

## *Is Judicial Review a Threat to Democracy?*

The Right Honourable  
Lord Dyson

*Master of the Rolls, England and Wales*

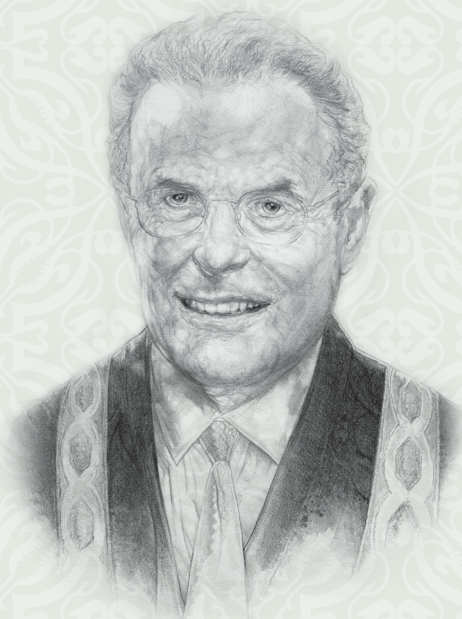
It is an enormous pleasure and privilege to deliver the Twenty-ninth Sultan Azlan Shah Lecture and a great honour for me to be added to the roll call of distinguished jurists who have given this prestigious lecture since 1986.

The prestige of this lecture owes everything to the brilliance of His Royal Highness Sultan Azlan Shah, many of whose judicial and extra-judicial statements about the importance of judicial review resonate with the content of my lecture.

**Lord Dyson**

# The Right Honourable Lord Dyson

## Is Judicial Review a Threat to Democracy?



**John Anthony Dyson**  
(b. 31 July 1943)

**J**ohn Anthony Dyson, Lord Dyson was born on 31 July 1943. He was educated at Leeds Grammar School, and then studied classics at Wadham College, University of Oxford. He was called to the English Bar by the Honourable Society of the Middle Temple in 1968, became a Queen's Counsel in 1982 and was appointed a Bencher of the Middle Temple in 1990.

Lord Dyson was appointed as a Judge of the English High Court in 1993. In January 2001, Lord Dyson was elevated to the English Court of Appeal as a Lord Justice of Appeal and appointed to the Privy Council. He was made the Deputy Head of Civil Justice in England and Wales in 2003.



In April 2010, Lord Dyson was appointed as a Justice of the United Kingdom Supreme Court. He was the second Justice to be appointed directly to the UK Supreme Court. On 1 October 2012, Lord Dyson was appointed as the Master of the Rolls.

As a Supreme Court Justice, as well as in his role as the Master of the Rolls, Lord Dyson has delivered judgments in numerous landmark cases, many of which involve judicial review of governmental action.

Lord Dyson, in the UK Supreme Court case of *Assange v Swedish Prosecution Authority* [2012] UKSC 22, upheld the validity of a European arrest warrant issued by the Swedish Prosecution Authority against Julian Assange, the editor-in-chief of WikiLeaks, to further a preliminary investigation into accusations of criminal offences allegedly committed by Assange.

In *Mitsui Sumitomo Insurance Co (Europe) Ltd and another v Mayor's Office for Policing and Crime* [2014] EWCA Civ 682, Lord Dyson MR delivered the judgment of the English Court of Appeal dealing with the right of insurers to recover compensation against the London Mayor's Office pursuant to section 2 of the Riot (Damages) Act 1886 (the origin of the well-known phrase, *reading the riot act*) in respect of damage and destruction to property caused by acts of riot and civil disturbances which took place in London in 2011.

In *R (on the application of Evans) v Attorney General* [2014] EWCA Civ 254, Lord Dyson MR also delivered the judgment of the English Court of Appeal which ruled that written communications from Prince Charles the Prince of Wales to various British government ministers

and politicians advocating certain causes of particular interest to him, more popularly known as the “black spider memos”, should be disclosed to the public pursuant to the UK Freedom of Information Act 2000. This decision was upheld by the UK Supreme Court in March 2015.

Lord Dyson is married to Lady Jacqueline Dyson, a Teaching Fellow (specialising in Tax Law) at the Faculty of Laws, University College London (UCL). They have two children, Michelle and Steven.

Lord Dyson is a highly gifted pianist.

#### Editor's note

Lord Dyson retired as the Master of the Rolls on 2 October 2016.

Lord Dyson was the Treasurer of the Middle Temple in 2017.

Lord Dyson is a member of the Court of Arbitration for Sport (CAS), the Sport Resolutions Arbitration Panel, the Football Association's Judicial Panel, the London Court of International Arbitration and ICC.

Since retiring from the bench, Lord Dyson has authored a number of books, including *A Judge's Journey*, Hart Publishing, 2019, and *Justice: Continuity and Change*, Hart Publishing, 2018.



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Your Royal Highnesses, may I begin by thanking Sultan Nazrin Shah most sincerely for his extraordinary generosity in inviting me and my wife to Malaysia and for the warmth of his welcome. We are deeply grateful and honoured to be here. May I also thank Professor Tan Sri Visu Sinnadurai for his meticulous planning of our visit and the kindness he has shown to us throughout our stay.

Distinguished guests, ladies and gentlemen, it is an enormous pleasure and privilege to deliver the Twenty-ninth Sultan Azlan Shah Lecture and a great honour for me to be added to the roll call of distinguished jurists who have given this prestigious lecture since 1986. The prestige of this lecture owes everything to the brilliance of His Royal Highness Sultan Azlan Shah, many of whose judicial and extra-judicial statements about the importance of judicial review resonate with the content of my lecture. For example, in his celebrated judgment in *Pengarah Tanah dan Galian v Sri Lempah Enterprise*<sup>1</sup> he said: “Every legal power

*Twenty-ninth  
Sultan Azlan Shah  
Law Lecture delivered  
on 24 November 2015  
in the presence of  
His Royal Highness  
Sultan Nazrin Shah  
and Her Royal  
Highness Tuanku  
Zara Salim.*

must have legal limits, otherwise there is dictatorship ... The courts are the only defence of the liberty of the subject against departmental aggression.” The sentiment expressed in these words should be fixed securely in the minds of all judges who are called on to decide claims for judicial review.

The undoubted excellence of the previous lecturers is daunting for those who have to follow. It is a striking feature that almost all of them have been UK jurists. This undoubtedly reflects the international reputation of UK judges. But, perhaps even more importantly, it also betokens the closeness of the bond between our two countries. We share many traditions, above all our cherished common law. Personal friendships abound. Long may that continue.

Before I address the question raised by the title of this lecture, I need to say something about the scope of judicial review in England and Wales. This is a huge subject which I can only touch on in the barest of outlines. But it is necessary to do this before considering whether in the 21st century judicial review poses a threat to our Parliamentary democratic system.

As I said in *R (Cart) v Upper Tribunal*:<sup>2</sup> “Authority is not needed (although much exists) to show that there is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review”. In his Consultation Paper dated December 2012, the Secretary of State for Justice said (at paragraph 1.2): “Judicial Review is a critical



check on the power of the State, providing an effective mechanism for challenging decisions of public bodies to ensure that they are lawful". Statements at this high level of generality are not controversial. But what has proved to be problematic has been fleshing them out. In the same Consultation Paper, the Secretary of State invited comment on various proposed measures which were intended to curb what he claimed to be an unacceptable growth in the incidence of judicial review proceedings.

There is no doubt that in my country in the past few decades there has been a massive increase in the number of applications for judicial review. There have been several reasons for this. These include first that, as I shall explain, the standard of review has been relaxed. This may in part be because our judges are no longer as executive-minded as they once were. Secondly, there has been an explosion of legislation, much of it rushed through without sufficient consideration. This has given rise to uncertainty which generates litigation. Thirdly, under the pressure of major national and international challenges, executive public bodies take risks and make decisions which are, at least arguably, of doubtful legality. Thus, for example, they have made controversial decisions to safeguard national security from the threat of terrorism, to maintain an effective immigration policy and to cut costs in order to reduce the national debt. Decisions in these (and other) areas inevitably involve making political judgments and promoting the interests of one group of individuals at the expense of those of others.

How active should judges be in intervening in the business of elected government? Those who would espouse a minimalist approach have remarked on the social exclusivity of the judges and their supposed isolation from the real world as well as on their non-accountability to the electorate. There is the further and perhaps more important point that an adversarial judicial process is not the most effective means of resolving problems that need often to be considered, having regard to wider considerations of public policy which lie beyond the boundaries of particular litigation. Courts decide issues that are raised before them by the parties. Occasionally, they have the benefit of representations by interveners who have a particular knowledge about, and interest in, the subject of the dispute before the court. But the nature and quality of the evidence and submissions made to a court in litigation varies greatly. It is not always calculated to assist the court to arrive at the best solution to the problem. After all, the main objective of parties is to win their cases.

The questions which have particularly troubled our courts include: (i) what is the correct standard of review, and (ii) to what extent and in what circumstances should the court examine and determine the merits of the decision under challenge for itself? These are fundamental questions.

A useful starting point is Lord Diplock in 1984. He said in *Council of Civil Service Unions v Minister for the Civil Service*<sup>3</sup> that judicial review had developed to a stage where, without reiterating any analysis of the steps

by which the development had come about, one could conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground he called “illegality”; the second “irrationality”; and the third “procedural impropriety”. He recognised that further development on a case-by-case basis might add further grounds. Presciently, he had in mind particularly the possible adoption in the future of the principle of “proportionality” recognised in the administrative law of several Member States of the European Economic Community.

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By “irrationality”, Lord Diplock was referring to “*Wednesbury* unreasonableness”, ie 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”. He was confident that “whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system”. That was said only 30 years ago. A great deal has happened since then. I shall not attempt to produce a Diplockian synthesis of the current state of the law. I suspect that Lord



Diplock would have been less reticent: he would probably have found the challenge irresistible.

His statement of principle underlined the fact that the court was not concerned with the question of whether the decision-maker reached the “correct” decision, but rather with the question of whether sensible decision-makers, properly directed in law and properly applying their minds to the matter, could have regarded the conclusion under review as a permissible one.

But even before the Human Rights Act 1998 came into force in 2000, judges did not always apply the harsh and austere irrationality test in the most rigorous way. Very few decisions are illogical or immoral in the sense that Lord Diplock probably intended the irrationality test to be understood. If that principle, understood in that way, had stood the test of time, judicial review would probably have stayed relatively unnoticed in a quiet backwater of our law.

The edges of “irrationality” have, however, undoubtedly been softened during the past 30 years and a far more nuanced approach has emerged. This has not been the direct result of any legislation. It has been the product of judicial activity in developing the common law. As we shall see, this development has gained momentum under the influence of the European Convention on Human Rights (“the Convention”) and its incorporation into our domestic law by the Human Rights Act.

Perhaps the most important and earliest example of a more nuanced and sophisticated approach is to be found in *R v Ministry of Defence, ex parte Smith*.<sup>4</sup> This was considered to be a hugely important case at the time. By a statement made in 1994, the Ministry of Defence reaffirmed its policy that homosexuality was incompatible with service in the armed forces and that personnel known to be homosexual would be discharged from service. The policy had been considered by both Houses of Parliament in debate and by select committees of the House of Commons and was consistent with advice received from senior members of the services.

The four applicants were serving members of the armed forces who had been administratively discharged on the sole ground that they were of homosexual orientation. They challenged the decisions to discharge them and the policy on which it was based on the grounds that they were irrational and contrary to Article 8 of the Convention. The Divisional Court dismissed the applications. The court approached the case on the conventional *Wednesbury* basis adapted to a human rights context and asked whether the Secretary of State could show an important competing public interest which he could reasonably judge sufficient to justify the restriction. The primary judgment was for him.

Simon Brown LJ said “only if his purported justification outrageously defies logic or accepted moral standards can the court, exercising its secondary judgment,

properly strike it down”. The court had a duty to remain within its constitutional bounds. Only if it were plain beyond sensible argument that no conceivable damage could be done to the armed forces as a fighting unit would it be appropriate for the court to remove the issue entirely from the hands of the military and of the government. If the Convention were part of our law, the primary judgment would be for the court and the constitutional balance would shift.

In the Court of Appeal, Sir Thomas Bingham MR accepted that irrationality was the test for judicial review, but adopted the approach proposed by Mr Pannick QC that 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”. In judging whether the decision-maker has exceeded the margin of appreciation or area of discretion accorded to him by the domestic court, the human rights context is important. And then this important statement: “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.”

Having considered the facts, the Master of the Rolls concluded that the policy could not be stigmatised as irrational. As he said, it was supported by both Houses of Parliament and by those to whom the ministry properly



looked for professional advice. There was no evidence before the ministry which plainly invalidated that advice. It was true that changes had been made by other countries, but the ministry did not have the opportunity to consider the full range of arguments that had been deployed before the court. Major policy changes should be the product of mature reflection, not instant reaction. The threshold of irrationality was a high one. It had not been crossed in this case.

The applicants took their case to Strasbourg and were successful.<sup>5</sup> It was accepted by the government that the policy involved interferences with the applicants' right to respect for their private lives protected by Article 8 of the Convention. The principal issue was whether the interferences were justified. The court found the interferences with the applicants' private lives to be "especially grave". It followed that, whilst taking account of the margin of appreciation allowed by Strasbourg to the State in matters of national security, the court had to consider whether "particularly convincing and weighty reasons exist by way of justification for the interferences with the applicants' right to respect for their private lives". The government's case (supported by the professional advice of the military) was that the presence of open or suspected homosexuals in the armed forces would have a substantial and negative impact on morale and, consequently, on the fighting power and operational effectiveness of the armed forces.

The European Court of Human Rights scrutinised the government's case critically and in a degree of detail eschewed by our domestic courts. It was not persuaded by the evidence that the policy was justified. But it went further in the light of the strength of feeling aroused by the issue in military circles and "the special, interdependent and closely knit nature of the armed forces' environment" and proceeded on the basis that it was reasonable to assume that some difficulties could be anticipated as a result of any change in what was now a long-standing policy. The court said that it had not been shown that codes of conduct and disciplinary rules could not adequately deal with any behavioural issues on the part either of homosexuals or heterosexuals. The court, therefore, concluded that convincing and weighty reasons had not been put forward by the government to justify the policy and consequently the discharge of the applicants from the armed forces.

I shall have to come back to the Convention. Meanwhile, it is right to record that the test adopted by the Court of Appeal in *Ex parte Smith* was routinely applied in our courts. Thus in *R (Mahmood) v Secretary of State for the Home Department*,<sup>6</sup> Laws LJ said that, in addition to the traditional *Wednesbury* test, in fundamental rights cases, a court could "insist that that fact be respected by the decision-maker, who is accordingly required to demonstrate either that his proposed action does not in truth interfere with the right, or, if it does, that there exist considerations which may reasonably be accepted as amounting to a

substantial objective justification for the interference”. This approach and the basic *Wednesbury* rule are “by no means hermetically sealed one from the other”. Rather, he said, there is a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required.

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In *R (Q) v Secretary of State for the Home Department*,<sup>7</sup> the Court of Appeal explicitly recognised that the law had moved on. It said:

Starting from the received checklist of justiciable errors set out by Lord Diplock in [CCSU] the courts, as Lord Diplock himself anticipated they would, have developed an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity. They continue to abstain from merits review—in effect, retaking the decision on the facts—but in appropriate classes of case they will today look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them.



So on the eve of the coming into force of the Human Rights Act, the common law was no longer insisting on the uniform application of the rigid test of irrationality. The nature of judicial review in every case depended on the context and on factors including the gravity of the issue which was the subject of the decision under challenge. Thus quite apart from modern international human rights law, there were certain rights which were regarded by our domestic common law as so fundamental that interference with them was difficult to justify before the courts. This gave rise to the use of “anxious scrutiny” as a technique for reviewing decisions in fundamental rights cases. Lord Sumption has recently criticised this as a catch phrase with little or no legal content: see his Administrative Law Bar Association Lecture.<sup>8</sup> He is right to insist on intellectual rigour in the use of such a phrase.

This is just another facet of our common law feeling its way towards a more just and proportionate solution. The trouble with the original formulation was that it was too blunt an instrument.

It is time to come back to proportionality. This is a concept that has become increasingly important in UK public law over recent years. In *R (ABCIFER) v Defence Secretary*,<sup>9</sup> giving the judgment of the Court of Appeal, I noted that there was growing support for the recognition of proportionality as part of English domestic law in cases which do not involve European Community law or the Convention on Human Rights and said that the case

for this was a strong one. Trying to keep the *Wednesbury* principle and proportionality in separate compartments was unnecessary and confusing. The criteria of proportionality were more precise and sophisticated. The *Wednesbury* test was moving closer to proportionality and in some cases it was not possible to see any daylight between them. The court said that it had difficulty in seeing what justification there now was for retaining the *Wednesbury* test. Nevertheless, it was not for the Court of Appeal to perform its burial rites.

There is no doubt that the incorporation of the Convention (which affects so many areas of our domestic law) has led to the routine application of the doctrine of proportionality in many judicial review cases. It has led to a further relaxation of the rigours of the *Wednesbury* principle in its original manifestation and as explained by Lord Diplock. As currently understood, four questions generally arise where the court applies the principle of proportionality:

- (i) Is the objective of the measure under challenge sufficiently important to justify limiting a fundamental right?
- (ii) Are the measures which have been designed to meet it rationally connected to it?
- (iii) Are they no more than are necessary to accomplish it?

- (iv) Do they strike a fair balance between the right of the individual and the interests of the community?

The fourth question is often the most difficult and controversial. It is at this stage of the analysis that the court decides the proportionality question in the strict sense. Although the first three questions require the court to make value judgments to a certain extent, it is the fourth question which calls for the ultimate judgment of the proportionality of the measure.

*R (SB) v Governors of Denbigh High School*<sup>10</sup> provides a good illustration of the problems raised by the fourth question. The claimant, a school girl who professed the Muslim faith, sought judicial review of the decision of the school governors not to admit her to school wearing a jilbab and claimed that it was contrary to her right to manifest her religion under Article 9(1) of the Convention. Her claim failed. Lord Bingham said that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach had been exposed in *Smith and Grady v UK*. He said: "there is no shift to a merits review, but the intensity of the review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in [*Ex parte Smith*]". He continued: "The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time ... Proportionality must be judged objectively, by the

court ... the court must confront these questions, however difficult”.

In rejecting the challenge, Lord Bingham said that the school was fully justified in acting as it did. It had taken immense pains to devise a uniform policy which respected Muslim beliefs. There was no evidence that the school’s policy was opposed by anyone other than the claimant. Different schools had different policies, no doubt influenced by the composition of their pupil bodies and a range of other matters. Each school had to decide what uniform, if any, would best serve its wider educational purposes. It would in any event be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors to overrule their judgment on a matter as sensitive as this: the power of decision had been given to them for the compelling reason that they were best placed to exercise it. There was no reason to disturb their decision.

In his Administrative Bar Association Lecture, Lord Sumption has commented with reference to this authority that the Convention asks whether the decision under challenge was actually proportionate and not whether the decision-maker could rationally have thought that it was. He questions whether you can address the questions posed by the doctrine of proportionality without accepting some shift to a merits review. I agree. He made a similar point judicially in the recent case of *Phom v Secretary of State for the Home Department*.<sup>11</sup>



On the face of it, the fourth question appears to require a full merits review. The question “do the measures strike a fair balance” is categorically different from the question “could the decision-maker reasonably have decided that the measures strike a fair balance?” Despite his clear statement that there has been no shift to a merits review, part of Lord Bingham’s reasoning strongly suggests that he was indeed undertaking a merits review. What else is the statement that the court must make a value judgment and that proportionality must be judged objectively by the court by reference to the circumstances prevailing at the time? On the other hand, the statement that it would be irresponsible of the court to overrule the judgment of the school suggests that, if this was a merits review, it was one which allowed a generous area of judgment to the decision-maker. It is plain that the outcome would have been the same if the court had applied the heightened scrutiny test adopted by the Court of Appeal in *Ex parte Smith*. In other words, despite the rhetoric, it is questionable whether there are many cases where the outcome will differ according to which approach is adopted by the court.

After a good deal of uncertainty and shifting about, we seem to have reached the position where there has been a degree of assimilation of the domestic and European tests of judicial review. The speed of the changes that have taken place since Lord Diplock spoke in the *CCSU* case in 1984 has been remarkable. The incorporation of the Convention has played an important part in this. But I suspect that, even if the Convention had not been incorporated, the influence of

the Convention and of the jurisprudence of the Strasbourg court on the development of our common law would have been huge. Our common law would have looked rather as it looks today.

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Lord Mance helpfully summarised the present position in *Kennedy v The Charity Commissioners*.<sup>12</sup> He said that both a reasonableness review (ie the current version of the *Wednesbury* test) and proportionality involve considerations of weight and balance by the court, with the intensity of the scrutiny and the weight to be given to a primary decision-maker’s view dependent on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of the Convention and EU law. The right approach is that it is inappropriate to treat all cases of judicial review together under a general but vague

principle of reasonableness. It is preferable to look for the underlying principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation.

Having described in the barest of outlines what the test for judicial review on substantive grounds now is, I need to address the question raised by the title to this lecture. In one sense, it is obvious that judicial review is a valuable tool for the safeguarding of democracy. It is an effective means of ensuring that executive public bodies do not act illegally, as Sultan Azlan Shah said so elegantly.<sup>13</sup>

It will be recalled that illegality was Lord Diplock's first head of review. It includes ensuring that these bodies comply with their statutory obligations. Since these obligations are the result of the democratic process, their enforcement is an essential handmaiden to democracy itself. It is the very antithesis of something that undermines or constitutes a threat to democracy. It is true that the interpretation of statutes is undertaken by judges and, as we are frequently reminded, judges in the UK at any rate are not elected by the people and are not accountable to Parliament. But that should not be a cause for concern, since the aim of the interpretative process undertaken by the judges is to ascertain and give effect to the will of Parliament. Someone has to undertake this (sometimes difficult) task. In our system, I believe that there is a consensus that independent judges, skilled in the exercise, are the persons best qualified to undertake it.

This may seem fairly trite and obvious. But it needs to be said, because many judicial review challenges are based on the complaint that the decision-maker failed to comply with his statutory obligations. Insisting on the performance of these obligations is one of the hallmarks of any truly democratic system. There is no point in having carefully drafted legislation enacted by a democratically elected body if there is no effective mechanism for ensuring that public bodies faithfully comply with it.

But the illegality head of review goes much further than this. It also includes unlawful delegation or divestment of the decision-making power; fettering of discretion in the sense of imposing limits on the decision-maker's future freedom of action; and the taking into account of irrelevant considerations, including the distinction between those considerations to which regard must be had and the relative weight to be attached to each consideration, and the purposes for which a power may or may not be exercised, including the concept of bad faith. I would suggest that most fair-minded people would agree first that any fair and rational system of justice requires a mechanism for striking down decisions of public bodies which are illegal in any of these senses, and secondly that adjudications on illegality should be made by independent judges.

But what about judicial review challenges to policies or decisions which are not founded on complaints that the decision-maker acted illegally in the sense that I have just explained? I have already outlined the contours

of judicial review and the scope of the reasonableness and proportionality tests. Our courts are sensitive to the limitations in their competence to make normative judgments in certain contexts. Thus, for example, they are reluctant to investigate pure questions of policy. They do not examine the merits of decisions on foreign policy and national security. They are wary of imposing duties on the executive which have significant budgetary implications. They avoid adjudicating on political issues. The boundaries of this judicial self-restraint are not the product of legislation. They have been gradually worked out by the judges themselves through case-law in the way that the common law typically develops. As Lord Bingham put it in *A v Secretary of State for the Home Department*:<sup>14</sup>

Great weight should be given to the Home Secretary, his colleagues and Parliament on this question, because they were called upon to exercise a pre-eminently political judgment ... The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role for the court. It is the function of political and not judicial bodies to resolve political questions ... The present question seems to me to be very much at the political end of the spectrum.

The case, in fact, concerned national security.

The academics have a field day debating whether the rationale for this self-restraint on the part of the courts is



their lack of constitutional competence or their relative lack of institutional competence. Lord Bingham was inclined to think that it was better to approach the question in *A* as one of relative institutional competence. Although he did not describe the rationale for his decision in these terms in the *Denbigh* case, it seems clear enough that Lord Bingham based his conclusion in that case, at least in part, on the fact that the court was less well equipped than the school authorities to make a judgment on what would best serve the wider educational purposes of the school. They were the experts and had the practical experience of the likely impact on the running of the school of taking one decision rather than another. Similarly, the court is less well equipped to make judgments on issues of foreign policy, national security, economics and so on than those who have the experience and expertise to make them.

In my view, lack of institutional competence and lack of constitutional competence often complement each other. The decision-makers who are expert in making decisions in these areas are usually democratically accountable to the electorate, whether it is local or national. That is why the court lacks the necessary constitutional competence to make judgments as to the reasonableness or proportionality of decisions of this kind.

In *Mahmood*, the challenge was to a decision of the Secretary of State refusing a citizen of Pakistan leave to remain in the UK on the ground of his marriage to a British citizen. The reason for the refusal was that the marriage did not pre-date the enforcement action by at least two years as

required by the relevant policy. One of the issues was whether the decision was contrary to Article 8 of the Convention. It was argued (and accepted) that the court in that case was in as good a position as the Secretary of State to decide whether Article 8 was fulfilled on the facts of that case. The court was not, therefore, institutionally incompetent to review the merits of the decision under challenge. But Laws LJ said that the judges were not authorised to stand in the shoes of Parliament's delegates. The arrogation of such a power to the judges would usurp those functions of government which are controlled and distributed by powers whose authority is derived from the ballot box. In that case, therefore, the court dismissed the challenge because it considered that it did not have the constitutional competence to substitute its view for that of the Secretary of State.

This approach is similar to that applied by the courts in relation to qualified rights under the Convention on Human Rights. The courts have recognised in a wide range of different types of case the need for deference to decisions of the executive.

I accept at once that the ambit of the self-restraint that I am describing is not clear-cut or hard-edged. It is inevitable that some judges will be more deferential to decision-makers than others. But on the whole, I believe that our judges are acutely conscious of the need for caution. As I shall shortly explain, our government has recently sought to rein in judicial review to some extent. It has not, however, based its concerns about the rising tide of judicial

review applications on a complaint that judges are striking down decisions by unwarrantably entering into the arena of merits reviews. In short, therefore, I do not consider that our judges are showing a predilection for granting judicial review in circumstances which constitute a threat to our democracy. In any event, it is always open to the government to introduce legislation which has the effect of overturning a particular judicial decision which it considers to be creating difficulties and it does so from time to time. The fact that this occurs comparatively rarely suggests that, generally speaking, our judges steer a responsible course. I do, however, recognise, of course, the practical problems of finding Parliamentary time to introduce legislation. It would probably also be open to Parliament to pass legislation which had the effect of amending the judge-made law as to the grounds for judicial review. That would be a drastic step to take. So far as I am aware, there is no pressure to take it. But the sovereignty of Parliament is such that I can see no constitutional impediment to such a course being adopted.

Thus far, I have concentrated entirely on judicial review on substantive grounds and sought to explain why I do not consider it to be a threat to our democracy. In fact, however, the majority of judicial review challenges are based on what Lord Diplock described as procedural impropriety. The most common are the failure of the decision-maker to comply with certain procedural rules which have been propounded and refined by the courts over many years. They are all designed to secure fairness in the decision-making process. They include the requirement to consult

those who are likely to be affected by a proposed decision; the rules of natural justice (including that decision-makers should not be judges in their own cause and that there should be no appearance of bias); where Article 6 of the Convention applies, decision-makers must be independent; and in all cases, they must not have such preconceived views as amount to an unlawful fettering of discretion.

“The application of the rules of procedural fairness in individual cases often calls for a difficult exercise of judgment. Someone has to perform this exercise. Competent, independent judges are the obvious candidates to perform it.”

This is not the place to explore these rules. They are to be found in a huge body of case law both domestically and in Strasbourg (as well as in other jurisdictions). What is relevant for today's purposes is that in my view they do not pose any threat to democracy. The body of case law developed by the courts is the product of long experience of judges as to the requirements of a fair process. I do not believe that any reasonable person would dispute that decisions should be taken fairly by public bodies or that the broad elements of what fairness requires are as I have summarised them to be. The application of the rules of

procedural fairness in individual cases often calls for a difficult exercise of judgment. Someone has to perform this exercise. Competent, independent judges are the obvious candidates to perform it.

What I have said in relation to the grounds of substantive judicial review applies with equal force in relation to the rules of procedural fairness. If Parliament wishes to change the judge-made law in this area, it is free to do so. But it should be alive to the fact that Article 6 and the Strasbourg jurisprudence on it have much to say on the subject.

Our government has recently attempted to tackle what it perceives to be the problem of a rising tide of judicial review applications. In the consultation paper to which I referred earlier, the Secretary of State for Justice proposed a number of procedural reforms to judicial review proceedings. The paper noted that proceedings create delays and add to the costs of public services “in some cases stifling innovation and frustrating much needed reforms, including those aimed at stimulating growth and promoting economic recovery.” The declared intention of the reforms was “not to deny, or restrict, access to justice, but to provide a more balanced and proportionate approach”. The paper noted that in 1974 there were 160 applications for judicial review, but by 2000 this had risen to nearly 4,250 and by 2011 had reached over 11,000. The increase had been mainly the result of the growth in the number of challenges made in




immigration and asylum cases. In 2011, these represented more than 75% of all applications for permission to apply for judicial review.

In order to tackle the problem, the government proposed some fairly modest reductions in the time limit for bringing judicial review proceedings in cases involving challenges to public procurement and planning application decisions. It made further proposals which included, for example, (i) the introduction of a fee for an oral renewal hearing of an application for permission to seek judicial review following a refusal on the papers, and (ii) some proposals in relation to legal aid which were widely criticised.

To return to the title of this lecture, it is important to record that, since the 1960s, public law has become prominent in the landscape of UK public administration and judicial review decisions have begun to have a real impact on the daily work of administrators. An indication of this is the fact that in 1987 the Cabinet Office issued guidelines on judicial review to civil service administrators, prepared by the Treasury Solicitor's Department. The book bears the Orwellian title *The Judge over Your Shoulder*. The most recent edition was issued in 2006.<sup>15</sup> As one would expect, it is a balanced and careful summary of the relevant legal principles. It explains that its purpose is not "how to survive judicial review". Rather, it says, it is "to inform and improve the quality of administrative decision-making—though, if we are successful, that should have the incidental effect of

making decisions less vulnerable to Judicial Review”. The Preface continues: “We have always tried to emphasise what is best practice in administrative decision-making, rather than what you can get away with: see, for example, on the recording and giving of reasons”. What better evidence could there be of the importance of judicial review and its role in the public life of our country?

Judges must be constantly vigilant to make sure that the remedy is not abused. I believe that they are only too aware of this responsibility. They know that many individuals who are the subject of adverse administrative decisions are desperate people who will leave no stone unturned in their attempts to mount a legal challenge. Many of these challenges are dismissed. Indeed, many are hopeless. A high percentage of them are made by unsuccessful asylum seekers or other would-be immigrants. The stakes raised by these cases are often very high indeed. That is why they are considered so carefully by the judges. I do not believe that any fair-minded person would say that the judges adopt an approach to these cases which undermines our democracy.

Judicial review claims present real challenges to our judges. The limits of judicial power are not easy to define. But for the reasons that I have tried to explain, I am confident that judicial review is not a threat to the democratic system of my country. 

**Editor's note**

This lecture was delivered on 24 November 2015, just a day before the UK Supreme Court delivered its judgment on the “Batang Kali Massacre”, a case brought by a group (including some Malaysians) before the British courts seeking for judicial review of “the decision of the Secretaries of State for Foreign Affairs and Defence to refuse to hold a public inquiry into events which took place while the UK was the colonial power in the former Federation of Malaya (now Malaysia).”

In the Supreme Court decision, there is a detailed discussion on the law relating to judicial review: see *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69, SC (Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Kerr, Lord Hughes), on appeal from [2014] EWCA Civ 312, CA.

## Endnotes

- 1 [1979] 1 MLJ 135, at 148.
- 2 [2012] 1 AC 663, at paragraph 122.
- 3 [1985] AC 374, at 410.
- 4 [1996] QB 517.
- 5 *Smith and Grady v UK* (1999) 29 EHRR 493.
- 6 [2001] 1 WLR 840.
- 7 [2004] QB 36, at paragraph 112.
- 8 “Anxious Scrutiny”, Administrative Law Bar Association Lecture, 4 November 2014, available at [www.supremecourt.uk/docs/speech-141104.pdf](http://www.supremecourt.uk/docs/speech-141104.pdf) (accessed on 8 August 2018).
- 9 [2003] QB 1397.
- 10 [2007] 1 AC 100.
- 11 [2015] UKSC 19.
- 12 [2014] 2 WLR 808.
- 13 **Editor’s note:** See *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches of HRH Sultan Azlan Shah*, edited by Dato’ Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia, 2004.
- 14 [2005] 2 AC 68, at paragraph 29.
- 15 **Editor’s note:** The 2006 edition was withdrawn in 2015. The current edition, *The judge over your shoulder—a guide to good decision making*, was published in 2016 (updated October 2018) by the Government Legal Department.