (eds) *Understanding Human Rights Principles* (Hart 2001) 187.
[21] ibid 187.

They allow limitation in certain prescribed circumstances. Those rights in the second category, including the right to privacy in Article 8 and the right to freedom of expression in Article 10, require any interference to be 'necessary in a democratic society'.[22] The rights in the third category are those that enjoy the least protection. An example is the right to property in Article 1 of Protocol 1 which merely requires any limitation to be in the 'public interest'.[23]

The majority of rights fall within the second and third categories and are therefore qualified, albeit in different ways. As such the Convention follows what, on Dyzenhaus's interpretation, is a 'democratic model.'[24] By permitting derogation in certain circumstances the Convention allows domestic legislatures to have a say in the determination of rights. It is not just the preserve of the courts. Dyzenhaus contrasts the democratic model with the 'liberal model'[25], such as the Constitution of the United States of America, in which rights are framed as absolutes. Under such a model it is the judiciary who have sole interpretative authority. The hallmark of the liberal model, according to Dyzenhaus, is judicial supremacism.[26]

Pressing this further, there is at the heart of the Convention a desire to reconcile two competing impulses. As Griffith reminded us, we are 'both individual and social animals'.[27] As individuals we value the rights protected in the Convention but also accept that it is often necessary to restrict such rights in the interests of the wider community. This latter concern is informed by a utilitarian instinct, requiring us to act in a manner that produces the greatest good for the greatest number.[28] It also informs the democratic model and the qualified nature of most Convention rights. There is, as Feldman observes, 'a strong element of collectivism'[29] within the Convention. The rights 'are unlikely to operate in a purely liberal and individualistic way.'[30] There is broad scope, by virtue of their qualified nature, for collective concerns to inform the application of Convention rights. The rights may be limited in light of countervailing communal interests advanced by the elected branches of government.

It is this appreciation of collectivist concerns, and recognition of the role of the elected organs in the formulation of rights, that allows the Convention to act as a vehicle for the culture of justification. For it is by permitting derogation from the protected rights that an inquiry into the justifications behind Parliamentary or executive action is opened. As Dyzenhaus argues, 'a limitation provision gives the government an

[22] European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) Article 8(2), Article 10(2).
[23] ibid Protocol 1, Article 1.
[24] Dyzenhaus, 'Law as Justification' (n 17) 32.
[25] ibid 32.
[26] ibid 32.
[27] J A G Griffith, 'The Political Constitution' (1979) 42 MLR 1, 3.
[28] John Stuart Mill and Jeremy Bentham, *Utilitarianism and Other Essays* (Penguin 1987).
[29] David Feldman, 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19 LS 165, 174.
[30] ibid 173.

opportunity to show that the limitation is justifiable.'[31] If rights are absolute principles over which the courts exercise sole authority, there is no scope for a justificatory examination. The only question that must be answered in such circumstances is: has a right been breached? In contrast, under the ECHR where most of the rights are not absolutes, it must also be asked: why has a right been breached and are the reasons sufficient to justify the breach? It is only the democratic model, which the ECHR adopts, that will make every exercise of power 'the proper subject of the process of justification.'[32] Only the democratic model allows an assessment of the justifiability of a restriction of a right.

2.3 The Doctrine of Proportionality

The second element of Mureinik's culture of justification was a new, more demanding, approach from the courts. This approach would subject the actions of the elected branches to a more rigorous level of scrutiny and require more in terms of justification. Closer attention would be paid to the reasons behind any limitation of individual rights. The doctrine of proportionality allows for this more intense standard of judicial review in the UK and therefore contributes to the establishment of a culture of justification. It allows our courts to consider the justifiability of primary decisions to a much greater extent than was possible under the traditional grounds of judicial review. Proportionality was specifically adopted by the UK courts to provide the more intense standard of judicial review required under the ECHR. To demonstrate the greater emphasis on justifiability it is necessary to compare proportionality with the irrationality approach that has long been a feature of English administrative law.

The traditional test for irrationality is most associated with the judgment of Lord Greene MR in the *Wednesbury*[33] case and was summarised succinctly by Lord Diplock in the *GCHQ* [34] case. Lord Diplock stated that for a decision to be irrational it must be 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.'[35] To what extent this interpretation of irrationality has actually been adopted by the judiciary is open to question. As Craig points out, if the courts really did restrict irrationality review along the lines advocated by Lord Diplock, there would be 'almost no successful challenges of this kind.'[36] However, irrationality remains a very limited basis for judicial review. As Lord Bingham MR concluded in *Smith*, 'The threshold of irrationality is a high one.'[37] Though not impossible, it is difficult for an application to succeed.

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[31] Dyzenhaus, 'Law as Justification' (n 17) 32.
[32] ibid 36.
[33] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 (HL) 228-230.
[34] *R v Minister for the Civil Service, ex p Council of Civil Service Unions* [1985] AC 374 (HL)
[35] ibid 410.
[36] Paul Craig, 'Unreasonableness and Proportionality in UK Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 95.
[37] *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA) 558.

The *Wednesbury* doctrine grants the primary decision maker a very wide area of discretionary judgment into which the courts will not intrude. It is a standard of review that is 'notoriously weak'[38] in its intensity. The emphasis is on judicial restraint or, as Taggart puts it, keeping 'the judges' noses out of the tent of politics.'[39] It is symptomatic of what Harlow describes as the 'classic model'[40] of judicial review, founded upon a rigid conception of the separation of powers and a highly restricted role for the judiciary. Another significant feature of *Wednesbury* irrationality is that it places the burden of proof firmly on the applicant. The applicant had to demonstrate the irrationality of a primary decision. Furthermore, the public authority whose decision was being challenged was not required to give reasons for their actions.[41] As Taggart observes, administrative law has not historically regarded a requirement of reasons 'as an essential prerequisite to the validity of decision making.'[42] Public bodies were not obliged to demonstrate the justifiability of their decisions.

In *R (Daly) v Secretary of State for the Home Department*[43], the House of Lords explicitly adopted proportionality as the standard of review in HRA cases, replacing irrationality. In doing so the court endorsed the tripartite approach to proportionality set out by Lord Clyde in *De Freitas*.[44] When determining the acceptability of a limitation of a Convention right, the court would ask whether:

> (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[45]

In his judgment in *Daly*, Lord Steyn discussed the differences between the two grounds of review, remarking that 'the intensity of review is somewhat greater under the proportionality approach.'[46] Proportionality demands a more active role from the courts. Rather than merely considering the rationality of a decision, judges would be required to assess the balance struck by the primary decision maker. Furthermore, greater attention would have to be paid to the relative weight of rights and competing interests. In short, proportionality is a far more exacting standard of review than irrationality. As Hunt observes, proportionality requires 'a highly structured and

[38] Michael Fordham and Thomas de la Mare, 'Identifying the Principles of Proportionality' in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (Hart 2001) 32.
[39] Michael Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] NZLR 423, 429.
[40] Carol Harlow, 'A Special Relationship? American Influence on Judicial Review in England' in Ian Loveland (ed), *A Special Relationship? American Influences on Public Law in the UK* (Clarendon 1996) 83.
[41] Fordham and de la Mare (n 39) 32.
[42] Taggart (n 40) 462.
[43] [2001] UKHL 26, [2001] 2 AC 532.
[44] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69 (PC).
[45] ibid 80.
[46] *Daly* (n 44) [27].

sophisticated analysis quite different from anything that was ever required under the more traditional grounds of judicial review.'[47]

As well as providing a more structured methodology, proportionality differs greatly from *Wednesbury* in that the burden of justifying a primary decision 'is now squarely upon the decision maker.'[48] Under *Wednesbury*, the applicant had to demonstrate the irrationality of a primary decision. In contrast, proportionality requires the decision maker to explain the necessity of any limitation of individual rights. The court must be convinced that any such limitation is justifiable within the confines of the Convention. This opens what Taggart describes as a 'justificatory gap'[49] between proportionality and *Wednesbury*. The latter requires little in terms of justification from the decision maker whereas the former imposes a strong justificatory burden. This marks a significant departure from traditional administrative law which, as noted above, had little regard for the reasons behind a particular decision.

A vivid example of the difference between irrationality and proportionality was provided in *Smith and Grady v UK*.[50] The case concerned a challenge to the prohibition on homosexuals serving in the British armed forces. The applicants alleged that an investigation into their private lives and subsequent dismissal from the armed forces on the basis of their homosexuality constituted a breach of their right to privacy under Article 8 of the ECHR. In both the Divisional Court and the Court of Appeal the applicants were unsuccessful.

The prevailing theme in the domestic courts was the limited nature of *Wednesbury*. As Leigh explains, both Simon Brown LJ and Lord Bingham MR were 'apparently inclined to find against the Crown were it not for the limitations of judicial review'[51]. Simon Brown LJ confessed that he refused the applications with 'hesitation and regret'[52] and acknowledged that in the context of the ECHR, 'the days of this policy are numbered.'[53] Whilst the Court of Appeal refused to endorse this assessment, Lord Bingham MR suggested that domestic law was unable to protect the applicants stating that it 'may be necessary' for them to pursue their claim in Strasbourg.[54] Domestic judicial review was unable to provide the rights protection that the applicants desired. Despite concerns about the policy, and its possible incompatibility with the ECHR, it could not be said

[47] Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 337.
[48] Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671, 680.
[49] Taggart (n 40) 439.
[50] (2000) 29 EHRR 493, see also *Lustig-Prean and Beckett v UK* (2000) 29 EHRR 548.
[51] Ian Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' [2002] PL 265, 270.
[52] *Smith* (n 38) 541.
[53] ibid 542.
[54] ibid 559.

to be irrational. As Lord Bingham MR concluded, the high threshold of irrationality was not 'crossed' in this case.[55]

This approach was strongly criticised by the European Court of Human Rights (ECtHR). In unequivocal terms it declared that the standard of review before the domestic courts was:

> Placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued…[56]

Irrationality simply did not afford enough protection to the rights of the applicants. In adopting irrationality as their standard of review the domestic courts had failed to consider the justifications for the policy. They had instead relied upon the unsubstantiated claim that allowing homosexuals to serve in the military jeopardised morale and operational effectiveness. They were 'confined'[57] to asking whether the policy was irrational and simply refused to address the issue of whether a fair balance had been struck between the rights of the applicants and competing public interests.

In contrast, in applying proportionality, the ECtHR placed great emphasis on the justifications behind the policy. It concluded that the government had not offered 'convincing and weighty'[58] reasons to justify the policy. There was no evidence to suggest that the presence of homosexuals threatened the effectiveness of the armed forces. Furthermore, the burden was on the government to provide this evidence. It was clear from the judgment in *Smith & Grady* that, in the context of Convention rights, irrationality was not a sufficiently robust standard of review. As Clayton argues, the ECtHR 'specifically rejected the notion that the *Wednesbury* doctrine adequately protects Convention rights.'[59] It was only proportionality, with its emphasis on justification, which provided a level of protection compatible with the ECHR.

Heeding the words of the ECtHR, the House of Lords in *Daly* emphasised the need for justification when the rights of an individual are limited. In language similar to that of the ECtHR in *Smith & Grady*, Lord Bingham stated the court must consider whether a limitation was as a 'necessary and proper response'[60] to the social need that is being addressed. In the context of the case he concluded that he could not accept the reasons put forward to justify the blanket ban on prisoners being present whilst their cells were searched.[61] In so doing, his Lordship adopted an approach that was far more rigorous

[55] ibid 558.
[56] *Smith & Grady* (n 51) para 138.
[57] ibid para 132.
[58] ibid para 105.
[59] Richard Clayton, 'Regaining a Sense of Proportion: the Human Rights Act and the Proportionality Principle' [2001] EHRLR 504, 509.
[60] *Daly* (n 44) [18].
[61] ibid [19].

than he and his colleagues had done in *Smith*. It was not sufficient that the policy fell within a range of reasonable responses open to the primary decision maker. The policy had to be justifiable, there had to be strong reasons supporting it. As such *Daly* must be regarded as a significant step away from *Wednesbury*, at least in the context of human rights. According to Hunt, the decision was a 'major landmark on the road to the development of a true 'culture of justification''.[62] Proportionality had been formally adopted as the standard of review in cases brought under the HRA. The requirement of justification that had been so obviously lacking under *Wednesbury* had been granted a prominent place within judicial review.

2.4 A New Constitutional Order?

The enactment of the HRA has taken us towards the culture of justification to which Mureinik aspired. By incorporating most of the ECHR into domestic law, the Act provides a bill of rights along the democratic model. Rights are not absolute principles over which the courts enjoy supreme interpretative authority. Rather the determination of rights may be regarded as a joint enterprise between the courts and the elected branches of government. The democratic organs of state are permitted a say in the protection of individual rights. It is this model that allows an examination of the justifiability of the decisions of the elected branches.

The courts have also adopted a new, more demanding approach to determining the acceptability of any rights limitation. In the context of human rights cases the courts have embraced the doctrine of proportionality. Unlike the highly restrictive *Wednesbury* irrationality, proportionality requires the judiciary to pay greater attention to the justifications behind any limitation of individual rights. Rather than asking whether the decision in question was one reasonably available to the primary decision maker, proportionality requires a more complex analysis of the rights at stake and any countervailing interests. The courts must determine whether any limitation is justifiable within the context of the ECHR, not whether it passes the high threshold of irrationality.

As such, the HRA has introduced a new constitutional order. The elected branches of government can no longer rely solely upon their democratic credentials or superior constitutional status when limiting Convention rights. Instead they are required to objectively justify their decisions, they must demonstrate that their decisions are justifiable not just rational. As a result of the HRA we have 'moved away from a model of majoritarian democracy'[63] towards a model with greater respect for the individual rights enshrined in the ECHR. The requirement of justifiability should ensure that such rights are not easily restricted.

[62] Hunt (n 48) 342.
[63] Jowell (n 49) 682.

3 A THREAT TO THE NEW ORDER: THE DISCRETIONARY AREA OF JUDGMENT

Having argued that the HRA has established a new constitutional order, in which primary decision makers are required to objectively justify any limitation of Convention rights, it is now time to examine how the judiciary have responded to this new order. This chapter is to criticise the concept of a 'discretionary area of judgment'[64] which features in the early case law under the HRA. Founded upon a rigid conception of the separation of powers and the same judicial culture of deference to the elected branches that spawned *Wednesbury*, the discretionary area of judgment for a primary decision maker has been used by the courts to avoid sufficiently robust review of rights infringement. In certain cases immediately after the enactment of the HRA the judiciary did not engage in the sophisticated analysis required by the doctrine of proportionality. Instead, the discretion of the primary decision maker was invoked by the courts to avoid an inquiry into the justifications of any limitation of Convention rights. As such, the concept of a discretionary area of judgment poses a significant threat to the culture of justification.

3.1 The Concept of the Discretionary Area of Judgment

When determining the validity of a restriction of a qualified Convention right the ECtHR has developed its own margin of appreciation doctrine. The court has recognised that:

> By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions.[65]

As a supranational court, the ECtHR deems it necessary to accord the decisions of individual states, and their domestic institutions, a presumptive weight. As McBride explains, 'there is an assumption that those nearer the decisions might be better placed to assess the specific requirements of a situation.'[66] The ECtHR recognises that individual states are in a stronger position than itself to determine the appropriate response to domestic problems. The protection of Convention rights provided by the ECtHR is therefore 'subsidiary to the national systems safeguarding human rights.'[67] It is for states themselves to afford protection to Convention rights in the manner that best fits their own domestic situation.

The margin of appreciation doctrine has no place in domestic law. As Craig argues, the justification for the doctrine is 'integrally connected'[68] with the supranational nature of the ECtHR. It is founded upon a recognition that, as a supranational body, the court is

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[64] Lester and Pannick, *Human Rights Law and Practice* (n 5) 73.
[65] *Buckley v UK* (1996) 23 EHRR 101, para 49.
[66] Jeremy McBride, 'Proportionality and the European Convention on Human Rights' in Evelyn Ellis (ed). *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 29.
[67] *Handyside v UK* (1976) 1 EHRR 737, para 48.
[68] Paul Craig, 'The Courts, the Human Rights Act and Judicial Review' [2001] 117 LQR 589, 590.

limited in its ability to determine appropriate responses to domestic issues. The court is removed from 'local circumstance'[69] and therefore accords an element of deference to national institutions which are more likely to be in tune with the particular needs of that state. Such arguments are not applicable with respect to national courts. As Laws argues, the margin of appreciation will 'necessarily be inapt to the administration of the Convention in the domestic courts for the very reason that they are domestic.'[70] The doctrine is of supranational nature and is therefore inappropriate for adoption by domestic courts.

Despite the inappropriateness of the margin of appreciation doctrine in the context of domestic adjudication, it has been argued that national courts ought to develop a similar doctrine for judicial review under the HRA. Pannick contends that national courts should recognise a doctrine analogous to the margin of appreciation that accords a 'discretionary area of judgment in relation to policy decisions which the legislature, executive and public bodies are better placed than the judiciary to decide.'[71] He adds that the courts ought to recognise that in certain circumstances the elected branches of government are better placed to assess the needs of society and to carefully balance competing interests.[72] Just as the margin of appreciation doctrine is founded upon an assumption that national institutions are better placed to respond to particular domestic problems, the discretionary area of judgment assumes that Parliament and the executive occupy a superior position to the courts in the determination of questions of policy.

The danger with such an assumption, and consequently with the concept of a discretionary area of judgment, is that particular categories of Parliamentary and executive action can effectively be placed beyond the reach of judicial review. As Allan argues, the discretionary area of judgment is 'tantamount to a justiciability doctrine, premised on the idea that certain issues are not in any circumstances amenable to judicial determination.'[73] As the concept automatically assumes that the elected branches are better placed to make certain decisions, such as those relating to matters of policy, it encourages the judiciary to avoid any meaningful review of such decisions. As argued in the previous chapter, the HRA has replaced an assumption in favour of the superior status of the elected branches with a requirement that they justify any decision or action they take that limits Convention rights. That is the new constitutional order established by the HRA. The courts are charged with the responsibility of assessing such justifications. Failure to do so amounts to an abdication of judicial responsibility.

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[69] ibid.
[70] John Laws, 'The Limitations of Human Rights' [1998] PL 254, 258.
[71] David Pannick, 'Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment' [1998] PL 545, 545.
[72] ibid 549.
[73] TRS Allan, 'Human Rights and Judicial Review: A Critique of 'Due Deference'' [2006] CLJ 671, 687.

The discretionary area of judgment serves as an alternative to thorough judicial scrutiny of the justifications offered in defence of limitations of qualified Convention rights. In the words of Edwards, adoption of the concept renders judicial review little more than a 'smell test'.[74] The mere presence of policy related matters causes the judiciary to avoid any meaningful analysis of the impugned decision. Where such issues are raised, the discretionary area of judgment acts as a convenient excuse allowing the courts to avoid issues of political controversy. The emphasis is placed upon the type of decision and not whether it is justified. As Hunt argues, the discretionary area of judgment regards certain areas of decision making as being 'within the realm of pure discretion'.[75] The courts are prevented from assessing the justifications behind decisions that fall within such areas of discretion. The discretionary area of judgment identifies certain spheres of decision making as being insulated from judicial review. Such an outcome is contrary to the culture of justification fostered by the HRA.

3.2 The Discretionary Area of Judgment in Action

The discussion thus far has been abstract. To demonstrate the effect of the discretionary area of judgment it is necessary to turn to the case law. Rather than being confined to the pages of academic journals, the discretionary area of judgment has been adopted by the judiciary in cases concerning issues of acute political controversy. An example of such an issue is immigration. This section is dedicated to an examination of some notable immigration cases where the discretionary area of judgment, if not explicitly named as such, has proved significant in the reasoning of the courts. The examination of the case law is intended to demonstrate that the concept has been used by the courts to avoid the more sophisticated judicial review required under the HRA. As argued above, the discretionary area of judgment negates the requirement that a primary decision maker objectively justifies the limitation of a Convention right, in contravention of the culture of justification.

An early manifestation of the discretionary area of judgment came in the case of *Rehman*[76] which combined the judicial hot potatoes of immigration and national security. The case centred on a deportation order made by the Home Secretary on the grounds that Rehman was involved in terrorist activity in India and therefore posed a threat to the UK's national security. Rehman challenged the order on the basis that he posed no such threat. He argued that his group, Markaz Dawa Al Irshad (MDI), had no intention to and could not target the UK. Consequently he and his group posed no threat to the security of the UK. Though not decided under the HRA, the case provides an example of how the concept of a discretionary area of judgment can act as a substitute for effective judicial scrutiny of an executive decision.

The key question on which the case hinged was whether Rehman did actually pose a threat to national security. If he did then the deportation order made under section

[74] Richard Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859, 863.
[75] Hunt (n 48) 339.
[76] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153.

3(5)(b) of the Immigration Act 1971 was lawful, if not, the deportation could not be justified. Despite the central importance of the question to the legality of the deportation, the House of Lords refused to confront it. Instead their Lordships granted the executive a wide discretionary area of judgment to determine whether Rehman was a threat to national security. Leading the way in this regard was Lord Hoffmann. He stated that:

> the question of whether something is in the interests of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.[77]

For Lord Hoffmann, the issue was not how the courts ought to approach questions of immigration and national security but whether such questions can "properly be decided by a judicial tribunal at all."[78] Whilst not entirely dismissing the court's ability to review determinations of national security, Lord Hoffmann's preferred course of action was to grant huge discretion to the executive in this field of decision making. In his postscript he argued that there was a need for the judiciary to "respect the decisions of ministers of the Crown" on questions of national security.[79] This was a category of decision making that warranted very little, if any, judicial interference. Lord Hoffmann and his colleagues refused to question the executive's assertion that Rehman's continued presence in the UK posed a threat to national security. Their Lordships sought no justification for the Home Secretary's claim.

Underlying Lord Hoffmann's reluctance to challenge the Home Secretary's decision to deport Rehman, was the discretionary area of judgment. For Lord Hoffmann, considerable discretion was to be accorded to the executive when making policy decisions. Elsewhere he argued that it was a "legal principle" that majority approval was necessary for the determination of policy questions.[80] This would appear to suggest that the courts, who are not democratically elected, are unable to consider any cases involving elements of policy. Such a position runs counter to the very purpose of the HRA. As Lord Steyn argues, in principle "there cannot be any no-go areas under the ECHR and for the rule of law."[81] Seeking to immunise certain categories of decision making, such as immigration, undermines the protection of individual rights that the HRA is supposed to facilitate. It does not require primary decision makers to objectively justify the limitation of Convention rights. It is the antithesis of the more stringent judicial review required by the culture of justification.

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[77] ibid [50].
[78] ibid [52].
[79] ibid [62].
[80] *R (Prolife Alliance) v British Broadcasting Corporation* [2003] UKHL 23 [2004] 1 AC 185 [76].
[81] Lord Steyn, 'Deference: A Tangled Story' [2005] PL 346, 351.

The discretionary area of judgment was also pertinent in the judgment of Lord Phillips MR in *Mahmood*.[82] Mahmood challenged his removal from the UK on the basis that it constituted a disproportionate limitation of his right to family life under Article 8 of the Convention. In response, the Home Secretary argued that such a limitation was justified in the interests of maintaining firm immigration control. As the decision to remove Mahmood was made by the Home Secretary prior to the HRA coming into force, the issue arose as to whether the case should be decided under the Act. Disagreeing with his colleague Laws LJ, Lord Phillips MR believed that the case ought to be decided under the HRA as the Home Secretary had expressed the view that his decision was compatible with Article 8.[83] It was appropriate for the courts to assess this claim.

Unfortunately, Lord Phillips MR did not subject the Home Secretary's claim to much assessment. As in *Rehman*, the discretionary area of judgment proved influential. Lord Phillips MR relied upon the judgment of Lord Hope in *Kebilene*[84] where it was stated that:

> In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body…[85]

With this as his foundation Lord Phillips MR argued that, in cases such as *Mahmood*, there will often be "an area of discretion permitted to the executive"[86] before a decision can be said to breach the Convention. The practical consequence of adopting the discretionary area of judgment was that the standard of review implemented by Lord Phillips is simply inadequate in the context of the HRA. He stated that the courts had to ask "whether the decision-maker could reasonably have concluded that the interference was necessary"[87], granting an area of discretionary judgment in the process. This is not what is required under the Convention. The question is whether the limitation of the qualified right is objectively justified, whether it is proportionate.
With respect, the approach of Lord Phillips MR in *Mahmood* contradicts the culture of justification. It is couched in the language of *Wednesbury* unreasonableness which, as demonstrated in the previous chapter, has been declared inadequate for human rights review. The decision maker merely had to establish that is was reasonable to conclude that the limitation of a Convention right was necessary, not that it was actually necessary or proportionate. Rather than focussing upon the justifications behind the limitation of Mahmood's right to family life, Lord Phillips MR instead emphasised the discretion of the executive. He avoided any meaningful examination of the Home Secretary's decision. The level of judicial scrutiny was not sufficiently strong. As

[82] *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 (CA).
[83] ibid [36].
[84] *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 (HL).
[85] ibid 381.
[86] *Mahmood* (n 83) [38].
[87] ibid [40].

Edwards argues, "Scrutiny at this level is not of the rigour demanded by the HRA. It is, in fact, judicial avoidance."[88]

A similar approach was adopted by the Court of Appeal in *Farrakhan*.[89] Here the issue was the validity of the Home Secretary's decision to prevent the applicant from entering the UK. The Home Secretary argued that Farrakhan's exclusion from the country was justified as his presence was not conducive to the public good. In similarity to *Rehman*, the judiciary were confronted with a case concerning an assessment of a threat to public order and security. As Farrakhan's exclusion amounted to a limitation of his qualified right to freedom of expression, under Article 10 of the Convention, the court's emphasis ought to have been upon the justifications for the exclusion. Lord Phillips MR appeared to recognise this, agreeing that Farrakhan's challenge was a "reasons challenge."[90] The key question was whether the Home Secretary had sufficient objective reason to exclude Farrakhan from the UK. In other words, was the Home Secretary's claim that Farrakhan posed a threat to public order justified? The requirement of justification ought therefore to have been central to the court's decision making process.

It is useful to consider the approach of Turner J who found in favour of Farrakhan at first instance.[91] The Court of Appeal subsequently reversed his decision. His judgment placed a strong emphasis upon the need for the Home Secretary to objectively justify the decision to deny Farrakhan entry. Turner J stated that there had to be "substantial objective justification"[92] for the decision to limit Farrakhan's right to freedom of expression. Clearly he was of the opinion that the Home Secretary's contention that the applicant's presence in the UK would jeopardise public order had not been objectively justified. There was, in Turner J's view, a "complete absence of evidence"[93] that allowing Farrakhan to enter the country would pose any threat to public order. He concluded that the Home Secretary had simply not demonstrated that there was "more than a nominal risk that community relations would be likely to be endangered"[94] should Farrakhan be permitted to enter the country. As a result, Turner J found in favour of Farrakhan on the basis that there was no justification for denying him entry to the UK.

The judgment is significant for its refusal to adopt the discretionary area of judgment approach. Turner J, in contrast to the House of Lords in *Rehman*, did not regard immigration policy or determinations of risk as being beyond the scope of judicial review. On the contrary, the question of whether Farrakhan's presence in the UK did actually pose a threat to public order was of the utmost importance. He did not merely

[88] Edwards (n 75) 868.
[89] *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606, [2002] QB 1391.
[90] ibid [5].
[91] [2001] EWHC Admin 781.
[92] ibid [48].
[93] ibid [53].
[94] ibid.

accept the arguments advanced by the executive on the basis that this was a policy related matter. Instead he subjected such arguments to rigorous scrutiny to assess their veracity and determine whether they constituted the objective justification required for the limitation of a qualified Convention right. His approach was far more consistent with the new constitutional order established by the HRA than that adopted by the House of Lords in *Rehman*.

Unfortunately however Turner J's approach was not adopted by the Court of Appeal. The court endorsed the discretionary area of judgment and found in favour of the Home Secretary without examining the justifications behind Farrakhan's exclusion. In fact, Lord Phillips MR admitted that the Home Secretary "advanced no evidence to justify his decision".[95] Despite this declaration the court concluded that the "Secretary of State provided sufficient explanation for a decision that turned on his personal, informed, assessment of risk" and that the limitation of Farrakhan's right to freedom of expression was proportionate.[96] Lord Phillips MR and his colleagues were convinced of the proportionality of the exclusion despite acknowledging that there was no evidence to suggest Farrakhan's presence in the country threatened public order.

As in *Rehman*, the primary concern of the Court of Appeal in *Farrakhan* was the discretion that was to be accorded to the executive within the sphere of immigration policy. The court was preoccupied with ensuring that they did not interfere with the Home Secretary's decision stating that "the margin of appreciation or discretion accorded to the decision maker is all-important".[97] This was to ensure that the court "avoids substituting its own decision for that of the decision maker."[98] In its desperate attempt to avoid such a substitution the court failed to discharge its duty under the HRA, namely to ensure that any limitation of a Convention right is justified. Adoption of the margin of discretion acted as a replacement for judicial review of the decision to limit Farrakhan's right to freedom of expression. As Allan argues, "The protection of freedom of speech was notional: in practice, the minister's judgment was not subject to serious judicial scrutiny."[99] By ignoring the requirement of objective justification the court abandoned its own role in the new constitutional order established by the HRA. It did not require the limitation of Farrakhan's Article 10 right to be justified.

3.3 The End of the Discretionary Area of Judgment

As Ewing puts it, "The incorporation of Convention rights has to mean something more than simply new lyrics for old songs."[100] The concept of the discretionary area of judgment may be the new lyrics adopted by the judiciary in the immediate aftermath of incorporation. However, in practice it amounts to the same old songs of excessive judicial deference in cases of acute political controversy. Just like the *Wednesbury*

[95] *Farrakhan* EWCA (n 90) [60].
[96] ibid [79].
[97] ibid [67].
[98] ibid.
[99] Allan (n 74) 690.
[100] KD Ewing, 'The Futility of the Human Rights Act' [2004] PL 829, 852.

doctrine, the discretionary area of judgment is founded upon a rigid conception of the separation of powers that severely limits the role of the courts in the determination of rights. In desperately trying to avoid substituting its own judgment for that of the primary decision maker, the judiciary have on occasion avoided making any judgment whatsoever and have not required objective justification for the limitation of qualified Convention rights. As such they have failed to fulfil their obligations in the new constitutional order established by the HRA. The discretionary area of judgment ought to suffer the same fate as *Wednesbury* in the context of human rights. It must be consigned to history, an embodiment of the old constitutional order that existed prior to the HRA.

4 MAINTAINING THE NEW ORDER: JUSTIFIABILITY

The HRA has established a new constitutional order in which primary decision makers are obliged to justify any limitation of Convention rights. By adopting the concept of the discretionary area of judgment the judiciary failed to uphold this justificatory obligation. Having criticised the discretionary area of judgement, the question now arises as to how the courts ought to approach judicial review under the HRA. It must be asked how the courts are to provide adequate protection to the rights enshrined in the Convention whilst remaining sensitive to their own institutional limitations. In answering this question it is useful to return to the distinction made earlier between justified and justifiable.[101] When reviewing any limitation of Convention rights, the courts must consider whether such a limitation is *justifiable*, not whether it is justified. The court does not seek convergence between the impugned decision and its own view of how a particular problem ought to be resolved. Instead, the court's focus is upon the reasoning behind the limitation and whether it constitutes a plausible, but not necessarily the only, argument in defence of the limitation.

The first, and primary, duty of the courts is the application of proportionality. As discussed earlier, proportionality is the substantive standard of review that has been formally adopted in judicial review under the HRA. It allows for a critical examination of the reasons behind any limitation of Convention rights. However, in applying proportionality it is sometimes acceptable for the courts to show a degree of deference to the primary decision maker. Unlike the discretionary area of judgment, the extent of judicial deference is not predetermined by the subject matter of the impugned decision. Instead, the guiding principle is justifiability. The courts must ask whether deference is justifiable with reference to the particular context and factual matrix of the case at hand.

4.1 What is Deference?

Arguing that judges ought, on occasion, to show a degree of deference to the primary decision maker risks negating the requirement of objective justification. Advocating judicial deference to primary decision makers risks a repeat of the judicial inaction that was criticised in the previous chapter. This concern was raised by Lord Hoffmann in

[101] David Dyzenhaus, 'Law as Justification' (n 17) 27-28.

Prolife Alliance.[102] His Lordship expressed the view that deference had "overtones of servility, or perhaps gracious concession".[103] He believed deference to be an inappropriate description of the court's approach as it suggested an obsequious judiciary incapable of holding Parliament and the executive to account. A similar argument has been advanced by Trevor Allan for whom any doctrine of deference is "empty or pernicious."[104] According to Allan, a doctrine of deference is a "tool of judicial discretion"[105] that "threatens the coherence of constitutional rights adjudication".[106] The concern is that judicial deference weakens the protection of rights offered by the HRA. It may undermine the requirement that any limitation of Convention rights be justifiable.

Given what has been argued this is a pressing concern. If judicial deference undermines the justificatory burden placed upon primary decision makers then it will damage the new constitutional order established by the HRA. However, judicial deference does not have to be regarded in this light. The views expressed by Allan and Lord Hoffmann centre on a concern that deference may amount to the complete abdication of the judicial role in rights adjudication. However, if properly understood, deference does not encourage the courts to abandon any meaningful review of primary decisions as the discretionary area of judgment did. In the words of Kavanagh, deference is "partial"[107] and not "absolute or complete".[108] It does not prevent a court from embarking upon its own assessment of the issue at hand. Rather, deference is a more modest requirement that judges attribute weight to the primary decision where it is justifiable to do so.

Deference ought to be understood as an "institutional"[109] form of judicial restraint. Its emphasis is upon the "comparative merits and drawbacks of the judicial process as an institutional mechanism for solving problems."[110] Deference does not exclude the courts from problem solving but it does require judges to be attentive to their own limitations. As Young puts it, "there may be institutional reasons for accepting that the legislature or the executive is more likely to reach the correct answer."[111] The courts ought to accept that, in some circumstances, the elected branches are better placed to determine the necessity of a limitation of a Convention right. The courts still carry out a proportionality analysis. Proportionality is the substantive element of judicial review under the HRA. However, it is justifiable for the courts to accord weight to the determinations of a primary decision maker whose institutional features render them more likely than the courts to arrive at a reasoned outcome.

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[102] *R (Prolife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185.
[103] ibid [75].
[104] Allan, 'Human Rights and Judicial Review' (n 74) 675.
[105] TRS Allan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' (2011) 127 LQR 96, 98.
[106] ibid 99.
[107] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 172.
[108] ibid.
[109] Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OJLS 409.
[110] ibid 410.
[111] Alison Young, 'In Defence of Due Deference' (2009) 72 MLR 554, 562.

As Kavanagh argues, deference is a "rational response"[112] to uncertainty. Where a judge is unsure of a particular issue it is not an abdication of the judicial role to accord weight to the primary decision maker's own view. On the contrary, in circumstances of uncertainty, deference is a reasonable approach. An example of such a situation could be evaluating a potential threat to national security. The court is likely to be extremely uncertain of the extent of the threat posed by a particular individual or group. Determining the threat requires anticipation of future harms on the basis of credible intelligence, a difficult task for the courts who are generally ill equipped to make these judgments. Displaying a degree of deference to the executive's risk assessment is therefore justifiable. It does not amount to judicial inaction, as the discretionary area of judgment did. Rather it is an acknowledgement from the courts that they are uncertain of a particular issue and that other branches of government may be better equipped to make such judgments.

This was recognised by the majority of the House of Lords in the *Belmarsh Prison* case.[113] The UK government sought to derogate from the Convention to impose indefinite detention on foreign terror suspects. In determining the acceptability of such a derogation the House of Lords had to decide whether the UK faced a "public emergency threatening the life of the nation" as required by Article 15 of the Convention. On this issue, the court accorded a strong degree of deference to the executive. Lord Bingham argued that "great weight"[114] should be given to the Home Secretary's risk assessment. The decision required a "factual prediction"[115] of what people may do, making it "necessarily problematic."[116] His Lordship was uncertain as to the extent of the threat faced by the UK. It was therefore justifiable to accord strong weight to the executive's own assessments, especially given their superior access to intelligence.

Despite according strong weight to the executive's risk assessment, the court was still able to find in favour of the applicants. The case centred on the necessity of the detention, an issue on which the court correctly displayed far less deference. Deference is not applied in a blanket manner. The key question is whether deference is justifiable in a particular context. In some circumstances judicial deference is justifiable, in others it is not. It is therefore wrong to characterise deference as an abdication of the judicial role. As Kavanagh puts it, "deference is not anathema to the culture of justification".[117] It requires judges to accord an appropriate weight to primary decisions where such weight is justifiable, taking into account the particular context. Judges must be able to

[112] Aileen Kavanagh, 'Deference of Defiance?: The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008) 208.
[113] *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.
[114] ibid [29].
[115] ibid.
[116] ibid.
[117] Kavanagh, *Constitutional Review* (n 108) 174.

demonstrate that deference is appropriate. Deference cannot just be invoked as a means of avoiding controversial issues as the discretionary area of judgment was. The principle of justifiability serves as a restriction upon judicial deference, ensuring that the protection of Convention rights is not abandoned.

When deference is understood in this manner it is capable of withstanding the concern that it may amount to an abdication of the judicial role. It is not intended to exclude the courts from human rights adjudication. Rather it serves as a reminder that, as Gearty puts it:

> The judges make up an important branch of the state but it is no more than one branch, with there being two others, the legislative and executive, towards both of which the courts must show sensitivity and understanding.[118]

Judicial deference amounts to a recognition of the fact that the courts are not always best placed to determine the necessity of the limitation of a Convention right. The judiciary ought to recognise that in some circumstances the institutional characteristics of Parliament and the executive render their decisions worthy of weight. In such circumstances, judicial deference is justifiable.

4.2 Determining the Degree of Deference

Deference is the practice of attributing weight to a primary decision. The extent of the weight, and consequently the degree of deference, is to be determined by what is justifiable within the context of a particular case. What follows is a discussion of two such considerations that may lead a court to display deference. These are the relative expertise of the courts and the elected branches and the requirement of democratic legitimacy. It is to be argued that relative expertise is a justifiable reason for deference. However, democratic legitimacy is not. Deference on this ground undermines the new constitutional order established by the HRA.

4.3 Relative Expertise

There are situations in which the superior expertise of the elected branches renders a degree of judicial deference justifiable. As Lord Steyn argues, courts may owe deference to the elected branches when they are "institutionally better qualified to decide the matter".[119] The central concern here is the decision making capability of the courts in comparison to the primary decision maker. The emphasis is upon the "capacity"[120] of the courts to make the relevant decision. Issues of pertinence include the procedures of the courts and the access to important information that they enjoy. Acknowledging the limits of the court's decision making capacity does not negate the requirement that any limitation of a Convention right be objectively justifiable. Rather it is a rational recognition that another branch of government may be better placed to make a particular decision.

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[118] Conor Gearty, *Principles of Human Rights Adjudication* (OUP 2004) 117.
[119] Steyn, (n 82) 350.
[120] Jeffrey Jowell, 'Judicial Deference and Human Rights: A Question of Competence' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe* (OUP 2003) 73.

Kavanagh provides a useful example explaining the rationale behind deference on the ground of relative expertise. When consulting a doctor for advice regarding a medical condition we display deference to their opinion. This is not an unreasonable approach. On the contrary, such deference to the considered opinion of a medical practitioner is an entirely reasonable course of action. We recognise that they 'possess medical training and expertise we lack.'[121] In such a situation we are not precluded from forming our own opinion. We may have experienced the particular medical condition in the past and feel confident in managing it. However, regardless of our own experiences, we accord strong weight to the doctor's diagnosis and prescription. As Kavanagh puts it, the 'primary rationale'[122] for doing so is 'respect for the acknowledged superior claims or qualities of the other.'[123] We recognise that a doctor possesses greater medical expertise than ourselves. Consequently, a degree of deference to their opinion is entirely rational, even desirable.

In judicial review under the HRA, it is clear that on occasion the elected branches will possess greater expertise than the courts. In such circumstances it will be justifiable for judges to attach weight to the decisions of the elected branches, just as a patient would attach great weight to the medical opinion of their doctor. Unlike the discretionary area of judgment, this approach to deference does not automatically assume that a case centred on a particular subject warrants judicial restraint. Judges would not be permitted from abandoning any meaningful review of the primary decision simply on the basis of the type of decision being challenged. However, judges ought to recognise the limits of their decision making capability. As Keene argues, on some issues the court should 'attach considerable weight to the views of those who actually had expertise in such matters'.[124]

The key here is that judges ought to recognise their limitations with respect to *some issues*. As noted above, deference does not apply in a blanket manner, even when controversial political issues are at stake. Any decision making process under the HRA will consist of a number of steps and the degree of deference may vary for each. The degree of deference will depend upon what is justifiable on that particular part of the decision making process, depending upon the relative expertise of the courts and the primary decision maker. Consider again the situation in the *Belmarsh Prison* case where the executive sought to derogate from the Convention to deal with a perceived threat to national security.

[121] Kavanagh, 'Deference or Defiance?' (n 113) 187.
[122] ibid.
[123] ibid.
[124] Sir David Keene, 'Principles of Deference under the Human Rights Act' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 209.

In such a case the first issue to be determined is whether there is a threat to national security. On this first question, judicial deference to the executive is justifiable. As Jowell argues:

> there is no reason why the courts may not concede the superior intelligence gathering capacity of the executive to answer that question accurately – or at least more accurately than the courts.[125]

Here the courts ought to recognise the superior expertise of the executive in determining the extent of the threat. The executive has greater access to relevant intelligence. As such, the executive's assessment ought to carry great weight. That does not prevent the court from challenging such an assessment. Where the executive advances a risk assessment without any foundation the courts ought not to accept it. That was the approach of Turner J at first instance in *Farrakhan*.[126] He found against the Home Secretary on the basis that no evidence had been advanced supporting the claims that Farrakhan posed a threat to public order. However, executive assessments of the threat posed by a particular individual to security will generally attract a degree of deference on the ground of relative expertise. The executive is better placed to make such judgments. As such, according strong weight to those judgments is justifiable.

That is not the end of the story. Whilst executive risk assessments may attract a strong degree of judicial deference there are other considerations for the court which may not. Identifying a legitimate objective, such as protecting national security, is only one part of the proportionality inquiry. The other two components of proportionality, that the measures adopted are rationally connected to the objective and that the right is impaired no more than is necessary, are far less deserving of judicial deference. As Jowell argues, the necessity of the measure is the "crunch constitutional question"[127] in the new constitutional order. The primary decision maker does not enjoy any obvious superior expertise in the determination of these questions. Consequently, the same degree of deference is not justifiable.

That is why the House of Lords in *Belmarsh Prison* adopted a strong position on the requirement that executive detention be necessary to counter the threat to national security. Whilst according a strong degree of deference to the executive on the question of whether there was a threat to national security, their Lordships displayed no such deference in challenging the necessity of the measure. The executive may enjoy superior expertise in determining the extent of the threat posed to the country, but the courts must ensure that a right is infringed no more than is necessary. As Lord Nicholls stated, "The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected."[128] On this key issue, the

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[125] Jeffrey Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' [2003] PL 592, 598.
[126] *Farrakhan* EWHC (n 90).
[127] Jowell, 'Servility, Civility or Institutional Capacity' (n 126) 598.
[128] *Belmarsh Prison* (n 114) [80].

necessity of any rights limitation, less deference is due to the elected branches. Determinations where the primary decision maker enjoys superior expertise warrant a degree of judicial deference. Others, where the primary decision maker enjoys no such advantage, are not deserving of judicial deference. Deference is not justifiable.

4.4 Democratic Legitimacy

As well as relative expertise, it has been argued that the superior democratic credentials of the elected branches are another factor that may warrant judicial deference. Hunt argues that a doctrine of deference ought "to have space for a proper role for democratic considerations, including a role for the democratic branches in the definition and furtherance of fundamental values."[129] When reviewing the decisions of the elected branches courts ought to be mindful of the fact that they are reviewing decisions made by democratically elected and publically accountable bodies. As the courts do not enjoy such characteristics they ought to act with restraint. Failing to do so would amount to a usurpation of the democratic process and would elevate the unelected judiciary to the role of primary decision maker.

It is difficult to see the use of allowing democratic legitimacy as a factor determining judicial deference. As King puts it "Once we have accepted it is relevant, the issue becomes what role it should play."[130] In comparison to the courts, the elected branches will always have greater democratic legitimacy. They are by nature elected and accountable to the public. Attributing weight to a primary decision on the basis of democratic legitimacy only appears to amount to a bland assertion that the courts ought to acknowledge their secondary role. Such a secondary role is already preserved by the distinction between justified and justifiable. Remember, the court's focus is upon the reasons behind the limitation of a Convention right and whether they constitute a plausible argument in defence of the limitation. The court does not seek convergence between the impugned decision and its own view of how a particular problem ought to be resolved. This maintains the secondary function of the judiciary. There is no need to introduce democratic legitimacy as a factor determining deference as respect for the primary role of the elected branches is already implicit within the judicial review process.

Allowing democratic legitimacy to determine the degree of deference adds little to the discussion. Doing so could also undermine the justificatory burden imposed upon primary decision makers when limiting Convention rights. As Jowell argues, if democratic legitimacy is itself a reason for judicial deference

> courts would be automatically required to defer, on constitutional grounds, on any occasion on which a qualified right was claimed to be sacrificed on the altar of public interest.[131]

[129] Hunt, (n 48) 350.
[130] King (n 110) 436.
[131] Jowell, 'A Question of Competence' (n 121) 73.

If democratic legitimacy warrants judicial deference, what is to stop the courts from always deferring to the elected branches? Kavanagh responds by arguing that as deference is a matter of degree, and not an "all-or-nothing matter", democratic legitimacy will never be determinative of the judicial decision.[132] Deference is indeed a matter of degree. It is a matter of attributing weight to the primary decision. But if democratic legitimacy is a basis for attributing such weight, the review of a primary decision will always be weighted in favour of the elected branches. This is what Kavanagh describes as "minimal deference"[133], the presumption in favour of the primary decision that ought always to be present in judicial review under the HRA.

Such an outcome is contrary to the new constitutional order established by the HRA. As has been argued, the HRA imposes a burden on primary decision makers to objectively justify any limitation of Convention rights. The language of the qualified rights is clear, any limitation must be "necessary in a democratic society." This unequivocally instructs primary decision makers to demonstrate the necessity, or in common parlance, the proportionality of any rights restriction. It is therefore unjustifiable to advocate a universal presumption in favour of the primary decision, as Kavanagh does. The elected branches must justify any limitation of Convention rights. Any attempt to water down that requirement by introducing presumptions in favour of primary decision makers undermines this justificatory burden and the protection afforded to Convention rights. Reducing the burden on the elected branches on the basis of their democratic credentials runs counter to the new constitutional order established by the HRA.

4.5 The Concept of Justifiability

Instead of the discretionary area of judgment, the courts ought to be guided by justifiability to ensure that they provide adequate protection to Convention rights whilst remaining sensitive to their own institutional limitations. Proportionality is the substantive basis for judicial review under the HRA and ought to be the primary concern of the courts. However, when applying proportionality it may be justifiable for the court to accord a degree of deference to the primary decision maker. Rather than being an abdication of the judicial role, deference is the modest practice of attaching weight to the primary decision. The court is not prevented from assessing the issue nor is it permitted to abandon its core responsibility of protecting Convention rights. Instead, deference requires the courts to recognise that the elected branches sometimes enjoy institutional advantages rendering them better placed to make certain determinations. In such circumstances it is justifiable for the courts to accord strong weight to the conclusions of the elected branches.

Whilst deference on the basis of relative expertise is justifiable, deference on the basis of democratic legitimacy is not. Firstly, there is no need for allowing deference on this

[132] Kavanagh, *Constitutional Review* (n 108) 191.
[133] ibid 181.

basis. The secondary nature of the judicial role is inherent within the judicial review process, particularly as courts examine whether any rights limitation is justifiable and not whether it is justified. The judiciary are not promoted to the position of primary decision maker. It is unnecessary to repeat this in the form of an official judicial doctrine. Secondly, allowing deference on the ground of democratic legitimacy introduces a systemic bias in favour of the elected branches. This is contrary to the new constitutional order established by the HRA which imposes a justificatory burden on primary decision makers when they limit Convention rights. That burden should not be weakened by creating a presumption in favour of the elected branches.

5 CONCLUSION

Returning to the question of how judges ought to review the actions and decisions of the elected branches under the HRA, the answer offered here centres upon *justifiability*. The new constitutional order established by the HRA imposes a justificatory burden upon the elected branches when limiting Convention rights. They must demonstrate that such a limitation is objectively justifiable, supported by rational and cogent argument. No longer can the elected branches rely upon their democratic character or superior constitutional status to justify the limitation of Convention rights. It is for the courts, through proportionality, to critically asses the justifications offered in defence of a rights limitation. The concept of the discretionary area of judgment negated this justificatory obligation. It allowed the courts to avoid meaningful review of primary decisions concerning issues of political controversy, such as immigration. By granting the elected branches considerable discretion in certain fields of decision making, the courts failed to discharge their duty of ensuring that any limitation of Convention right be justifiable.

The primary concern of the courts in judicial review under the HRA is proportionality. It is the substantive basis for review and allows for a probing examination of the justifications behind a limitation of Convention rights. However, in applying proportionality it may be justifiable for the courts to display a degree of deference to the primary decision maker. It will be justifiable where the primary decision maker enjoys an institutional advantage over the courts rendering them better placed to make a reasoned decision. Whilst deference on the basis of relative institutional expertise is justifiable, deference on the basis of democratic concerns is not. The secondary nature of the judicial role is maintained by the fact that the courts ask whether a limitation of a Convention right is justifiable, not whether it is justified. The courts consider whether the reasons behind a limitation constitute a plausible defence of that limitation, not whether they would have adopted the same course of action. Furthermore, attaching weight to the decisions of the elected branches on the basis of their democratic credentials introduces a systemic bias in their favour. This weakens the justificatory burden placed upon them when limiting Convention rights.

The question of how judges ought to review the actions and decisions of the elected branches under the HRA is a question full of difficulty. This essay has offered a view

as to how that question should be answered. It is a view that is, of course, subject to challenge. One such challenge could be that given the introduction of a justificatory burden upon primary decision makers there is no need for deference. The courts ought simply to concern themselves with proportionality and not risk weakening the justificatory burden by introducing considerations designed to restrict the judicial role. Trevor Allan may, albeit in a more sophisticated form, raise such an objection.

However, such an argument ignores the considerable disagreement over human rights, their scope and when it is acceptable to limit them. It is wrong to argue that the courts should simply apply the doctrine of proportionality as if this will always yield the correct answer. There are no correct answers, only those that are more justifiable than others. The courts have to be prepared to accommodate, and respect, different views as to the necessity of restricting a Convention right. That is particularly the case where those different views are held by bodies whose institutional advantages over the court render them better placed to make certain determinations. That said, the courts cannot abandon their role of critically assessing the justifications offered in defence of a rights limitation. It has been suggested that they ought to be guided by what is justifiable when displaying deference as a means of ensuring that the justificatory burden imposed upon primary decision makers is not abandoned altogether.