

**"The Relationship Between English and European Community  
Administrative Law: The Principles of Legitimate  
Expectations and Proportionality"**

by Robert Thomas, LL.B(Hons).

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## Abstract

This thesis concerns the relationship between English and European Community administrative law. The main aim is to draw out the nature of this relationship by comparing the development of two principles, the principles of legitimate expectations and proportionality, within English and European Community administrative law. A secondary aim is to assess the challenge presented by European Community law for English law. The emphasis is on the distinct visions of law or legal traditions which have influenced both systems of administrative law rather than specific substantive laws.

Chapter 2 identifies the nature of the English and Continental traditions of administrative law and the development of English and European Community administrative law. More specifically, English law is based on the common law approach while Continental and European Community administrative law has a more purposive orientation. Chapter 3 examines the pressures for the adoption of the two principles in English law. These pressures have been both internal, through the role of Lord Diplock, and external, through the influence of European Community law.

In Chapters 4, 5, 6 and 7 the principles are examined in depth in both European Community and English administrative law. Comparative observations of the articulation of the principles in European Community law and their development in English law are made in chapters 5 and 7. In this respect the identification of the different traditions of administrative law becomes crucial in assessing the success of the principles as legal transplants in English law.

The conclusion draws together these themes in order to identify the relationship between English and European Community law. An assessment is also made of the challenge presented by European Community law and suggestions are made as to what English law ought to do in order to respond effectively.

## **Declaration**

This thesis has not been presented to this or any other university in support of an application for any degree.

The law is correct as stated upto July 1998.

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## **Chapter 1: Introduction**

### **1. Why Study Legitimate Expectations and Proportionality?**

The principal aim of this thesis is to explore the complex relationship between English and European Community administrative law. Whilst issues of constitutional and administrative law are closely related, the primary focus is on administrative law. In examining the relationship between English and European Community administrative law I have selected the principles of legitimate expectations and proportionality for detailed consideration. These two principles are undoubtedly "European" in nature and form part of the general principles of Community law. It is suggested that comparative study of the case-law of the European Court of Justice and the English courts concerning the principles of legitimate expectations and proportionality can enable understanding of the developing interaction between Community and English administrative law for the following reasons. First, the English courts have attempted to adopt these two principles into

English law. Analysis of how successful English law has been in this project can provide insights into the different conceptions of administrative law that exist between English and Community law. Secondly, the English courts are under an obligation to apply such principles when acting as Community courts and increasingly a spill-over effect of Community law is being felt by the national legal systems. The principles of legitimate expectations and proportionality have been applied by the English courts in their role as Community courts which has created a corresponding pressure to recognise them as independent principles of English law. A comparative analysis can attempt to assess the viability of the principles as legal transplants from one legal system to another and form a means of examining the developing law of English judicial review in the light of the challenge of Community administrative law.

While there has been similar comparative work undertaken, the amount of research has not been extensive and neither has it attempted to place such a comparison within the different traditions

of English and European administrative law.<sup>1</sup> The purpose of my study is to fill the gap in the existing literature by providing a detailed comparison of the development of the principles in English administrative law with their articulation in European Community administrative law. The study will begin with an examination of the different approaches to judicial review which exist in England and Europe. This is necessary in order to understand the case-law of the European Court of Justice and the English courts. The factors which have influenced the adoption of the European principles by English law will then be analysed. It

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<sup>1</sup> Lord Mackenzie Stuart "Legitimate Expectations and Estoppel in Community and English Administrative Law" [1983/1] L.I.E.I. 53; C. Graham "Towards a European Administrative Law? The English Case" [1993] *Rivista Trimstrala di Diritto Pubblico* 3; D. Wyatt "European Community Law and Public Law in the United Kingdom" in B.S. Markesinis (ed.), *The Gradual Convergence. Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century*. (Oxford: Clarendon Press, 1994) page 188; Y. Cripps "Some Effects of European Law on English Law" (1994) 2 *Indiana Journal of Global Legal Studies* (<http://www.law.indiana.edu/glsj/vol2/cripps.html>); J.E. Levitsky "The Europeanization of British Legal Style" (1994) 42 *A.J.C.L.* 347; A. O'Neill *Decisions of the European Court of Justice and their Constitutional Implications* (London: Butterworths, 1994) chapter 5; N. Grief "The Pervasive Influence of European Community Law in the United Kingdom" in P. Birks (ed.), *Pressing Problems in the Law Volume 2: What are Law Schools for?* (Oxford: University Press, 1996) page 97; P.P. Craig "The Impact of Community Law on Domestic Public Law" in P. Leyland and T. Woods (eds.), *Administrative Law Facing the Future: Old Constraints & New Horizons* (London: Blackstone, 1997) page 271; J.A. Usher *General Principles of EC Law* (London: Longman, 1998) chapter 9.

will be seen that the pressures for the English courts to develop the principles in English law have come from both internal and external sources which are respectively the role of Lord Diplock and the challenge of Community law. The elaboration of the principles in the case-law of the European Court of Justice and the English courts will form the detailed body of the study. An analysis of the case-law will enable comparisons to be made and conclusions to be drawn over how the English courts have responded to the principles and the suitability of their adoption into English law. Through an analysis of the English case-law it should be possible, viewing the principles as legal transplants and in light of Community law obligations to apply the principles, to gain a better understanding of the relationship between English and European Community administrative law. Finally, I will suggest what the English courts should do if they are to respond effectively to the challenges presented by Community law in regard to substantive principles of law.

## **2. Legal Transplants**

Comparative law can be used to attain a deeper understanding of problems faced in the national legal order and provide possible solutions which can be adopted through the transplantation of foreign law. A legal transplant involves the transfer of a legal rule, principle or institution from one legal system to another. Accordingly, lawyers considering transplantation need to consider two questions: first, has the solution proved satisfactory in its country of origin and, second, will it work in the country which proposes to adopt it?<sup>2</sup> However, debate has arisen on the nature and possibility of legal transplants.

In the 18th century Montesquieu warned against the transplantation of laws from one country to another as laws are particular to their environment.<sup>3</sup> Montesquieu argued that law was the product of human reason in relation to various factors, such as the "nature and principle of each government",<sup>4</sup> "the climate of each country",<sup>5</sup> which together constitute the "Spirit of the Laws". In updating this thesis Kahn-Freund has argued that

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<sup>2</sup> K. Zweigert and H. Kötz *An Introduction to Comparative Law* (Oxford: Clarendon Press, 1987) page 16.

<sup>3</sup> C. Montesquieu *The Spirit of the Laws* [1748] (New York, 1949, translated by T. Nugent) book 1, chapter 3, pages 6-7.

<sup>4</sup> *Ibid.*

environmental factors - geographical, social, economic and cultural elements - have reduced in importance whereas political factors had become more significant.<sup>6</sup> This was justified by the fact that economic, social and cultural integration amongst the developed countries had been accompanied by a political differentiation.<sup>7</sup> This process had affected the possibility of legal transplants. Accordingly, Kahn-Freund stated that there is a continuum of legal rules with varying degrees of transferability. The closer a rule is linked with the foreign power structure then the less susceptible it is of transplantation because of the political differentiation. As public law rules concern the control of political power Kahn-Freund considered them to be the least transferable rules:

"All rules which organise constitutional, legislative, administrative or judicial institutions and procedures are designed to allocate power, rule-making, decision-making, above all, policy making power. These are the

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<sup>5</sup> *Ibid.*

<sup>6</sup> O. Kahn-Freund "On Uses and Misuses of Comparative Law" (1974) 37 M.L.R. 1.

<sup>7</sup> *Ibid.*, 8.

rules which are closest to the 'organic' end of our continuum, they are the ones most resistant to transplantation."<sup>8</sup>

In general Kahn-Freund cautioned lawyers considering a transplantation not to be informed by a purely legalistic spirit but to have a "knowledge not only of the foreign law, but also of its social, and above all its political, context."<sup>9</sup>

Alternatively, Watson has argued that the recipient legal system does not need to have any knowledge of the political and other contexts of the origin and growth of the rule<sup>10</sup> but such views have been subjected to telling criticism.<sup>11</sup>

In assessing the viability of transplanting rules which organise public power the impact of the European Community on the exercise of public power must be addressed. Under the competences given to

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<sup>8</sup> *Ibid.*, 17.

<sup>9</sup> *Ibid.*, 27.

<sup>10</sup> A. Watson *Legal Transplants: An Approach to Comparative Law* (Edinburgh, 1974); A. Watson "Legal Transplants and Law Reform" (1976) 92 L.Q.R. 79, 80-81. See also E. Stein "Uses, Misuses - and Nonuses of Comparative Law" (1977) 72 N.W.U.L.R. 198; W. Ewald "Comparative Jurisprudence (II): The Logic of Legal Transplants" (1995) 43 A.J.C.L. 487.

<sup>11</sup> See R.L. Abel "Law as Lag: Inertia as a Social Theory of Law" (1982) 80 Michigan L.R. 785, 793; J.W.F. Allison *A Continental Distinction in the Common Law. A Historical and Comparative Perspective on English Public Law*. (Oxford: Clarendon Press, 1996) pages 14-16; P.

them by the European Treaties the Community institutions have powers previously exercised by the Member States. Also the Member States now exercise public power by virtue of Community law. Profound shifts in power have been occurring due to the organic development of the European Community.<sup>12</sup> Public power is no longer the preserve of the sovereign nation-state but is exercised at a variety of levels. Such changes have helped to undermine the traditional view of legal sovereignty<sup>13</sup> and have affected the judicial controls to be placed on their exercise. The European Court enforces Community standards of legality on measures adopted by the Community institutions and on measures of the Member States required or permitted by Community law.<sup>14</sup> The transplantation of the principles of

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Legrand "The Impossibility of 'Legal Transplants'" (1997) 4 M.J. 111.

<sup>12</sup> See J. Morison and S. Livingstone *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (London: Sweet & Maxwell, 1995) pages 13-17, 54-62. See also W.C. Müller and V. Wright "Reshaping the State in Western Europe: The Limits to Retreat" (1994) 17 *West European Politics* 1 (Special Issue on The State in Western Europe: Retreat or Redefinition?).

<sup>13</sup> N. MacCormick "Beyond the Sovereign State" (1993) 56 M.L.R. 1.

<sup>14</sup> See J. Temple Lang "The Sphere in Which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles" [1991/2] L.I.E.I. 23; *R. v. Ministry of Agriculture, Fisheries*

proportionality and legitimate expectations cannot be viewed solely as the adoption of legal principles that apply to a foreign power structure as the United Kingdom now forms part of that power structure by virtue of its Treaty obligations and the principles apply to measures of the Member State adopted under Community law.<sup>15</sup> In the complex emerging picture of interdependence and globalisation, the transplantation of the European principles could be viewed as an attempt to provide the individual with an equal level of legal protection against purely national administrative decisions compared with that which is enjoyed as a European citizen against the Community administration. The principles are already linked to the national and Community power structure by virtue of Community law. As the normative importance of the Community and the "new legal order"<sup>16</sup> increases, the strength of arguments against successful transplantation based upon the principles being linked to a foreign power

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*and Food ex parte First City Trading Ltd.* [1997] 1 C.M.L.R. 250.

<sup>15</sup> See D. Williams "The Influence of European Union Law upon United Kingdom Administration" in G. Richardson and H. Genn (eds.), *Administrative Law & Government Action. The Courts and Alternative Mechanisms of Review.* (Oxford: Clarendon Press, 1994) page 233.

structure will diminish and calls for their recognition as independent principles of English law will become stronger. Such changes suggest a new role for comparative law of national legal systems within the European Community. According to Lord Goff, European Community law forms one influence towards comparative study which is bound to lead to "an enrichment of...[English]...legal culture on an unparalleled scale".<sup>17</sup>

However, this is not to overlook the potential hazards of transplantation. According to Atiyah and Summers "legal transplants...require careful study of their possible ramifications."<sup>18</sup> Transplants may not be impossible<sup>19</sup> but it will be necessary that the environment be carefully prepared and that their possible second-stage effects be fully considered. Legal transplants may only become

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<sup>16</sup> Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] E.C.R. 1, 12.

<sup>17</sup> Lord Goff "Judge, Jurist and Legislature" [1987] Denning L.J. 79, 93. See also J. Bell "The English Lawyer in the Europe of 1993" (1991/2) 34 *University of Leeds Review* 181; T.H. Bingham "'There is a World Elsewhere': The Changing Perspectives of English Law" (1992) 41 *I.C.L.Q.* 513; R. Dehousse "Comparing National and EC Law: The Problem of the Level of Analysis" (1994) 42 *A.J.C.L.* 761; I. Ward "The Limits of Comparativism: Lessons from UK-EC Integration" (1995) 2 *M.J.* 23; P. Legrand "How to compare now" [1996] *L.S.* 232.

<sup>18</sup> P.S. Atiyah and R.S. Summers *Form and Substance in Anglo-American Law. A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions.* (Oxford: Clarendon Press, 1987) page 428.

effective if at least some of the norms and philosophy of the native legal system are also incorporated.<sup>20</sup> Transplanting principles from one legal system to another will require detailed knowledge and study of the context in which they operate and preparation for their reception into another legal system. In relation to the transplantation of proportionality and legitimate expectations this requires examination of whether the model of judicial review and the conception of law underpinning it are appropriate to the development of such principles.

The method proposed is to compare the case-law of the English courts with that of the European Court concerning proportionality and legitimate expectations in order to evaluate whether the transplantation of the principles was well considered and suited to English administrative law. In conducting this comparison it is to be borne in mind that as the common law develops on a gradual case by case basis it will be unable to adopt the whole principle in one case. The scope of that principle will be examined, defined and re-

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<sup>19</sup> *Contra* P. Legrand "The Impossibility of 'Legal Transplants'" (1997) 4 M.J. 111.

defined in subsequent cases. Judicial decisions are made in respect of specific disputes and tend to depend on their own facts. Furthermore, while some judges may have considered the principles as transplants from European law, other judges may not. If judges do not have regard to comparative materials in order to guide the development of a transplant then it is unlikely to be wholly successful.<sup>21</sup>

The above views concerning the contingency of successful transplantation of legal principles from one legal system to another suggest that comparative lawyers should not view law as a subject capable of rendering universal principles through a "general jurisprudence".<sup>22</sup> Rather they suggest that comparative law should focus on the particular nature of legal systems within the societies in which they operate as the basis of comparison. For example, Atiyah and Summers, in

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<sup>20</sup> F.S.C. Northrop "The Comparative Philosophy of Comparative Law" (1960) 45 Cornell L.Q. 617, 657.

<sup>21</sup> See B.S. Markesinis "Comparative Law - A Subject in Search of an Audience" (1990) 53 M.L.R. 1, 3-4. See also B.S. Markesinis "Judge, Jurist and the Study and Use of Foreign Law" (1993) 109 L.Q.R. 622; T. Allen and B. Anderson "The Use of Comparative Law by Common Law Judges" (1994) 23 Anglo-American L.R. 435; T. Koopmans

"Comparative Law and the Courts" (1996) 45 I.C.L.Q. 545.  
<sup>22</sup> J. Austin *Lectures on Jurisprudence or The Philosophy of Positive Law* (London, 4th edn., R. Campbell (ed.)),

their comparison of Anglo-American legal systems, identify, within the same legal family of the common law, different "visions of law" which those legal systems vindicate; in England a more formal approach to law is typically adopted compared with the substantive approach of the United States. A "vision of law" is composed of "a set of inarticulate and perhaps even unconscious beliefs held by the general public at large, and to some extent, also by politicians, judges, and legal practitioners, as to the nature and function of law - how and by whom it should be made, interpreted and enforced."<sup>23</sup> Similarly Bell has argued that "law is best viewed as a tradition within a legal community, rather than essentially as rules or norms of conduct. Within such a view of law, the central interplay between a community and its norms of conduct can be appreciated."<sup>24</sup>

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1879) page 1106 "On the Uses of the Study of Jurisprudence".

<sup>23</sup> Atiyah and Summers, *op. cit. supra* no. 18, page 411.

<sup>24</sup> J. Bell "Comparative Law and Legal Theory" in W. Krawietz, N. MacCormick and G. von Wright (eds.), *Prescriptive Formality and Normative Rationality in Modern Legal Systems. Festschrift for Robert S. Summers*. (Berlin: Duncker & Humblot, 1994) page 19, 20. See also, in this context, J. Bell "Mechanisms for Cross-fertilisation of Administrative Law in Europe" in J. Beatson and T. Tridimas (eds.), *New Directions in European Public Law* (Oxford: Hart, 1998) page 147.

Law then is to be viewed as an artefact of tradition and culture and comparative law should look not only to the cultural, social and economic context of a legal system but also to the specific legal tradition which will have a significant effect upon the way functions are performed.<sup>25</sup> Only by identifying the cultural and legal traditions of a community, is it possible to examine how meaning is given to legal principles and doctrines. It might be argued that this method is particularly appropriate in the context of public law because the development of public law involves the impact of politics and history within specific cultural traditions.<sup>26</sup>

This method of comparing how different legal systems attempt to solve the similar problems enables the study of comparative law to concentrate upon "relatively narrow and manageable problems" thereby avoiding the problems associated with

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<sup>25</sup> *Ibid.*, page 31. See also M. Krygier "Law as Tradition" (1986) 5 *Law and Philosophy* 237; Legrand, *op. cit. supra* no. 17; D. Nelken (ed.), *Comparing Legal Cultures* (Dartmouth, 1997).

<sup>26</sup> See J.S. Mill "Bentham" (1838) in J.S. Mill and J. Bentham *Utilitarianism and Other Essays* (Harmondsworth: Penguin, A Ryan (ed.), 1987) page 132, 164; J.D.B. Mitchell "Law, Democracy and Political Institutions" in M. Cappelletti (ed.), *New Perspectives For a Common Law of Europe* (Florence, 1978) page 361, 363; M. Loughlin "The Importance of Elsewhere" (1993) 4 *P.L.R.* 44, 57.

large-scale comparison of legal systems.<sup>27</sup> A comparison of the principles of legitimate expectations and proportionality in English and Community law must therefore be set within the specifically legal context of the different traditions of public law. It must seek to assess the interplay between the specific "vision of law" or legal tradition and the transplantation of the principles.

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<sup>27</sup> B.S. Markesinis "An Expanding Tort Law - The Price of a Rigid Contract Law" (1987) 103 L.Q.R. 354, 396.

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## Chapter 2: English and Continental Approaches to Administrative Law

### 1. The English Tradition of Administrative Law

The traditional account of English public law is well known.<sup>1</sup> The defining features of this account have been that Parliament is sovereign and that the Rule of Law requires all individuals and public bodies to be subject to the ordinary processes of the law. Public authorities are not entitled to be treated any differently than private individuals and the exercise of all public power is to be channelled through Parliament. A distinctive feature of English government has been the value placed upon the traditions, conventions and established practices in the business of government which can only make sense when interpreted in the light of innumerable tacit understandings.

Traditional practices have served the purpose of accommodating new developments and ensuring a sense

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<sup>1</sup> A.V. Dicey *Introduction to the Study of the Law of the Constitution* [1885] (London: Macmillan, 10th edn., 1959). See P.P. Craig *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990) chapter 2; M. Loughlin *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) pages 140-162.

of continuity between past and present.<sup>2</sup> The dominant political culture has placed great value on the practical experience of the governing class. According to Keeton "Parliament was omnipotent...but it was in no danger of abusing its powers because it was a combination of diverse elements, linked together by an intricate set of 'checks and balances'...and also because Englishmen possessed, to a markedly greater degree than other peoples, a mysterious political instinct."<sup>3</sup> In contrast to Continental states with bureaucratic state structures, British Government has been described by Bagehot as "club government"<sup>4</sup> with public administration being viewed as an art form rather than as a distinct science.

In relation to law such traditions are reflected in the common law method which is not a theoretical science based on reason but is founded

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<sup>2</sup> See J. Millar *An Historical View of the English Government, From the Settlement of the Saxons in Britain to the Revolution in 1688. Volume IV.* [1787] (London: Mawman, 1803) chapter VII "The Progress of Science Relative to Law and Government"; the distinction made by W. Bagehot *The English Constitution* [1867] (London: Fontana, 1993) page 63 between the "dignified" and "efficient" parts of the constitution.

<sup>3</sup> G.W. Keeton "The Twilight of the Common Law" (1949) *The Nineteenth Century and After* 230, 234.

<sup>4</sup> Bagehot, *op. cit. supra* no. 2, page 158.

on "artificial reason"<sup>5</sup> and practical knowledge. Uninfluenced by Roman law,<sup>6</sup> England developed the common law with its distinctive "common law mind"<sup>7</sup> against the backcloth of the myth of the ancient constitution. Law was seen as the result of immemorial custom and the accumulated wisdom of continual experience being constantly applied by the courts. In this way the common law was viewed as having the advantages of both continuity and innovation in that it was capable of being up to date but also existed "time out of mind of man".<sup>8</sup> Underpinning this cultural heritage of political tradition and the common law is the adoption of an essentially anti-rationalist approach that places importance in practical experience which is acquired by an education within this tradition of behaviour.<sup>9</sup> The adoption of an anti-rationalist approach can be seen clearly in the common law

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<sup>5</sup> *Prohibitions del Roy* (1607) 12 Co. Rep. 63, 65 per Sir Edward Coke C.J.

<sup>6</sup> See Millar, *op. cit. supra* no. 2, Volume II, Chapter VII, section 3.

<sup>7</sup> See J.G.A. Pocock *The Ancient Constitution and the Feudal Law: A Study of the English Historical Thought in the Seventeenth Century*. (Cambridge: University Press, 1957) chapter 2.

<sup>8</sup> Sir Edward Coke C.J. *The Third Part of the Reports of Edward Coke* (Revised edn., 1738) page vii.

<sup>9</sup> Loughlin, *op. cit. supra* no. 1, pages 64-83 drawing upon the work of M. Oakeshott, in particular *Rationalism in Politics and other essays* (Liberty Fund, new and extended edn., 1991).

method by the use of precedent by judges educated within the practices and culture of the common law. It was against this background that Dicey, being "the first to apply the analytical method to English public law",<sup>10</sup> formulated the general principles of law of the constitution. For Dicey, the doctrine of Parliamentary sovereignty was "an undoubted legal fact"<sup>11</sup> and the Rule of Law was to be expressed by the ordinary courts drawing upon the ordinary law of the land.

As a result of this cultural heritage English lawyers have not been required to develop a legal conception of the State relevant to modern government<sup>12</sup> but instead have preferred to use the concept of the Crown<sup>13</sup> or the doctrine of Parliamentary sovereignty<sup>14</sup> to explain the exercise of public power. The comment of Redlich and Hirst that the England of the late nineteenth century was

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<sup>10</sup> W.I. Jennings "In Praise of Dicey 1885-1935" (1935) 13 *Public Administration* 123, 133.

<sup>11</sup> Dicey, *op. cit. supra* no. 1, page 68.

<sup>12</sup> K.H.F. Dyson *The State Tradition in Western Europe. A Study of an Idea and Institution*. (Oxford: Martin Robertson, 1980) pages viii, 36-44. See also E. Barker "The 'Rule of Law'" (1914) 2 *Political Quarterly* 117, 118-119; H.J. Laski "The Responsibility of the State in England" (1919) 32 *Harv. L.R.* 447; P. Allott "The Theory of the British Constitution" in H. Gross and R. Harrison (eds.), *Jurisprudence: Cambridge Essays* (Oxford: Clarendon Press, 1992) page 173, 186.

<sup>13</sup> See F.W. Maitland "The Crown as Corporation" (1901) 17 *L.Q.R.* 131.

uninformed about an abstract legal theory of the State and its jurisprudence was unequipped with a theory of general administration remains true today.<sup>15</sup> Despite the vast changes in the role and size of the State and the gradual extension of democratic politics, the basic institutional and cultural heritage has remained the same. Rather than re-conceptualising the role of law in view of the changing relationship between the individual and the State, the dominant tradition of public law has preferred to accommodate such developments within the established arrangements. The emergence of a more rationalist and ideological politics within an essentially anti-rationalist constitutional framework has inevitably caused strains. These new tensions have been viewed by some as the passing away of traditions and the development of an "elective dictatorship"<sup>16</sup> and by others as a failure to develop a constitution

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<sup>14</sup> Dicey, *op. cit. supra* no. 1, chapter 1.

<sup>15</sup> J. Redlich and F.W. Hirst *Local Government in England Volume II* (London: Macmillan, 1903) pages 376-377.

<sup>16</sup> N. Johnson "Constitutional Reform: Some Dilemmas for a Conservative Philosophy" in Z. Layton-Henry (ed.), *Conservative Party Politics* (London, 1980) pages 126, 128-9; Lord Hailsham *The Dilemma of Democracy. Diagnosis and Prescription*. (London: Collins, 1978) chapter xx "Elective Dictatorship".

suitable to contemporary needs and demands.<sup>17</sup> As the growth in the scale and complexity of the State has been achieved by a vast increase in legislation, statutes have come to displace the common law as the source of law. However, a corresponding change has not occurred at the level of the conception of legality. The dominant view of law has remained at a common law conception despite the vast growth and change in the State over the last century. The result has been that law is viewed merely as a means of controlling the exercise of public power and not as a means of facilitating or evaluating administrative action. The role of law in the British administrative state has therefore been distinctively influenced by British constitutional traditions.

The development of judicial review of administrative action by the English courts may be viewed as the gradual articulation of the traditional account of English public law as it has attempted to respond to such challenges. As the basic conception of the structure of the State is reflected in the means used to control the

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<sup>17</sup> D. Marquand *The Unprincipled Society. New Demands and Old Politics*. (London, 1988) chapter 7; W. Hutton *The*

administration,<sup>18</sup> the lack of a legal definition of the State has shaped the entire structure of English administrative law. Rather than being subject to special legal controls, disputes between public authorities and individuals have been resolved by applying the ordinary principles of the common law. Dicey declared that the Rule of Law meant that the common law was the supreme law of the land and that all classes of people were to be subject to the equal application of the law. Under this universal conception of legality, public authorities were not to be allowed to "shelter behind a droit administratif."<sup>19</sup> According to Dicey, the existence of a separate administrative law, like that which existed in Continental countries, and particularly in France, rested on "ideas foreign to the fundamental assumptions of our English common law, and especially...the rule of law."<sup>20</sup> A separate administrative law would, it was thought, undermine the universality and equality of

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*State We're In* (London: Vintage, new edn., 1996) chapter 11.

<sup>18</sup> B. Chapman *The Profession of Government. The Public Service in Europe*. (London, 1966) page 185. See also C. Harlow and R. Rawlings *Law and Administration* (London: Butterworths, 2nd edn., 1997) page 1.

<sup>19</sup> *Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223, 266D per Lord Denning M.R. See also Salmon L.J. at 275B.

<sup>20</sup> Dicey, *op. cit. supra* no. 1, page 329.

the common law, place the state in a privileged position and require the establishment of special courts thereby breaching the principle of the separation of judicial and executive powers. This rejection proceeded upon the assumption that a separate administrative law would in fact treat public authorities more favourably than private individuals which arose because the state was not viewed as having its own distinct functions and therefore requiring distinct legal consideration. Dicey drew a sharp distinction between the regular law of the land and the existence of arbitrary power and viewed the two as incompatible. The existence of a separate administrative law was viewed as enshrining rather than constraining arbitrary power.

Though Dicey both failed to recognise the scope of administrative law which existed at the time he wrote,<sup>21</sup> misunderstood French administrative law,<sup>22</sup> and later began to revise his views,<sup>23</sup> his

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<sup>21</sup> H.W. Arthurs "Jonah and the Whale: The Appearance, Disappearance, and Reappearance of Administrative Law" (1980) 30 University of Toronto L.J. 225; H.W. Arthurs 'Without the Law': *Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto, 1985).  
<sup>22</sup> E.M. Parker "State and Official Liability" (1905/6) 19 Harv. L.R. 335, 347-9; W.I. Jennings *The Law and the Constitution* (London, 5th edn., 1959) pages 232-238. See also J.W. Garner "Anglo-American and Continental European Administrative Law" (1929) 7 N.Y.U.L.Q.R. 387;

influence has been immense both in terms of moulding the scope of the subject<sup>24</sup> and in defining the dominant tradition.<sup>25</sup> According to Loughlin:

"By denying the existence of administrative law in the face of the structural pressure for growth in administration, the influence which Dicey's theory had on political and legal thought served to shield us from the realities and prevent us from addressing the issues raised by these developments in a constructive fashion."<sup>26</sup>

England could not develop a separate administrative law with its own philosophy that was not contrary to the Rule of Law as articulated by Dicey. In this way Dicey could be viewed as constructing a positivistic style which enabled the anti-

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R. Errera "Dicey and French Administrative Law: A Missed Encounter?" [1985] P.L. 695.

<sup>23</sup> A.V. Dicey *Introduction to the Study of the Law of the Constitution* (London, 8th edn., 1915) page xlvi; A.V. Dicey "The Development of Administrative Law in England" (1915) 31 L.Q.R. 148.

<sup>24</sup> See the "outline of subject" in *Introduction to the Study of the Law of the Constitution* where Dicey explained the "true nature of constitutional law". See also R. Blackburn "Dicey and the Teaching of Public Law" [1985] P.L. 679; Loughlin, *op. cit. supra* no. 1, pages 14-23, 159.

<sup>25</sup> Jennings, *op. cit. supra* no. 10; H.W. Arthurs "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1; N. Johnson and P. McAuslan "Dicey and His Influence on Public Law" [1985] P.L. 679; Craig, *op. cit. supra* no. 1; Loughlin, *op. cit. supra* no. 1, pages 140-162.

rationalist culture of the common law and the British Constitution to become established as the dominant tradition of public law. Furthermore, because most public lawyers in this century have continued to work within this style of analytical jurisprudence, this has exercised a profound influence in bolstering the dominant paradigm of the subject and in preventing them from critically assessing its normative authority.

However, not every lawyer agreed with either Dicey's views or his approach. During the inter-war period some writers applied a functionalist approach to the role of law in public administration and sought to constructively meet the challenges for law presented by the growth of administrative power.<sup>27</sup> Robson's work *Justice and Administrative Law*<sup>28</sup> was written in order to dispel the illusion that in Britain there was no administrative law.<sup>29</sup> Robson examined in detail the exercise of judicial functions by administrators and tribunals and sought to rationalise the

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<sup>26</sup> Loughlin, *op. cit. supra* no. 1, page 160.

<sup>27</sup> See generally Loughlin, *op. cit. supra* no. 1, pages 165-176; Harlow and Rawlings, *op. cit. supra* no. 18, chapter 3.

<sup>28</sup> W.A. Robson *Justice and Administrative Law. A Study of the British Constitution.* (London: Stevens, 3rd edn., 1951).

haphazard arrangements into a system of public law. Jennings argued that that Dicey's writings could only be understood against his Whig individualism<sup>30</sup> and sought to re-define the role of the lawyer in view of the growth of administrative power:

"The task of the lawyer as such is not to declare that modern intervention is pernicious, but, seeing that all modern States have adopted the policy, to advise as to the technical devices which are necessary to make the policy efficient and to provide justice for individuals."<sup>31</sup>

Such writers argued that the growth of administrative discretion required new ideas and new institutions rather than disapproval of the extension of government combined with complacent

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<sup>29</sup> W.A. Robson *"Justice and Administrative Law Reconsidered"* (1979) 32 C.L.P. 107.

<sup>30</sup> Jennings, *op. cit. supra* no. 10, 124-133. In *Lectures on the Relationship Between Law and Opinion in England during the Nineteenth Century* (London: Macmillan, 2nd edn., 1963) pages 257-258 Dicey articulated his distrust of social legislation: "[t]he beneficial effects of State intervention, especially in the form of legislation, is direct, immediate, and, so to speak, visible, whilst its evil effects are gradual and indirect...State help kills self-help."

<sup>31</sup> W.I. Jennings "Courts and Administrative Law - The Experience of English Housing Law Legislation" (1936) 49 Harv. L.R. 426, 430.

nostalgia for past constitutional arrangements.<sup>32</sup> Therefore, both Robson and Jennings argued for a special administrative jurisdiction in order to hear appeals from administrative tribunals.<sup>33</sup> To be effective in resolving disputes concerning the application of policy it was argued that such an appellate body should be separate from the traditions of the common law which were incompatible with the philosophy underlying social legislation and be staffed by those with knowledge and experience of public administration. However, this functionalist style has never been able to displace the dominant tradition. The idea of a separate administrative jurisdiction was rejected by the Committee on Ministers' Powers<sup>34</sup> which was set up to consider the issues of delegated legislation and administrative adjudication. As the terms of reference for the Committee were to

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<sup>32</sup> See W.A. Robson *Public Administration Today* (London: Stevens, 1948) pages 15-17.

<sup>33</sup> Robson, *op. cit. supra* no. 28, pages 426-429; W.I. Jennings "The Report on Ministers' Powers" (1932) 10 *Public Administration* 333, 348-351. See also J. Willis *The Parliamentary Powers of Government Departments* (Cambridge, 1933) page 172.

<sup>34</sup> *The Report of the Committee on Ministers' Powers* Report Cmd. 4060, (London: HMSO, Donoughmore Report, 1932). See W.A. Robson "The Report of the Committee on Ministers' Powers" (1932) 3 *Political Quarterly* 346; Jennings, *op. cit. supra* no. 33; D.G.T. Williams "The Donoughmore Report in Retrospect" (1982) 60 *Public Administration* 273.

"report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law",<sup>35</sup> Robson considered it to have "started life with the dead hand of Dicey lying frozen on its neck."<sup>36</sup>

In the first part of this century the courts sometimes exercised great restraint when met with challenges to the use of administrative power<sup>37</sup> and concerns were expressed over the growth of administrative law or "administrative lawlessness".<sup>38</sup> In the absence of a separate administrative jurisdiction, it was left to the ordinary courts to fill the gap. It was during this period that functionalist writers argued that the courts displayed a distrust of administrative power against the protection of private right and lacked the institutional ability to resolve such issues.<sup>39</sup> However, despite early disagreements over whether

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<sup>35</sup> *Ibid.*, section 1, paragraph 1.

<sup>36</sup> Robson, *op. cit. supra* no. 28, page 423.

<sup>37</sup> See, e.g., *Local Government Board v. Arlidge* [1915] A.C. 120.

<sup>38</sup> Lord Hewart of Bury *The New Despotism* (London, 1929) page 13. See also C.K. Allen *Law in the Making* (London, 1927); C.K. Allen *Bureaucracy Triumphant* (London, 1931).

<sup>39</sup> See H.J. Laski "Judicial Review of Social Policy in England" (1926) 39 *Harv. L.R.* 832; J. Willis "Three Approaches to Administrative Law: the Judicial, the Conceptual and the Functional" (1935) 1 *University of*

they were capable of controlling the exercise of public power,<sup>40</sup> the courts gradually became willing to referee disputes between individuals and public authorities. In a process which is only discernible in hindsight, the courts re-discovered "their historic but long-neglected role as protectors of the private citizen against unlawful or unjust treatment by the executive branch of government"<sup>41</sup> by subjecting the "crooked cord" of unlawful administrative discretion to the "golden and straight metwand" of the common law.<sup>42</sup> This was achieved by resurrecting the old prerogative writs<sup>43</sup> and removing obstacles to the control of administrative power. For instance, in *R. v. Northumberland Compensation Appeal Tribunal ex*

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Toronto L.J. 53; Jennings, *op. cit. supra* no. 31; Robson, *op. cit. supra* no. 28.

<sup>40</sup> A. Denning *Freedom Under the Law* (London, The Hamlyn Lectures, 1949) page 126 argued in favour of the courts rising to the challenge. Contra P. Devlin "The Common Law, Public Policy and the Executive" (1956) 9 C.L.P. 1, 14-15. See also Keeton, *op. cit. supra* no. 3; H.W.R. Wade "Law, Opinion and Administration" (1962) 78 L.Q.R. 188, 198-199.

<sup>41</sup> Lord Diplock "Administrative Law: Judicial Review Reviewed" (1974) 33 C.L.J. 233.

<sup>42</sup> C.F. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord. Essays on Public in Honour of Sir William Wade QC.* (Oxford: Clarendon Press, 1998) page vii. The language is that of Sir Edward Coke C.J. 4 Inst 41.

<sup>43</sup> See S.A. deSmith "The Prerogative Writs" (1950) 11 C.L.J. 40; E.G. Henderson *The Foundations of English Administrative Law. Certiorari and Mandamus in the Seventeenth Century.* (Cambridge Mass., 1963).

*parte Shaw*<sup>44</sup> the Court of King's Bench revived its inherent power to review for errors of law on the face of the record. The House of Lords in *Ridge v. Baldwin*<sup>45</sup> eroded the distinction between administrative and judicial decision-making in relation to the right to be heard. The concept of jurisdiction was opened up to cover all errors of law<sup>46</sup> and in *Padfield v. Ministry of Agriculture, Fisheries and Food*<sup>47</sup> it was held that discretionary power should not be exercised for an improper purpose. The revival of principles and remedies by the English courts is undeniable. However, this development has taken place within terms of the traditional account of public law and the culture of the common law. While it has been accepted that the existence of administrative law is no longer "fundamentally inconsistent"<sup>48</sup> with the British constitution, the values and beliefs articulated by Dicey still exist and can be found in leading textbooks and court judgements.<sup>49</sup>

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<sup>44</sup> [1951] 1 K.B. 711 (D.C.); [1952] 1 K.B. 338 (C.A.).

<sup>45</sup> [1964] A.C. 40.

<sup>46</sup> *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.

<sup>47</sup> [1968] A.C. 997.

<sup>48</sup> Dicey, *op. cit. supra* no. 1, page 203.

<sup>49</sup> See, e.g., H.W.R. Wade and C.F. Forsyth *Administrative Law* (Oxford: Clarendon Press, 7th edn., 1994). Cf. the "conservative normativism" described by Loughlin, *op.*

The courts therefore came to develop, within the Diceyan tradition, the traditional model of judicial review.<sup>50</sup> Under this model the role of the courts was to enforce the intention of Parliament, thereby fulfilling Parliamentary sovereignty, and to protect private law remedies. The conceptual tool used to ensure that public authorities did not go beyond their powers was the *ultra vires* rule.<sup>51</sup> The courts also required observance of the established common law rules. The role of the courts was therefore limited to determining whether the body had acted outside the limits of its jurisdiction. Any other forms of control were to be sought in Parliament. Underpinning this model is a positivist 'top-down' conception of law. Whether law is viewed as a command<sup>52</sup> or as a system of primary and secondary rules<sup>53</sup> matters little; law is

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*cit. supra* no. 1 which has become the normal discourse of public law.

<sup>50</sup> P.P. Craig *Administrative Law* (London: Sweet & Maxwell, 3rd edn., 1994) pages 4-17; R. Cotterrell "Judicial Review and Legal Theory" in G. Richardson and H. Genn (eds.), *Administrative Law and Government Action. The Courts and Alternative Mechanisms of Review*. (Oxford: Clarendon Press, 1994) page 13.

<sup>51</sup> Wade and Forsyth, *op. cit. supra* no. 49, pages 41-49. See also A. Rubenstein *Jurisdiction and Illegality. A Study in Public Law*. (Oxford: Clarendon Press, 1965).

<sup>52</sup> J. Austin *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* [1832] (H.L.A. Hart (ed.), London, 1954).

<sup>53</sup> H.L.A. Hart *The Concept of Law* (Oxford: Clarendon Press, 1961).

viewed as rules emanating from a sovereign. This conception of law requires the courts to apply the law, as it originates in the will of a sovereign legislature, to the exercise of public power delegated to public authorities by Parliament. The courts were also to apply the common law Rule of Law to the actions of public authorities in order to protect private rights. It is this model of judicial review which has become dominant in English law.

The principles which the courts have articulated through the "artificial reason" of the common law have been justified as supplying "the omission of the legislature".<sup>54</sup> However, the courts have not developed a coherent body of administrative law<sup>55</sup> and no consistent principles have emerged as to when the judiciary will intervene or adopt a more formalist model of judicial restraint.<sup>56</sup> The concentration on parliamentary methods of control during a time when

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<sup>54</sup> *Cooper v. The Board of Works for the Wandsworth District* (1863) 14 C.B. (N.S.) 180, 194 per Byles J.

<sup>55</sup> Lord Scarman "The Development of Administrative Law: Obstacles and Opportunities" [1990] P.L. 490, 491.

<sup>56</sup> See M. Loughlin "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978) 28 *University of Toronto L.J.* 215; J. Jowell and A. Lester "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] P.L. 368; T.R.S. Allan

the emergence of the positive state rendered Parliament progressively less capable of overseeing the exercise of public power has prevented the development of a coherent body of administrative law. According to Mitchell "public law is all too often regarded as a series of unfortunate exceptions to the desirable generality or universality of the rules of private law, and is not seen as a rational system with its own justification, and perhaps its own philosophy."<sup>57</sup> The introduction of a special procedure for applications for judicial review<sup>58</sup> has served to highlight the lack of a distinct public law jurisprudence.

The vision of administrative law which the English legal system typically adopts is characterised by the absence of a justification for a separate administrative law with distinct principles to regulate the relationship between the individual and the State. Instead English law has preferred to adopt a common law conception of

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"Pragmatism and Theory in Public Law" (1988) 104 L.Q.R. 422.

<sup>57</sup> J.D.B. Mitchell "The Causes and Effects of the Absence of a System of Public Law in the United Kingdom" [1965] P.L. 95, 96.

<sup>58</sup> Order 53 R.S.C., S.I. 1977 No. 1955; section 31 Supreme Court Act 1981. See L. Blom-Cooper "The New Face

administrative legality with the judges drawing upon the accumulated wisdom of the common law with its anti-rationalism and distaste for system. In response to the increase in administrative power, this common law conception of legality has been retained. As legislation has come to supplant the common law as the primary source of law, this has resulted in law coming to be seen as the will of the legislature rather than from traditional custom and administrative legality has come to be expressed in a crude formula whereby public authorities can do as they please within the limits of their powers so long as it is not unreasonable. It is against this developing vision of law that the English courts began to refer to the principles of legitimate expectations and proportionality.

## **2. The Continental Tradition of Administrative Law**

Continental conceptions of administrative law, particularly French and German administrative law, have exerted a pervasive influence over European

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of Judicial Review: Administrative Changes in Order 53" [1982] P.L. 250.

Community administrative law.<sup>59</sup> In order to define the rules of law relating to the application of the Treaty<sup>60</sup> the European Court has adopted a comparative method.<sup>61</sup> In drawing upon the national legal orders the European Court has not been content to adopt those principles of national law

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<sup>59</sup> See W.P. Gormley "The Significant Role of French Administrative Jurisprudence as Presently Applied by the Court of European Communities, With Emphasis on the Administrative Law Remedies Available to Private Litigants" (1963) 8 South Dakota L.R. 32; M. Fromont "L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de Justice des Communautés européennes" (1966) 2 R.T.D.E. 47; Lord Mackenzie Stuart "The Court of Justice of the European Communities and the Control of Discretion" [1974-5] J.S.P.T.L. 16; T. Koopmans "The Birth of European Law at the Crossroads of Legal Traditions" (1991) 39 A.J.C.L. 493; J. Schwarze *European Administrative Law* (London: Sweet & Maxwell, 1992) page 1434; L. Neville Brown and J.S. Bell *French Administrative Law* (Oxford: Clarendon Press, 4th edn., 1993) pages 262-267; G. Nolte "General Principles of German and European Administrative Law - A Comparison in Historical Perspective" (1994) 57 M.L.R. 191, 211.

<sup>60</sup> See Articles 173 and 215(2) of the EC Treaty.

<sup>61</sup> See L. Neville Brown "Comparative Law and the Court of Justice of the European Communities" (1976) 7 Cambrian L.R. 65; A. Bredimas "Comparative Law in the Court of Justice of the European Communities" in *The Yearbook of World Affairs 1978 Volume 32* (London: Stevens & Sons, 1978) page 320; P. Pescatore "Le Recours, dans la Jurisprudence de la Cour de Justice des Communautés Européennes, a des Normes Dédites de la Comparaison des Droits des États Membres" (1980) 32 R.I.D.C. 337; M. Akehurst "The Application of General Principles of Law by the Court of Justice of the European Communities" [1981] B.Y.I.L. 29; M. Hilf "The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities" in A. de Mestral et al. (eds.), *The Limitation of Human Rights in Comparative Constitutional Law* (Lés Editions Yvon Blais Inc., 1986) page 549; F. Jacobs "The Uses of Comparative Law in the Law of the European Communities" in R. Plender (ed.), *Legal History and Essays in Honour of Albert Kiralfy* (London: Frank Cass, 1990) page 99.

which are "arithmetical 'common denominators'" between the Member States but has chosen those principles which seem to it to be the most "progressive" having regard to the objects of the Treaty.<sup>62</sup> The purpose of this comparative method has not been to create a synthesis or "compromis juridique"<sup>63</sup> of the various national legal orders but to adopt the "most carefully considered"<sup>64</sup> national solution which is suited to the purposes of Community law. According to Advocate General Dutheillet de Lamothe, the principles of the national legal systems "contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges".<sup>65</sup> As

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<sup>62</sup> Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v. High Authority of the European Coal and Steel Community* [1962] E.C.R. 253, 283-4 of the opinion of Advocate General Lagrange. See also Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v. Council* [1971] E.C.R. 975, 989 (col. 2) of Advocate General Roemer's opinion; H. Kutscher "Methods of Interpretation as seen by a Judge as the Court of Justice" in *Judicial and Academic Conference 27-28 September 1976* (Luxembourg, 1976) I-5, 29; Y. Galmot "Réflexions sur le recours au droit comparé par la Cour de Justice des Communautés européennes" (1990) 6 R.F.D.A. 255, 258.

<sup>63</sup> M. Lagrange "L'Ordre Juridique de la C.E.C.A. vu a Travers Jurisprudence de sa Cour de Justice" (1958) 64 R.D.P. 841, 857.

<sup>64</sup> Joined Cases 63 to 69/72 *Wilhelm Wehahn Hansamühle v. Council* [1973] E.C.R. 1229, 1260 (col. 1) of Advocate General Romer's opinion.

<sup>65</sup> Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*

French and German administrative law have been the predominant sources of Community administrative law, compared with the more limited influence of English law,<sup>66</sup> it is necessary to examine the differences between English and Continental conceptions of administrative law.

Continental administrative law has developed within a different tradition to English administrative law.<sup>67</sup> In comparison with English law, Continental administrative law is characterised by a tradition of theorising over the role of the State, a division between public and private law, the rationale underlying judicial review and the existence of special administrative courts.

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[1970] E.C.R. 1125, 1146 (col. 2) of the opinion of the Advocate General.

<sup>66</sup> See Case 17/74 *Transocean Marine Paint Association v. Commission* [1974] E.C.R. 1063; Case 155/79 *AM & S Europe Limited v. Commission* [1982] E.C.R. 1575. See also E. Petersen "L'influence possible du droit anglais sur le recours en annulation auprès de la Cour de Justice des Communautés européennes" (1966) 2 R.T.D.E. 256; J.A. Usher "The Influence of National Concepts on Decisions of the European Court" (1976) 1 E.L.Rev. 359, 370-373; J. Bell "The English Lawyer in the Europe of 1993" (1991/2) 34 *University of Leeds Review* 181.

<sup>67</sup> On the history of the development of Continental public law see J.H. Merryman "The Public Law - Private Law Distinction in European and American Law" (1968) 17 *Journal of Public Law* 3, 5-14; C. Szladits "The Distinction Between Public Law and Private Law" in *International Encyclopedia of Comparative Law*, II-2 paragraphs 25-57; A.E. Tay and E. Kamenka "Public Law - Private Law" in S.I. Benn and G.F. Gaus (eds.), *Public and Private in Social Life* (London, 1983) page 67.

The lack of an English State tradition contrasts sharply with Continental approaches to the idea of the state. Both France and Germany have strong traditions of theorising over the role and purpose of the State<sup>68</sup> and its relationship to law.<sup>69</sup> The significance of the State tradition is that it formed the intellectual background for French and German administrative law.<sup>70</sup> Continental administrative law is also conceptualised in a different manner to English law. The administration is viewed as the institution which realises the purposes of the State and a systematic and rational body of law is therefore required to control the exercise of such power. Administration is seen as the application of law and has developed upon the basis of a legal-rational model of bureaucracy with legally trained administrators using formalised

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<sup>68</sup> Dyson, *op. cit. supra* no. 12, chapter 6. See also P. Allott "The Crisis of European Constitutionalism: Reflections on the Revolution in Europe" (1997) 34 C.M.L.Rev. 439.

<sup>69</sup> See L. Duguit "The Law and the State" (1917/18) 31 Harv. L.R. 1; N. Johnson "Law as the Articulation of the State in Western Germany: A German tradition seen from a British perspective" (1978) 1 *West European Politics* 177; Dyson, *op. cit. supra* no. 12, pages 107-117; H.S. Jones *The French State in Question. Public Law and Political Argument in the Third Republic*. (Cambridge: University Press, 1993) chapter 2.

<sup>70</sup> See J.W.F. Allison "Theoretical and Institutional Underpinnings of a Separate Administrative Law" in M. Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart, 1997) page 71.

"objective" methods of administrative decision-making.<sup>71</sup> Law provides the values and principles to inform public action. Continental jurists recognised that the State possessed great powers over its citizens which resulted in an inequality between the two.<sup>72</sup> As the State performs unique tasks, for which it exercises discretionary power, a distinct body of public law is needed to control its activities. The distinction between public law and private law, which had its roots in Roman law,<sup>73</sup> became fundamental to the Civil law tradition. A substantive distinction was therefore made in the principles regulating the state as opposed to private individuals. For example, in the *Blanco* case<sup>74</sup> the French Tribunal des Conflits declared that the liability of the state was not governed by private law but by a separate set of rules of public law: "...cette responsabilité n'est ni générale, ni absolue; qu'elle a ses règles

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<sup>71</sup> For a comparison between British and Continental approaches to administration see C.H. Sisson *The Spirit of British Administration with some European Comparisons* (London, 1959).

<sup>72</sup> Szladits, *op. cit. supra* no. 67, paragraphs 32-39; Merryman, *op. cit. supra* no. 67, 13.

<sup>73</sup> See J.W.F. Allison *A Continental Distinction in the Common Law. A Historical and Comparative Perspective on English Public Law.* (Oxford: Clarendon Press, 1996) pages 109-112.

spéciales qui varient suivant les besoins du service et la nécessité de concilier les droits de l'État avec les droits privés...".<sup>75</sup> The conceptual structure of the law differs according to whether a dispute arises under public or private law. Under a system of public law effective judicial protection must be available in order to protect the individual against the State. In this way judicial review is correlative to the extent of administrative power. In the Continental tradition administrative law therefore developed as a distinct and independent area of law supporting the idea of the modern constitutional State based on the Rule of Law.<sup>76</sup>

As the Continental tradition viewed the State as having distinct purposes, this came to be reflected in administrative law. A rule which governs the whole of administrative law is the

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<sup>74</sup> T.C. 8th February 1873 in M. Long et al. (eds.), *Les grand arrêts de la jurisprudence administrative* (Sirey, 10th edn., 1993) page 1.

<sup>75</sup> *Ibid.*: "...this liability is neither general nor absolute; that it has its own rules which vary according to the needs of the service and the necessity to reconcile the rights of the state with private rights...".

<sup>76</sup> This underlies the German idea that administrative law is concretised constitutional law: F. Werner "Verwaltungsrecht als konkretisiertes Verfassungsrecht" [1959] D.V.Bl 527. See also E. Schmidt-Aßmann "Basic Principles of German Administrative Law" (1993) 35 *Journal of the Indian Law Institute* 65, 67-69.

principle of the purpose pursued.<sup>77</sup> As the administration acts in the public interest it has special powers for that end. As a former member of the Conseil d'État, Letourner, has stated:

"[a]dministrative law is, by its very nature, an unequal law; for the general interest must be accorded supremacy over private rights."<sup>78</sup> The essential role of the administrative judge is to limit this supremacy by reconciling the imperative requirements of the general interest with the legitimate interests of the individual. The underlying purpose of judicial control of administrative action is to recognise the different needs of the State and the individual and to balance them. According to Advocate General Lagrange:

"...in each case the public interest and legitimate private interests should be balanced against each other: that, moreover, is

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<sup>77</sup> L. Duguit *Law in the Modern State* (trans. by F. and H.J. Laski) (London, 1921) pages 142-144; Case 3/54 *Associazione Industrie Siderurgiche Italiane (ASSIDER) v. High Authority of the European Coal and Steel Community* [1954-56] E.C.R. 63, 76 of the opinion of Advocate General Lagrange.

<sup>78</sup> M. Letourner "The Concept of Equity in French Public Law" in R.A. Newman (ed.), *Equity in the World's Legal Systems. A Comparative Study*. (Brussels, 1973) page 261, 262.

one of the fundamental concepts of administrative law, and is without doubt the chief justification for the very existence of administrative courts."<sup>79</sup>

The purpose of the balancing test is to ensure that in the exercise of its powers, the State does not act arbitrarily. The administrative court cannot replace its assessment of the discretionary choices with that of the administrator but can only intervene if the decision is unreasonable or badly thought-out. This forces administrators to give serious and plausible justifications for their decisions.<sup>80</sup> The balancing test is a relative exercise dependent on the competing strengths of

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<sup>79</sup> Case 14/61 *Hoogovens*, *supra* no. 62, 283 (col. 1) of the Advocate General's opinion. See also Case 2/57 *Compagnie des Hauts Fourneaux de Chasse v. High Authority of the European Coal and Steel Community* [1957-58] E.C.R. 199, 228; Joined Cases 14, 16, 17, 20, 24, 26 and 27/60 and 1/61 *Meroni & Co. v. High Authority of the European Coal and Steel Community* [1961] E.C.R. 161, 174 (col. 1) of the opinion of Advocate General Lagrange; M. Letourner "L'erreur manifeste d'appréciation dans la jurisprudence du Conseil D'État Français" in *Miscellanea W.J. Ganshof Van Der Meersch. Tome Troisième.* (Brussels, 1972) page 563; F. Ewald "A Concept of Social Law" in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (Berlin/New York: Walter de Gruyter, 1986) pages 40, 61-71; J. Bell "The Expansion of Judicial Review Over Discretionary Powers in France" [1986] P.L. 99, 100; Schmidt-Aßmann, *op. cit. supra* no. 76, 69.

<sup>80</sup> See the opinion of Commissaire du Gouvernement Braibant in C.E. 28th May 1971 *Ville Nouvelle Est* [1971]

the various interests involved. According to Advocate General Lagrange: "[i]n general, it is the public interest, represented...by respect for legality which should prevail. The only exception is where that respect may demand such a sacrifice in the part of the private interests that the public interest involved cannot justify it."<sup>81</sup> If the public interest predominates then the administrative act is lawful, whereas if the private interest is sufficiently weighty then the public interest should similarly be of a competing weight otherwise it will not justify the restriction. As the nature of the interests involved vary so will the nature of the balancing test to be undertaken. When the public interest is an important and pressing one compared with a marginal impact on the private interest, then the administrative judge will adopt a less intense control on the appropriate balance. Whereas if the private interest infringed is an important one, such as personal liberty, then the judge may require an important competing public interest to

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A.J.D.A. 463, 467 quoted in Brown and Bell, *op. cit.* supra no. 59, pages 248-249.

<sup>81</sup> Case 14/61 *Hoogovens*, supra no. 62, 286 (col. 2) of the Advocate General's opinion.

justify the restriction.<sup>82</sup> Indeed, as the nature of the interests involved may change, the balance accomplished may be superseded and need to be repeated.<sup>83</sup> There are no straightforward solutions as to how the balance should be struck and judicial and administrative views of what constitutes "good administration" may not necessarily coincide.<sup>84</sup> The weighing up and balancing of competing interests is a flexible judgment in view of the changing needs of public administration which is oriented towards the goal the administration wishes to achieve. Once the administrative court has reviewed the administration's concept of the legal nature of the interests then the administration is free to exercise its discretionary power.<sup>85</sup>

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<sup>82</sup> Cf. the difference between "minimum" and "normal" review by the Conseil d'État see Brown and Bell, *op. cit. supra* no. 59, pages 250-251.

<sup>83</sup> Letourner, *op. cit. supra* no. 79, page 563.

<sup>84</sup> Bell, *op. cit. supra* no. 79, page 100.

<sup>85</sup> Case 14/61 *Hoogovens*, *supra* no. 62, 284 (col. 2) of the Advocate General's opinion; Lord Mackenzie Stuart *The European Communities and the Rule of Law* (London: The Hamlyn Lectures, 1977) page 55. On the judicial control of discretionary power in Continental legal systems see E.K. Pakuscher "The Use of Discretion in German Law" (1976-77) 44 *University of Chicago L.R.* 94; J. Kahn "Discretionary Power and the Administrative Judge" (1980) 29 *I.C.L.Q.* 521; Bell, *op. cit. supra* no. 79; C.J. Bax "Judicial Control on the Administration in the Netherlands" (1992) 4 *E.R.P.L.* 71; F. Stroink "Judicial Control of the Administration's Discretionary Power (*le bilan - juge administratif*)" in R. Bakker (ed.), *Judicial Control: Comparative Essays on Judicial Review* (Antwerpen: MAKLU, 1995) page 81.

One of the techniques used to enable the administrative court to balance the competing public and private interests has been to develop general principles of law which enforce an administrative morality - "the idea that the state is an honest man and must behave properly towards *l'administré*."<sup>86</sup> Such principles of law are specifically designed to resolve disputes between the State and the individual. The general principles of law test the internal legality of the administrative act as opposed to its external legality which concerns whether the act was within the grant of power given to the public body.<sup>87</sup> The principles of proportionality and legitimate expectation are, along with equality, legal certainty, the right to be heard and fundamental

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<sup>86</sup> Brown and Bell, *op. cit. supra* no. 59, page 203. On French administrative law see M. Letourner "Les principes généraux du droit dans la jurisprudence du Conseil d'État", *Etudes et Documents du Conseil d'État* 1951, page 19; Brown and Bell, *ibid.*, pages 205-223. On German administrative law see M.P. Singh *German Administrative Law in Common Law Perspective* (Berlin: Springer-Verlag, 1985) chapters 5 and 6; Nolte, *op. cit. supra* no. 59, 199-201.

<sup>87</sup> J. Mertens de Wilmars "The Case-Law of the Court of Justice in Relation to the Review of the Legality of Economic Policy in Mixed-Economy Systems" [1982/1] *L.I.E.I.* 1, 5.

human rights, central to the European Court's review of internal administrative legality.<sup>88</sup>

On the Continent separate administrative jurisdictions grew up to deal with administrative law. In France the Conseil d'État gradually evolved as an independent jurisdiction for administrative law adjudication<sup>89</sup> with inquisitorial procedures.<sup>90</sup> In Germany an independent system of administrative courts has developed.<sup>91</sup> Such separate jurisdictions have allowed a degree of specialisation in governmental processes that was unattainable in the

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<sup>88</sup> *Ibid.*, 8-9, 11-16. See also A. Arnall *General Principles of EEC Law and the Individual* (Leicester: University Press, 1990); J. Schwarze *European Administrative Law* (London: Sweet & Maxwell, 1992); J.A. Usher *General Principles of EC Law* (London: Longman, 1998).

<sup>89</sup> Brown and Bell, *op. cit. supra* no. 59, pages 42-47; Allison, *op. cit. supra* no. 73, pages 142-152. See also C. J. Hamson *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat* (London: The Hamlyn Lectures, 1954); N. Questiaux "Administration and the Rule of Law: The Preventive Role of the French Conseil d'État" [1995] P.L. 247.

<sup>90</sup> J. Bell "Reflections on the Procedure of the Conseil d'État" in G. Hand and J. McBride (eds.), *Droit Sans Frontiers. Essays in Honour of L. Neville Brown*. (Birmingham: Holdsworth Club, 1991) page 211; Brown and Bell, *op. cit. supra* no. 59, chapter 5; Allison, *op. cit. supra* no. 73, pages 207-216.

<sup>91</sup> See M. Schindler "Judicial Review of Administrative Acts in Germany" (1955-56) 2 *British Journal of Administrative Law* 113; W. Feld "The German Administrative Courts" (1962) 36 *Tulane L.R.* 495; Singh, *op. cit. supra* no. 86, chapter 7; E. Blankenburg "Changes in Political Regimes and Continuity of the Rule of Law in Germany" in D.M. Provine et al. (eds.), *Courts, Law, and Politics in Comparative Perspective* (Yale: University Press, 1996) pages 249, 259-266, 306-308.

ordinary courts.<sup>92</sup> The Continental distinction between public and private law is closely related to the existence of separate jurisdictions. This degree of separation and specialisation enabled the administrative courts to develop certain principles specifically designed to regulate the exercise of public power. Duguit summarised this approach in the following manner: "[t]he administration of the state is conducted under the control of administrative courts...Cognisant of the conditions under which it is necessary to operate the state, they afford the necessary guarantees of independence and impartiality. They reconcile the interests of the state with those of private citizens. In this way all administration is a matter of law and controlled by the courts."<sup>93</sup>

Though the above similarities can be drawn out when compared with English law, significant differences of approach exist between French and German administrative law.<sup>94</sup> The French tradition is

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<sup>92</sup> Duguit, *op. cit. supra* no. 77, page 159; J.F. Garner "Administrative Law: Civil and Common Law Systems Compared" (1980) 25 I.C.J.R. 39, 49.

<sup>93</sup> *Ibid.*, pages 158-159.

<sup>94</sup> See R.W. Evans "French and German Administrative Law with some English comparisons" (1965) 14 I.C.L.Q. 1104; H.G. Crossland "Rights of the Individual to Challenge Administrative Action Before Administrative Courts in France and Germany" (1974) 24 I.C.L.Q. 707; J.-M. Woehrling "Le Controle Jurisdictionnel De

based on the objective control of the legality of administrative action and has been viewed as oriented in favour of the administration.<sup>95</sup> As the administration serves the public interest, the French have considered that it should not be constrained by a rigid set of rules but by such limitations as are necessary to protect the individual in light of the needs of public administration. According to Brown and Bell "the law applied by the administrative courts in France has come into being as the result of a delicate balance between those guarantees for the rights of the individuals that are demanded at any one time by public opinion, and the ever-changing necessities of public administration."<sup>96</sup> The German tradition is marked by a high degree of legalism in politics<sup>97</sup> and dominated by the idea of the protection of subjective individual rights<sup>98</sup> and the

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L'Administration En Europe De L'Ouest. Particularismes et Convergences." (1994) 6 E.R.P.L. 353.

<sup>95</sup> See A. Mestre *Le Conseil d'État, Proteturs des Privileges de l'Administration* (Librairie générale du droit française, 1974).

<sup>96</sup> Brown and Bell, *op. cit. supra* no. 59, page 167, see also page 277.

<sup>97</sup> See P. Blair "Law and Politics in Germany" (1978) 26 *Political Studies* 348.

<sup>98</sup> See A. Blankenagel "The Concept of Subjective Rights as the Focal Point of German Administrative Law" (1992) 11 *Tel Aviv University Studies in Law* 79.

close control of discretion.<sup>99</sup> In Germany administrative law is viewed as "a notion of order which has a lasting impact on the administrative culture"<sup>100</sup> and aims at "achieving an optimum balance between an effective administration and realization of social interests on the one hand and the safeguard of...individual interests on the other."<sup>101</sup> Under the "Rechtsstaat" concept<sup>102</sup> the German courts have developed *inter alia* the principles of legitimate expectations ("Vertrauensschutz") and proportionality

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<sup>99</sup> See E.K. Pakuscher "The Use of Discretion in German Law" (1976-77) 44 *University of Chicago L.R.* 94; Singh, *op. cit. supra* no. 86, chapter 6; Nolte, *op. cit. supra* no. 59, 196-197.

<sup>100</sup> E. Schmidt-Aßmann quoted in Singh, *op. cit. supra* no. 86, page 2. It might be noted that the concept of juridification has largely been developed German scholars in order to ensure that legal order underpins developing State activity, see M. Weber *Economy and Society* (New York, G. Roth and C. Wittich (eds.), 1968) volume 2, chapter 8; G. Teubner "Juridification. Concepts, Aspects, Limits and Solutions" in G. Teubner (ed.) *Juridification of Social Spheres* (Berlin, 1987) page 3; J. Habermas *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy.* (Polity Press, 1996).

<sup>101</sup> Singh, *op. cit. supra* no. 86, page 65. See also Schmidt-Aßmann, *op. cit. supra* no. 76, 66.

<sup>102</sup> See R.C. van Caenegem "The 'Rechtsstaat' in Historical Perspective" in *Legal History: A European Perspective* (London: The Hambledon Press, 1991) page 165; V. Götz "Legislative and Executive Power under the Constitutional Requirements entailed in the Principle of the Rule of Law" in C. Starck (ed.), *New Challenges to the German Basic Law* (Baden-Baden: Nomos Verlagsgesellschaft, 1991) page 141. See also E.K. Pakuscher "Control of the Administration in the Federal Republic of Germany" (1972) 21 *I.C.L.Q.* 452, 464-465; P.

("Verhältnismäßigkeit") to regulate the citizen-state relationship.<sup>103</sup> While different styles of approach are evident, the general aim of Continental administrative law is clearly purposive. It seeks to ensure that public authorities exercise their powers in the public interest and that in the process individual interests are protected; a balance must be struck by the administrative court between administrative purpose and individual interests.

According to Redlich and Hirst, it is because Continental public law "forms so complete an antithesis to the development of the law and constitution of England...[that]...through this antithesis the true meaning and effect of the English constitution are best shown."<sup>104</sup> Profound differences also exist between British and Continental administrative cultures. The highly legalistic attitude of the Continental legal-rational model of bureaucracy compared with the more pragmatic, typically discretion-based approach of British administration is at the centre of the difference. This difference in administrative

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Rädler "Judicial Protection against the Executive by German Administrative Courts" [1992] *Admin Review* 78.

<sup>103</sup> Nolte, *op. cit. supra* no. 59, 192-195, 201-203.

cultures infuses the methods of redress against the administration. The legalistic Continental approach places great importance on legal remedies whereas the British culture traditionally emphasises the redress through political channels with the courts playing a subsidiary role.<sup>105</sup> The distinctive feature of Continental administrative law is then the rational and principled approach to the protection of the individual and the evaluation of the administration. This contrasts sharply with the more pragmatic British common law method. Continental Europe developed a tradition of theorising over the role of the State which was reflected in administrative law. The State was seen as having a distinct set of purposes from the individual and therefore was to be subject to a distinct body of law. In England there is no tradition of the State as a legal entity and Dicey denied the possibility of a separate administrative law as incompatible with the Rule of Law. According to Kahn-Freund the difference between Civilian and common law approaches to public law arises in part because of the fact that in Continental countries

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<sup>104</sup> Redlich and Hirst, *op. cit. supra* no. 15, page 325.

government has an inherent power to govern. Whereas in the common law the courts have an inherent power to control but government has no inherent power at all: "[t]hat which is true of administrative action under the common law - that it must be based on a statutory grant of power - is true of judicial action under the 'civil law' systems."<sup>106</sup> The inherent power of the common law courts allowed them to develop a system of precedents in an anti-rationalist manner whereas Continental courts operate within a more formal, rational and conceptualised framework.<sup>107</sup>

While elsewhere special jurisdictions, such as the French Conseil d'État, were established to decide public law disputes, in England the ordinary courts were to decide such issues by applying the artificial reason of the common law. As a closer relationship exists between the administration and the courts on the Continent, there is a better fusion of fairness with good and efficient

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<sup>105</sup> F.F. Ridley "The Citizen Against Authority: British Approaches to the Redress of Grievances" (1984) 37 *Parliamentary Affairs* 1, 7.

<sup>106</sup> O. Kahn-Freund "Common Law and Civil Law - Imaginary and Real Obstacles to Assimilation" in M. Cappelletti (ed.), *New Perspectives For a Common Law of Europe* (Florence, 1978) page 137, 160. See also Singh, *op. cit.* supra no. 86, pages 64-65.

<sup>107</sup> P. Legrand "European Legal Systems Are Not Converging" (1996) 45 *I.C.L.Q.* 52, 75.

administration than in the common law where, in the absence of such a relationship, the courts concentrate only upon imposing standards of fairness in administrative dealings. In Continental countries administrative law developed as an autonomous and systematic discipline with separate legal principles to regulate the relationship between citizen and the State, whereas in common law countries that relationship is governed by the same principles that apply between citizens themselves. Significantly different styles of legal reasoning and approach exist between the pragmatic common law tradition and the more formal and rational civilian tradition. The insight of J.S. Mill that the English "distrust everything which emanates from general principles...[while]...the French...distrust whatever does not so emanate"<sup>108</sup> is indicative of the different styles of legal thought and also of the different approaches to administrative law between common law and Continental systems. Continental administrative courts have endeavoured to keep step with evolving governmental activities and above all to make "an

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<sup>108</sup> J.S. Mill "Bentham" (1838) in J.S. Mill and J. Bentham *Utilitarianism and Other Essays* (Harmondsworth: Penguin, A Ryan (ed.), 1987) page 132, 164.

effort...to maintain a rational and elegant synthesis of public law by relating judgments to principles derived from a coherent and evolving philosophy."<sup>109</sup> Whereas in England the common-law system was caught up in a web of medieval governmental immunities<sup>110</sup> and concepts which prevented the evolution of a coherent body of law.

The relationship between English and Continental administrative law has changed and developed over time. English law has been able to define itself by reference to Continental law. At first, this relationship was one of the perceived superiority of the common law. Lord Hewart considered the "Continental system of 'Administrative Law'...[to be]...profoundly repugnant...to English ideas".<sup>111</sup> However, as the growth in administrative power has continued, comparative studies have undermined the view that English law provides better protection for the individual against the arbitrary exercise of power than Continental administrative law.<sup>112</sup> The response

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<sup>109</sup> Dyson, *op. cit. supra* no. 12, page 233.

<sup>110</sup> See, e.g, *Rederiaktiebolaget 'Amphitrite' v. The King* [1921] 3 K.B. 500; *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344.

<sup>111</sup> Hewart, *op. cit. supra* no. 38, pages 12-13.

<sup>112</sup> F.J. Port *Administrative Law* (London, 1929) chapter VII; Denning, *op. cit. supra* no. 40, pages 77-81, 115-118, 123-126; B. Schwartz *French Administrative Law and*

of Continental administrative law to the growth of State activity has been a positive one: notions of legality have been adapted to the changing purposes of administrative power.<sup>113</sup> In comparison English administrative law has failed to provide an adequate response to such changes instead preferring to retain the traditional common law model of judicial review. The purposive approach of Continental administrative law seems have to been more effective than the common law in ensuring that the individual is provided sufficient protection.

To the extent that English judges have responded to Continental belief that no administrative law exists in England, it has been by recourse to the upsurge in judicial review and the establishment of a separate procedure beneath which the common law conception of legality

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*the Common-Law World* (New York: University Press, 1954) chapter 10; Hamson, *op. cit. supra* no. 89; Brown and Bell, *op. cit. supra* no. 59, pages 249-250, 277, 286; Allison, *op. cit. supra* no. 73, chapter 8.

<sup>113</sup> J.D.B. Mitchell "Administrative Law and Policy Effectiveness" in J.A.G. Griffith (ed.), *From Policy to Administration. Essays in Honour of William A. Robson*. (London: Allen & Unwin, 1976) page 174, 190; G. Arena "Rights vis-à-vis the Administration: Commentary" in A. Cassese, A. Clapham and J. Weiler (eds.), *Human Rights and the European Community: Methods of Application*. (Baden-Baden: Nomos Verlagsgesellschaft, 1991) page 495, 498-502; Schmidt-Aßmann, *op. cit. supra* no. 76, 66; N. Emiliou *The Principle of Proportionality in European Law. A Comparative Study*. (Kluwer, 1996) chapter 1.

continues to prevail.<sup>114</sup> This is in sharp contrast with the French who "find a justification for the distinct character of their *droit administratif* in its capacity to adapt the principles of administrative legality and administrative liability to the differing needs of the various public services, a capacity which they claim could only be found in judges who are also trained administrators."<sup>115</sup> It is also in contrast with German administrative law which places great importance on substantive controls of discretionary power by specialist courts<sup>116</sup> and acknowledges that "[a]n administrative law which does not recognise...[the]...legitimate functions of the administration...can...[only marginally]...influence...administrative reality".<sup>117</sup> Comparing the development of English and Continental administrative law, Chiti has commented that the development of a separate administrative law in European states never implied that the administration was "exempt from control,

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<sup>114</sup> See G. Slynne "But in England there is no..." in W. Fuerst (ed.), *Festschrift für Wolfgang Zeidler Volume 1* (Berlin/New York, 1987) page 397; Lord Woolf "Droit Public - English Style" [1995] P.L. 57.

<sup>115</sup> Brown and Bell, *op. cit. supra* no. 59, page 274.

<sup>116</sup> Nolte, *op. cit. supra* no. 59. See also Schwarze, *op. cit. supra* no. 88, pages 270-279.

<sup>117</sup> Schmidt-Aßmann, *op. cit. supra* no. 76, 66.

but rather that it was subject to an administrative legality which was distinct in content and conditions from the law to which private individuals were subject. This was perhaps a more efficient means of limiting administrative power, for it was modelled on the specific characteristics of that power, in a continuous dialectic between authority and liberty."<sup>118</sup> The development of Continental administrative law has been characterised as a change of focus "from administrative power to administrative function"<sup>119</sup> with the law based not just on the idea of control but also on ideas of efficiency and impartiality and having to be constantly adapted to the goal or function of the administration.

Overall, it may be concluded that different traditions and methods of approach to the subject of public law exist between England and the Continent which influence the whole conception of the subject.<sup>120</sup> In 1969 Mitchell could justifiably comment that "the real gap between the United

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<sup>118</sup> M.P. Chiti "Administrative Comparative Law" (1992) 4 E.R.P.L. 11, 19.

<sup>119</sup> Arena, *op. cit. supra* no. 113, page 498.

<sup>120</sup> See J. Bell "Convergences and Divergences in European Administrative Law" [1992] *Rivista Italiana di Diritto Pubblico Comunitario* 3, 5-7, 19-20.

Kingdom and mainland Europe lies in the area of public law".<sup>121</sup>

European Community administrative law is a unique hybrid of different legal traditions specifically adapted for the purposes of the European Community.<sup>122</sup> The Treaties have entrenched the values of economic liberalism at a constitutional level. The European Court acts as a guardian of the Treaties and serving the integrationist ideology of the Community.<sup>123</sup> By identifying the purposes of the Community, the Treaties set out the limits within which the Community institutions and the Member States must perform their tasks. The European Court is concerned to ensure that such powers are fulfilled and that in the process due weight is afforded to the affected private interests. The European Court has drawn from French and German administrative law in order to define the general principles which should govern the exercise of power and specifically adapted them to the Community where power is in the form of economic intervention for

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<sup>121</sup> J.D.B. Mitchell "Why European Institutions?" in L.J. Brinkhorst and J.D.B. Mitchell *European Law and Institutions* (Edinburgh: University Press, 1969) page 30, 44.

<sup>122</sup> See Koopmans, *op. cit. supra* no. 59.

the purpose of market liberalisation.<sup>124</sup> While the methodology and style of the European Court is the result of different legal traditions, it has developed a broad armoury of review which adopts a purposive orientation toward the exercise of public power. According to Advocate General Lagrange "the rule which governs the whole of administrative law...[is]...the principle of the purpose pursued. In contrast to the rights of private individuals...the rights of public authorities which are in fact powers, may be exercised only for the purposes for which they have been vested with those powers."<sup>125</sup>

The complexity of administration within the Community has required the European Court to articulate general principles in order to guide the administration in its dealings with individuals and traders in view of the purposes for which it is exercising its powers.<sup>126</sup> The aim and effect of the general legal principles "are both to guarantee the

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<sup>123</sup> G.F. Mancini and D.T. Keeling "Democracy and the European Court of Justice" (1994) 57 M.L.R. 175, 186.

<sup>124</sup> Mertens de Wilmars, *op. cit. supra* no. 87.

<sup>125</sup> Case 3/54 *Associazione Industrie Siderurgiche Italiane (ASSIDER) v. High Authority of the European Coal and Steel Community* [1954-56] E.C.R. 63, 76 (col. 1) of the Advocate General's opinion.

<sup>126</sup> See W. Lorenz "General Principles of Law: Their Elaboration in the Court of Justice" (1964) 13 A.J.C.L. 1; Schwarze, *op. cit. supra* no. 88.

freedom of action given to the authority and to place such restrictions on it as are necessary to avoid arbitrariness."<sup>127</sup> The general principles have a specific normative character which is defined by reference to the purpose for which the administration acts. For example, the principle of proportionality, which requires the administration not to impose a disproportionate burden on the individual, is adapted to the economic purposes of the Community in order to ensure that economic intervention is subsidiary and that there is a connection between an intervention threshold and the safeguard of individual liberties.<sup>128</sup> Aware that the principles will need to be applied across a diverse range of administrative powers which change with the development of the European Community, the European Court has sought to leave room for interpretation, precision and further elaboration in the application of the general principles of law. However, within the different contexts of application, there is sufficient certainty in the articulation of the general principles to enable the administration to be guided and directed as to

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<sup>127</sup> Mertens de Wilmars, *op. cit. supra* no. 87, 8. See also Schwarze, *ibid.*, page 73.

<sup>128</sup> *Ibid.*, 13. See chapter 6.

how it ought to conduct itself in order to avoid arbitrary action.<sup>129</sup> The importance of the principles is such that their codification is being debated.<sup>130</sup>

European Community administrative law is an amalgam of different influences and therefore of different visions of administrative law. Community law only has its own distinctive legal tradition because it is the result of different alternating influences of French and German administrative law which are adapted to the distinct purposes of the Community. For instance, the European Court adopts a less intensive form of substantive review of legality than the German administrative courts so as not to interfere with the decision-making competence of the institutions.<sup>131</sup> Beneath these influences can be seen the common factor of a purposive orientation towards administrative law.

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<sup>129</sup> See chapter 6, section 4.

<sup>130</sup> See M.P. Chiti "Are there Universal Principles of Good Governance?" (1995) 1 E.P.L. 241; J. Schwarze "The Europeanization of National Administrative Law" in J. Schwarze (ed.), *Administrative Law Under European Influence. On the Convergence of the Administrative Laws of the EU Member States*. (London: Sweet & Maxwell, 1996) pages 789, 830-836; C. Harlow "Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot" (1996) 2 E.L.J. 3; M. Shapiro "Codification of Administrative Law: The US and the Union" (1996) 2 E.L.J. 26.

This purposive nature is reflected in the fact that administrative law is viewed as an area of law having to be constantly developed with changes in public administration in order to ensure administrative legality. The general principles of law and the balancing of public and private interests are the tools which the administrative court uses for this end. Furthermore, a specialist administrative court with the institutional ability to effectively review administrative action is seen as an essential component of administrative law.

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<sup>131</sup> Nolte, *op. cit. supra* no. 59, 205-206, 211; M. Brenner "Administrative Judicial Protection in Europe: General Principles" (1997) 9 E.R.P.L. 595, 615.

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## Chapter 3: Pressures for the Development of the Principles in English Law

### 1. The Role of Lord Diplock

In 1963 Lord Reid stated:

"We do not have a developed system of administrative law - perhaps because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases the courts have had to grope for solutions, and have found that old powers, rules and procedures are largely inapplicable to cases which they were never designed or intended to deal with."<sup>1</sup>

The Diceyan legacy of the denial of the existence of an English administrative law and the perceived need for developing such a system put the English judiciary in a difficult position. As Lord Reid's statement shows there was a dawning realisation that public law cases differed from private law cases and consequently different concepts and remedies needed to be applied. The difficulty was

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<sup>1</sup> *Ridge v. Baldwin* [1964] A.C. 40, 72-73. Cf. *Breen v. Associated Engineering Union* [1971] 2 Q.B. 175, 189H per Lord Denning M.R.

that if the judiciary were to embark on this project they needed to develop separate rules suited for public law adjudication and it was exactly the denial of a public law tradition in which they had to work. Following the lead taken by the House of Lords in a number of important cases<sup>2</sup> other judges were encouraged to develop administrative law.<sup>3</sup> Most judges preferred to move cautiously<sup>4</sup> while others, typically Lord Denning,<sup>5</sup> occasionally adopted a more activist stance. One judge, Lord Diplock, consciously attempted to develop new solutions to enable the courts to decide public law cases. Lord Diplock was a senior Law Lord for many years<sup>6</sup> and gave many important

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<sup>2</sup> *Ridge v. Baldwin*, *ibid.*; *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; *Anisminic v. Foreign Compensation Commission* [1969] 2 A.C. 147.

<sup>3</sup> Encouragement also came from academics. See H.W.R. Wade "Crossroads in Administrative Law" (1968) 21 C.L.P. 75.

<sup>4</sup> See A. Lester "English Judges as Law Makers" [1993] P.L. 269, 270.

<sup>5</sup> See E. Young "Developing a System of Administrative Law?" in P. Robson and P. Watchman (eds.), *Justice, Lord Denning and the Constitution* (Gower, 1981) page 157; J. Jowell "Administrative Law" in J. Jowell and P. McAuslan (eds.), *Lord Denning: the Judge and the Law* (London: Sweet & Maxwell, 1984) chapter 6; *The Denning Interviews - Administrative Law* (V.H.S. Videocassette, Interviewer: H.W.R. Wade, Butterworths, 1984).

<sup>6</sup> From 1968 to 1985. On Lord Diplock's judicial career see R. Stevens *Law and Politics. The House of Lords as a Judicial Body, 1800-1976*. (London: Weidenfeld and Nicolson, 1979) pages 565-569; A. Paterson *The Law Lords* (London: Macmillan, 1982). For biographical details see

speeches concerning judicial review. According to Sir Stephen Sedley, Lord Diplock "never uttered a word without some carefully thought-out purpose."<sup>7</sup>

To understand the role of Lord Diplock it is helpful to examine his views on judicial law-making which he gave in his Presidential Address to the Holdsworth Club in 1965.<sup>8</sup> Lord Diplock began from the statement that law is about man's duty towards his neighbour and that courts are by the very nature of their functions sometimes compelled to act as legislators. Lord Diplock was concerned to show that the law should be relevant to the needs of contemporary society. To determine the kinds of law the Parliamentary and judicial process are best fitted to make it was necessary to realise the basic differences between them. When Parliament

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B. Dickson "The Contribution of Lord Diplock to the General Law of Contract" (1989) 9 O.J.L.S. 441, 442-444.  
<sup>7</sup> S. Sedley "The Sound of Silence: Constitutional Law Without a Constitution" (1994) 110 L.Q.R. 270, 282. Lord Diplock was a powerful judge whose judgments were characterised by their penetrating analyses and precise use of language. However, his intellectual confidence could on occasion lead to ironic put downs. For example, in *Hughes v. Hughes* (unreported, 1966) sitting in the Court of Appeal with Lord Denning M.R. and Harman L.J., who both favoured the appeal, Lord (then Lord Justice) Diplock dissented by simply stating: "For the reasons given by my brother Harman, I would dismiss the appeal." L. Blom-Cooper and G. Drewry *Final Appeal. A Study of the House of Lords in its Judicial Capacity*. (Oxford: Clarendon Press, 1972) page 87.

<sup>8</sup> Sir Kenneth Diplock "The Courts as Legislators" (The Holdsworth Club, University of Birmingham, 1965). See

makes a law it is inevitably indulging in "crystal-gazing"<sup>9</sup> to foresee how human beings will react to a new law of conduct in circumstances which will be different to those in which the Act was passed. While technical advances caused social and economic changes more quickly than ever before, an Act of Parliament could soon be operating in a different social environment from the one in which it was passed. However, Lord Diplock stated that judge-made law which is based on the actual experience of the litigants involved is "flexible not rigid, adaptable to changing circumstances, not fixed for ever in the fetters of the past."<sup>10</sup> The static, agricultural and aristocratic society of the nineteenth century had given way to a dynamic, industrial and economic society of the twentieth century. While the judges of the nineteenth century had boldly developed the common law to adapt to the needs of society, Lord Diplock considered that at the turn of the century the courts had lost their courage and resorted to the literal interpretation of statutes. In the modern society the common law by itself was no longer adequate. Statute and

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also Lord Reid "The Judge as Law Maker" (1972-3) 12 J.S.P.T.L. 22.

<sup>9</sup> *Ibid.*, page 13.

common law had to work together in order that the law was adequate for developing social needs. Statute law had laid down rules in areas which "bear no relation to existing judge-made law"<sup>11</sup> and the flexible use of precedent was needed to remedy this. Lord Diplock suggested that the contemporary role of the courts in modern society must recognise the following:

"Today in a highly complex swiftly changing society most changes are organisational and involve the creation of new or of the adaptation of existing administrative organs to carry them out. This Parliament alone can do; the Courts cannot...[such]...organisational changes do not destroy human relationships, they only alter the framework in which the individual, whether within the organisation or outside, performs his duty to his neighbour. It is the regulation of those human relationships within the new framework that I suggest is the proper field of judge-made law."<sup>12</sup>

The role of the courts was limited. Only Parliament could decide how society would be organised.

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, page 12.

<sup>12</sup> *Ibid.*, page 15.

However, the courts could appropriately supplement the legislative function.<sup>13</sup> Lord Diplock hoped that recent decisions showed a "growing tendency to tackle the new problems and to evolve new principles to solve them" and a reversion to the "bolder attitude of the nineteenth century judges".<sup>14</sup> Such views share an affinity with Dicey's opinion that "the appeal to precedent is in the law courts merely a useful fiction by which judicial decision conceals its transformation into judicial legislation".<sup>15</sup> It is against such background ideas that Lord Diplock directly considered administrative law which coincided with the reawakening of the courts' interest in this area.<sup>16</sup>

Having identified the growth in administrative activity as the challenge for the common law, Lord

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<sup>13</sup> *Ibid.*, page 11. Lord Diplock stated that "judge-made law, if judges will make proper use of its potentialities, is the only practicable way of laying down rules of conduct appropriate in the unforeseeable variety of circumstances which will in fact arise." *ibid.*, page 15 (italics added).

<sup>14</sup> *Ibid.*, page 22.

<sup>15</sup> A.V. Dicey *Introduction to the Study of the Law of the Constitution* [1885] (London: Macmillan, 10th edn., 1959) page 19. See also A.V. Dicey *Lectures on the Relation Between Law & Public Opinion in England During the Nineteenth Century* (London: Macmillan, 2nd edn., 1963) lecture XI.

<sup>16</sup> In "Judicial Control of the Administrative Process" (1971) 24 C.L.P. 24 Lord Diplock stated: "[w]hen I was called to the Bar in 1932 the expression 'administrative law' was unknown. Although I was myself instrumental in 1967 in obtaining its inclusion among the subjects for

Diplock was concerned to show that the courts were capable of meeting it by reviving old remedies and removing obstacles.<sup>17</sup> Lord Diplock's own contribution began by widening the scope of review by opening up prerogative powers to review<sup>18</sup> and an analysis of jurisdiction<sup>19</sup> which "set the fuse to explode the old distinction between" errors of law within and without jurisdiction.<sup>20</sup> As part of this process Diplock used the opportunity in a case concerning *locus standi* to reformulate the Rule of Law:

"The rules as to standing...were made by judges, by judges they can be changed; and so they have been over the years to meet the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private

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the Bar Examinations, I still do not find it easy to define."

<sup>17</sup> Lord Diplock, *ibid.*; Lord Diplock "Administrative Law: Judicial Review Reviewed" (1974) 33 C.L.J. 233.

<sup>18</sup> *R. v. Criminal Injuries Compensation Board ex parte Lain* [1967] 2 Q.B. 864. See also *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 409E-410D per Lord Diplock.

<sup>19</sup> *Anisminic Ltd. v. Foreign Compensation Commission* [1968] 2 Q.B. 862 (C.A.).

<sup>20</sup> J. Laws "Illegality: The Problem of Jurisdiction" in J. Goudie and M. Supperstone (eds.), *Judicial Review* (London: Butterworths, 1992) page 51, 54. See now *R. v. Lord President of the Privy Council ex parte Page* [1993] A.C. 682.

citizens are controlled by governmental authorities, that have been taking place continuously, sometimes slowly, sometimes swiftly...Those changes have been particularly rapid since World War II. Any judicial statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today."<sup>21</sup>

Lord Diplock viewed the Rule of Law as a constant principle within a changing social and economic structure. It was for the courts to decide exactly what legal requirements the principle demanded against such changes to human relationships in the new organisational frameworks.<sup>22</sup> The requirements of the Rule of Law were therefore to be described in dynamic and not in static terms.<sup>23</sup> Should the tide of social and economic changes require modifications to the Rule of Law then the courts

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<sup>21</sup> *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617, 639H-640A.

<sup>22</sup> S. Sedley "Governments, Constitutions, and Judges" in G. Richardson and H. Genn (eds.), *Administrative Law & Government Action. The Courts and Alternative Mechanisms of Review.* (Oxford: Clarendon Press, 1994) page 35, 40; S. Sedley "The Common Law and the Constitution" in Lord Nolan and S. Sedley *The Making and Remaking of the British Constitution* (London: Blackstone, 1997) page 15, 21.

<sup>23</sup> J. Laws "The Ghost in the Machine: Principle in Public Law" [1989] P.L. 27, 29.

would step in. The consequence of this is that the Rule of Law could no longer be given the restrictive Diceyan interpretation but must be responsive to social and political change. If Lord Diplock introduced any new principles of administrative law it was because he considered them necessary to safeguard the Rule of Law in view of the changing modes of social organisation and government.

In 1977 Lord Diplock ended his address to the 5th Commonwealth Law conference with a review of the judicial developments in relation to administrative law.<sup>24</sup> This was "the great achievement of the twentieth century in the judicial development of law".<sup>25</sup> Recalling his admiration of previous generations of judges, Lord Diplock stated that what had been achieved in the twentieth century in administrative law was comparable to the great achievements of those nineteenth century judges who succeeded in adapting private law to the needs of an increasingly

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<sup>24</sup> Lord Diplock "Judicial Development of Law in the Commonwealth" in *Proceedings and Papers of the Fifth Commonwealth Law Conference* (Edinburgh: Blackwood & Sons, 1978) page 493.

<sup>25</sup> *Ibid.*, page 500.

industrial and utilitarian society. Lord Diplock continued:

"Public law, the mutual rights and duties of government and governed, now rivals private law...in the influence it has on mutual happiness and well-being...*And, if I have my way, we have not finished yet.*"<sup>26</sup>

Earlier the same year Lord Diplock had indicated what course of direction he had in mind for English administrative law. In a contribution to a House of Lords debate<sup>27</sup> on the introduction of a Bill of Rights Lord Diplock referred to the European context of the forms of protection for fundamental rights. Recalling a meeting of the heads of the supreme administrative courts of the Member States of the European Community<sup>28</sup> Lord Diplock stated that it had been the unanimous opinion that the method

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<sup>26</sup> *Ibid.* (emphasis added).

<sup>27</sup> Hansard 379 H.L. Deb. col. 991-995 (3rd February 1977).

<sup>28</sup> Fifth Colloquium of the Councils of State and the Supreme Courts of Justice of the Member States of the European Communities *Discretionary Power and the Advisability of Administrative Decisions; The Extent and Limitations of Judicial Control* (The Hague: Government Publishing Office, 1976). Lord Diplock "Judicial Development of Law in the Commonwealth", *op. cit. supra* no. 24, page 500 commented of his own attendance: "[m]ay be I want under a false trade description bearing in

of reviewing abuse of governmental power on the grounds of a breach of fundamental rights would have substantially the same result in all the European countries.<sup>29</sup> Referring to Community law, Lord Diplock commented that although the European Treaty did not contain any explicit guarantee concerning fundamental rights, the European Court had not taken the lowest common measure but looked to the more progressive doctrines in the national legal systems. As a result of this method the European Court had developed two doctrines "which have not yet been accepted fully in this country".<sup>30</sup> The two doctrines were, namely, the principles of the protection of legitimate expectations and proportionality. In a revealing aside prompted by a query by Lord Hailsham, Lord Diplock intimated that "[t]hose are the two that I had in mind particularly as doctrines which are only just beginning to be assimilated in this country."<sup>31</sup> In

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mind Dicey's proud disclaimer that *droit administratif* formed any part of English or Imperial law."

<sup>29</sup> *Ibid*: "[t]he reasoning by which the result was reached would be different in the civil law countries, the juristic concepts which underlay what constituted the major and minor premises in the reasoning process would not necessarily be the same, but all lead to the same conclusion."

<sup>30</sup> Hansard 379 H.L. Deb. col. 993 (3rd February 1977).

<sup>31</sup> *Ibid.*, Hansard col. 994. Cf. M. Beloff "Judicial Review - 2001: A Prophetic Odyssey" (1995) 58 M.L.R. 143, 151-152 suggesting that proportionality and

short, Lord Diplock considered the time ripe for judicial development of the principles of legitimate expectation and proportionality in English law.

It is important to understand the motivation behind this project. However, in attempting to do so an immediate difficulty emerges as Lord Diplock did not provide a clear expression of why he considered the assimilation of these principles to be appropriate. Therefore, in order to attempt to understand the motivation of Lord Diplock recourse must inevitably be made to interpretation in order "to bring to light an underlying coherence or sense."<sup>32</sup> Piecing together what little information actually exists, Lord Diplock's intention to develop these principles within English law can be subjected to a range of different interpretations in order to find a coherence between his actions and the meaning of the situation for him. This involves understanding to what extent Lord Diplock's short-term intentions (the adoption of

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substantive legitimate expectations are "principles ripe for transplant".

<sup>32</sup> C. Taylor "Interpretation and the Sciences of Man" in *Philosophy and the Human Sciences: Philosophical Papers Volume 2* (Cambridge: University Press, 1985) page 15. Cf. generally M. Loughlin *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) chapter 3.

the principles) were dependent upon his longer-term intentions.<sup>33</sup>

The contemplated adoption of new principles can be interpreted in light of the process of developing the common law to establish an administrative law. The "breakthrough"<sup>34</sup> of the House of Lords decision in *Anisminic*<sup>35</sup> had freed the courts from drawing the distinction between errors within and without jurisdiction. *Ridge v. Baldwin* revived and expanded the applicability of the right to be heard. Following the procedural reforms of Order 53,<sup>36</sup> Lord Diplock, in *O'Reilly v. Mackman*,<sup>37</sup> introduced a principle of procedural exclusivity and used the terms "public law" and "private law" to signify the difference between the proceedings.<sup>38</sup> Referring to the statement of Lord Reid referring to the lack of an administrative law in England,

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<sup>33</sup> See A. MacIntyre "The Indispensability of Political Theory" in D. Miller and L. Sidentop (eds.), *The Nature of Political Theory* (Oxford: Clarendon Press, 1983) page 17, 27.

<sup>34</sup> *In re Racal Communications Ltd.* [1981] A.C. 374, 383B per Lord Diplock.

<sup>35</sup> *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.

<sup>36</sup> Order 53 R.S.C., S.I. 1977 No. 1955; section 31 Supreme Court Act 1981. See L. Blom-Cooper "The New Face of Judicial Review: Administrative Changes in Order 53" [1982] P.L. 250.

<sup>37</sup> [1983] 2 A.C. 237.

<sup>38</sup> *Ibid.*, 283H-285G. See also *Hoffman-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, 366A; *Town Investments Ltd. v. Department of the*

Lord Diplock commented that "[b]y 1977 the need...[for an administrative law]...had continued to grow apace and this reproach to English law had been removed. We did have by then a developed system of administrative law..."<sup>39</sup> The possible adoption of new principles could have been a fulfilment of Lord Reid's challenge for the courts to find new solutions for the new types of cases that were coming before them. Central to the developing system of administrative law was the elaboration of the grounds of review. The adoption of the principles of legitimate expectations and proportionality could therefore be viewed as part of the rationalisation and simplification of judicial review, which Lord Diplock desired,<sup>40</sup> and therefore contributing towards a more developed system of administrative law.

The adoption of the principles could also have been motivated by a general desire for English law to keep up with Continental developments. Lord

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*Environment* [1978] A.C. 359, 380A-381E; *GCHQ*, *supra* no. 18, 408E-411B.

<sup>39</sup> *Ibid.*, 279H.

<sup>40</sup> See Lord Diplock "Administrative Law: Judicial Review Reviewed", *op. cit. supra* no. 17, 244; *Racal Communications*, *supra* no. 34, 382G. The categorisation of the three heads in the *GCHQ* case was a product of this rationalisation and simplification.

Diplock was interested in comparative law<sup>41</sup> and well aware of the case-law of the Conseil d'État, the Bundesverwaltungsgericht<sup>42</sup> and the European Court.<sup>43</sup> Even before the UK joined the European Community, Lord Diplock remarked that "[i]n the course of...[his]...lifetime in the law...[he had]...been fortunate to work enough with European lawyers to believe that the common law has much to gain from closer contact with and understanding of the concepts of the civil law."<sup>44</sup> According to Lord Wilberforce there were two features in the approach

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<sup>41</sup> See Lord Diplock "Preface" in J.F. Garner and A.R. Galbraith (eds.), *Judicial Control of the Administrative Process* (Report of a Conference at Ditchley Park 4-7 July 1969, Ditchley Paper No. 22); Lord Diplock "Foreword" in B. Schwartz and H.W.R. Wade *Legal Control of Government* (Oxford: Clarendon Press, 1972) page xi; Lord Diplock "The Common Market and the Common Law" (1972) 6 *The Law Teacher* 3, 15; Dickson, *op. cit. supra* no. 6, 443. In the Seventh Colloquium of the Councils of State and the Supreme Courts of Justice of Member States of the European Community *The Power of the Courts - both Superior and Inferior Courts and Bodies Exercising Quasi-Judicial Functions - to Award Damages in Administrative Actions* (London, 1980) Lord Diplock acted as chairman. In his opening address he stated, at page 193: "[t]he topic that we have chosen... (and I must confess I have a certain share of the responsibility for choosing it) is a branch of administrative law where I think that we in the United Kingdom perhaps have the greatest amount to learn from you...".

<sup>42</sup> See Lord Diplock "Judicial Control of the Administrative Process", *op. cit. supra* no. 16, 3-5; *ibid.* "Administrative Law: Judicial Review Reviewed", *op. cit. supra* no. 17, 241 and 244.

<sup>43</sup> Hansard 379 H.L. Deb. col. 993-4 (3rd February 1977). Lord Diplock was also chairman of the House of Lords Committee to examine the EEC directives and regulations: "Lord Diplock 1907-1985" (1986) 102 L.Q.R. 1, 2.

of Lord Diplock: one of cautious moves within established principle and secondly a desire to keep English law in a moving relationship with European developments.<sup>45</sup> Wade has stated that Lord Diplock's "object was to show that British judicial review was fully equal to that of other countries in range and effectiveness."<sup>46</sup> Significantly, Lord Diplock attended a meeting of the heads of the supreme administrative courts of the EEC countries in the Hague in October 1976<sup>47</sup> allowing for comparative discussion on the judicial control of administrative power. In his welcoming address of the conference, W.F. De Gaay Fortman stated that "[t]he growing integration of the European Communities means that the...[national courts]...must pay ever closer attention to the administrative law of the other Member States and

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<sup>44</sup> Lord Diplock "The Common Market and the Common Law", *op. cit. supra* no. 41, 16.

<sup>45</sup> R. Wilberforce "Lord Diplock and Administrative Law" [1986] P.L. 6. Jowell, *op. cit. supra* no. 5, page 209 states that Lord Diplock espoused the "restraint model" of judicial control of administrative action compared with Lord Denning's more activist approach. According to Wilberforce, *ibid.*, such restraint was more "a matter of technique than objective."

<sup>46</sup> Letter from Sir William Wade to the author dated 26th March 1997. See also Lord Diplock "Administrative Law: Judicial Review Reviewed", *op. cit. supra* no. 17, 244.

<sup>47</sup> Fifth Colloquium of the Councils of State and the Supreme Courts of Justice of the Member States of the European Communities *Discretionary Power and the*

also to the jurisprudence evolved by the Court of Justice...Mutual influences are at work here...".<sup>48</sup> The introduction of legitimate expectations and proportionality was not preceded by any direct exposure of English law to the Community principles. However, Lord Diplock's interest in European and comparative law must have provided an impetus for developing similar principles in English law.

Furthermore, it seems probable that Lord Diplock foresaw the importance of the European Community and its potential influence on English law. By his own admission Lord Diplock had "as a lawyer...[been for a]...long...[time]...interested in the legal questions involved in membership of the Common Market" and was concerned to resolve any problems that might have been faced by the accession of the United Kingdom.<sup>49</sup> It is possible that he contemplated the introduction of the two principles so that English law would be better prepared for the challenges ahead. If so, then Lord Diplock could have sought to pre-empt the influence

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*Advisability of Administrative Decisions; The Extent and Limitations of Judicial Control*, op. cit. supra no. 28.

<sup>48</sup> *Ibid.*, page 197.

<sup>49</sup> Lord Diplock "The Common Market and the Common Law", op. cit. supra no. 41.

of European principles by their active adoption into English law prior to the increasing influence of Community law.<sup>50</sup> Alternatively, Lord Diplock could have merely wished to change the language of review to a more European fashion. According to Wade, who has long held the view that problems in administrative law stem from a confusion of terminology or verbal misunderstandings,<sup>51</sup> Lord Diplock's "opinion...was that proportionality and legitimate expectation were different more in name than in substance from the English rules, though he realised that it might be necessary for British judges to adopt them as the influence of European law became ever more insistent."<sup>52</sup> However, that Lord Diplock considered the adoption of the

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<sup>50</sup> See the quotation of Lord Roskill at no. 70 below which supports this.

<sup>51</sup> See H.W.R. Wade "'Quasi-judicial' and its Background" (1949) 10 C.L.J. 216, 218; H.W.R. Wade "The Twilight of Natural Justice?" (1951) 67 L.Q.R. 103, 109; H.W.R. Wade and C.F. Forsyth *Administrative Law* (Oxford: Clarendon Press, 7th edn., 1994) page 27. Cf. the importance of linguistic philosophy in post-war jurisprudence, in particular H.L.A. Hart "Definition and Theory in Jurisprudence" (1954) 70 L.Q.R. 37; *ibid.*, *The Concept of Law* (Oxford: Clarendon Press, 1961). On the contribution of H.W.R. Wade to the "conservative normativist" style of public law scholarship see Loughlin, *op. cit. supra* no. 32, pages 184-190.

<sup>52</sup> Letter from Sir William Wade to the author dated 26th March 1997. In "Administrative Law: Judicial Review Reviewed", *op. cit. supra* no. 17, 242 Lord Diplock stated: "[n]o doubt we shall continue to confuse our fellow lawyers in the European Communities by continuing to talk of *ultra vires* in relation to administrative

principles suggests that he did not view the change merely to be one of language but one of principle also.

Finally, it is possible to view Lord Diplock's interest in adopting these principles, which perhaps proceeded without a complete understanding of their significance within a Continental philosophy of law and the State, as another means by which the judiciary, with the value of their political experience gained through the common law tradition, could supervise the decisions of administrative bodies. Interpreted in this way, Lord Diplock's interest in transplantation would have been motivated less by the incorporation of another's systems principles and values but rather by a sense that the principles enabled another way through which traditional English judicial values could be articulated against executive incursions on liberty, albeit in a more conceptually precise method than the ordinary common law rules. If so, then the principles would have been viewed as fitting into the common law tradition of continuity and innovation; rather than fearing that the European principles would "imperil the heritage of

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action, when all we mean by it to-day is failure to

the Common Law",<sup>53</sup> Lord Diplock could have considered using them as a means of protecting that heritage.

A number of interpretations are then possible which may be more or less compatible. Diplock's decision to transplant the principles could have been motivated by a number of intentions. However, difficulties arise concerning the causal effectiveness of those intentions in bringing about one course of action over alternative courses.<sup>54</sup> For instance, had the United Kingdom not acceded to the European Community, and therefore the issue of the possible application of the principles by the English courts never arisen, would Lord Diplock have still considered their possible adoption by reason of his interest in comparative law or as a means of establishing a more developed system of English administrative law? Alternatively, had a more systematic English administrative law already existed, would Lord Diplock have been motivated by a felt need to keep up with European developments? It is difficult to give any clear answer to such questions. As the range of interpretations are not

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comply with the requirement of 'legality'".

<sup>53</sup> Lord Diplock "The Common Market and the Common Law", *op. cit. supra* no. 41, 4.

incompatible with each other, they can be viewed as, to some extent, interdependent. Lord Diplock's interest in comparative law could only have been further fuelled by the accession of the United Kingdom to the European Community. Equally, the identification of the need to develop English administrative law is related to a desire to ensure that it is comparable with European law. By seeking to introduce new principles as a means of upholding judicial values, Diplock could have viewed himself as exemplifying the attitude of those bold nineteenth century judges which he so admired.

Pulling together the possible strands - the maintenance of the Rule of Law within an increasingly sophisticated society, the development of a English system of administrative law, a desire to keep up with European developments, the inevitable impact of Community law, the introduction of a new language through which to articulate the "fundamental assumptions"<sup>54</sup> of the common law - Lord Diplock's decision to introduce these principles can be seen as a conscious attempt to transplant European principles of administrative law into English law. This is not to say that other

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<sup>54</sup> See MacIntrye, *op. cit. supra* no. 33, pages 26-27.

judges necessarily agreed with Lord Diplock's project. To traditional common lawyers the role of judges is merely to declare the law as it has developed since "time immemorial".<sup>56</sup> Lord Diplock's advocacy of new principles to control administrative power may have been seen by some as crossing the divide between what the law is and what it ought to be and therefore a questionable piece of judicial law-making. Others viewed the possible development of new grounds of review as unnecessary or the influence of European principles as unwarranted. For example, Wade questioned whether English law needed to import new principles as the doctrine of reasonableness would allow British judges to react against any element of unfairness, whether procedural or substantive<sup>57</sup> and in the opinion of Lord Wilberforce the European Court "is not a court which develops doctrines or jurisprudential theories which have any impact on English law."<sup>58</sup> However, to a Law Lord who openly

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<sup>55</sup> Dicey, *op. cit. supra* no. 15, page 329.

<sup>56</sup> See G.J. Postema *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) pages 4-13.

<sup>57</sup> H.W.R. Wade *Constitutional Fundamentals* (London: The Hamlyn Lectures, Revised edn., 1989) page 95.

<sup>58</sup> Lord Wilberforce interviewed in G. Sturgess and P. Chubb (eds.), *Judging the World: Law and Politics in the World's Leading Courts* (London: Butterworths, 1988) page 271, 276. Cf. the view of Lord Hailsham *The Dilemma of Democracy. Diagnosis and Prescription*. (London: Collins,

admitted that courts on occasion needed to legislate<sup>59</sup> and who had achieved an "almost Olympian"<sup>60</sup> predominance in the House of Lords such concerns could be put aside. Alternatively, Lord Diplock's "quality of persuading his colleagues to the extreme...[which]...almost got to the stage of a mesmeric quality" and his "intellectual superiority, coupled with enormous hard work" may have enabled him to persuade his colleagues to follow his point of view.<sup>61</sup>

It was not until 1984 in the *GCHQ* case that Lord Diplock gave a comprehensive statement on judicial review. According to Lord Scarman, this speech was "in a very real sense a last testament."<sup>62</sup> It is worth concentrating upon this statement for the following reasons. First, Lord Diplock suggested a novel categorisation of judicial review under the three heads of illegality, irrationality and procedural

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1978) page 175: "[o]ne cannot rule out...the long-term effects on judicial reasoning of familiarity with another tradition of jurisprudence."

<sup>59</sup> Lord Diplock "The Courts as Legislators", *op. cit. supra* no. 8.

<sup>60</sup> "Influential Law Lord", *The Times*, 16th October 1985, page 18.

<sup>61</sup> Lord Wilberforce, *op. cit. supra* no. 58, page 275.

<sup>62</sup> Lord Scarman "The Development of Administrative Law: Obstacles and Opportunities" [1990] P.L. 490. The speeches in the *GCHQ* case were delivered on 22nd November 1984. Lord Diplock died on 14th October 1985.

impropriety.<sup>63</sup> This tripartite classification was a product of the rationalisation of judicial review.<sup>64</sup> Questions of vires and jurisdiction were to be replaced with simple questions of legality. Unreasonableness was re-defined from the tautological definition provided by Lord Greene M.R.<sup>65</sup> to irrationality.<sup>66</sup> The Latin tags *audi alteram partem* and *nemo iudex in causa sua* were to be assimilated under a general ground of procedural impropriety.<sup>67</sup>

Secondly, Lord Diplock also used his speech to mark the possible future direction of the law. It therefore contained an exposition of the principle of legitimate expectations as it had developed until then. Lord Diplock also stated that in articulating the heads of review he had in mind

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<sup>63</sup> In *Nottinghamshire County Council v. Secretary of State for the Environment* [1986] A.C. 240, 249D Lord Scarman described this as a "'classical' but certainly not exhaustive analysis".

<sup>64</sup> For the argument that increases in the judicial review case-load in the 1980s provided a powerful pressure on the courts to rationalise the grounds of review in order to maintain consistency see M. Loughlin "Courts and Governance" in P. Birks (ed.), *The Frontiers of Liability* (Oxford: University Press, 1994) pages 91, 100, 107. The categorisation was also a product of Lord Diplock's strictly logical approach.

<sup>65</sup> See chapter 7, section 3B.

<sup>66</sup> It seems that Lord Diplock had the development of a ground of irrationality in mind since at least 1974. See "Administrative Law: Judicial Review Reviewed", *op. cit. supra* no. 17, 243.

<sup>67</sup> Nowadays commonly referred to as "procedural fairness".

"particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community."<sup>68</sup> The influence of the general principles of Community law is evident and has been recognised as such by Lord Diplock's contemporaries. According to Lord Mackenzie Stuart "[t]he concept of recognising that a failure to respect legitimate expectations may give rise, in public law, to a remedy is a novelty in English law and lacks discernible English parentage. To find the true ancestry one does not have to look far across the Channel."<sup>69</sup> Lord Roskill has revealed that in referring to the possible adoption of proportionality Lord Diplock "clearly had in mind the likely increasing influence of Community law upon our domestic law which might in time lead to the further adoption of this principle as a separate category and not merely as a possible

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<sup>68</sup> *GCHQ case*, *supra* no. 18, 410E.

<sup>69</sup> Lord Mackenzie Stuart "Recent Developments in English Administrative Law - The Impact of Europe?" in F. Capotorti (ed.), *Du droit international au droit de l'integration. Liber Amicorum Pierre Pescatore*. (Baden-Baden: Nomos Verlagsgesellschaft, 1987) page 411, 417.

reinforcement of one or more of these stated categories such as irrationality."<sup>70</sup>

In this, his last exposition on judicial review, Lord Diplock celebrated the advances made over the previous thirty years, classified the heads of challenge as principles of public law, endorsed the principle of legitimate expectations and advanced the possible adoption of proportionality. By giving this magisterial speech Lord Diplock ensured that judicial review, or rather his own articulation of it,<sup>71</sup> became firmly entrenched in English law and could be developed by future judges. Diplock's approach was that the judges should develop the law in a way that is responsive to social needs and therefore he led the judicial movement for the development of administrative law within the fold of the common law. This was achieved simply by declaring such a system to exist as a result of a few landmark cases<sup>72</sup> and procedural innovations.<sup>73</sup> However, this

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<sup>70</sup> *R. v. Secretary of State for the Home Department ex parte Brind* [1991] 1 A.C. 696, 750D.

<sup>71</sup> See *R. v. Panel on Takeovers and Mergers ex parte Datafin plc* [1987] Q.B. 815, 836H per Lord Donaldson M.R.; H.W.R. Wade *Administrative Law* (Oxford: Clarendon Press, 6th edn., 1988) page viii. See also Lord Wilberforce, *op. cit. supra* no. 58.

<sup>72</sup> *Ridge v. Baldwin*, *supra* no. 1; *Padfield v. Ministry of Agriculture, Fisheries and Food*, *supra* no. 2; *Anisminic Ltd. v. Foreign Compensation Commission*, *supra* no. 35.

grossly underestimated the complexity of the problems of both developing a system of administrative law and transplanting Continental principles within it. In conclusion Lord Diplock should be viewed as having exerted a powerful influence in identifying the agenda for English judicial review. His eminent standing ensured that the language of "public law", "proportionality" and "legitimate expectations" gained a firm foothold in the vocabulary of English law. However, while Lord Diplock succeeded in introducing this new language into English law, ironically he could exercise little influence over the subsequent conceptual development of the principles. That task inevitably passed to other judges who may not have either shared Diplock's views or even recognised the principles to be legal transplants.

## **2. The Challenge of Community Law**

One century after Dicey rejected *droit administratif* as incompatible with the English Rule of Law,<sup>74</sup> the English courts are facing the challenge presented by the Community Rule of Law

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<sup>73</sup> See no. 38 *supra*.

and the general principles of Community law which are derived from Continental systems of administrative law.<sup>75</sup> Since the entry of the United Kingdom into the European Community, the "new legal order"<sup>76</sup> has presented a major challenge for the English common law which has become apparent in different ways.<sup>77</sup> For instance, the question of the compatibility of the supremacy of Community law with the sovereignty of Parliament,<sup>78</sup> the obligation

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<sup>74</sup> Dicey, *op. cit. supra* no. 15, chapter XII.

<sup>75</sup> For statements that Community law is based on the Rule of Law see Case 294/83 *Parti écologiste 'Les Verts' v. European Parliament* [1986] E.C.R. 1339, paragraph 23; Case C-2/88 *Imm. J.J. Zwartfeld* [1990] E.C.R. I-3365, paragraph 17; Opinion 1/91 *Draft Agreement relating to the creation of the European Economic Area* [1991] E.C.R. I-60079, paragraph 21. See also G. Bebr "Court of Justice: Judicial Protection and the Rule of Law" in D. Curtin and T. Heukels (eds.), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers. Volume II.* (Martinus Nijhoff Publishers, 1994) page 303. Cf. also the impact of the European Convention of Human Rights see N. Grief "The Domestic Impact of the European Convention of Human Rights as Mediated through Community Law" [1991] P.L. 555; S. Farran *The UK Before the European Court of Human Rights. Case Law and Commentary.* (London: Blackstone, 1996); M. Hunt *Using Human Rights Law in English Courts* (Oxford: Hart, 1997).

<sup>76</sup> Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] E.C.R. 1, 12.

<sup>77</sup> Cf. Lord Denning's metaphor in *H.P. Bulmer Ltd. v. J. Bollinger S.A.* [1974] 1 Ch. 401, 418F of the tide of European law flowing "into the estuaries and up the rivers".

<sup>78</sup> *R. v. Secretary of State for Transport ex parte Factortame Ltd. (No. 2)* [1991] 1 A.C. 603; *R. v. Secretary of State for Employment ex parte Equal Opportunities Commission* [1995] 1 A.C. 1. See also H.W.R. Wade "What Has Happened to the Sovereignty of Parliament?" (1991) 107 L.Q.R. 1; P.P. Craig "Sovereignty of the United Kingdom Parliament after

to interpret national laws in conformity with European directives,<sup>79</sup> the need to identify which bodies provide "a public service under the control of the State" and have special powers for that purpose<sup>80</sup> in order to allow individuals to rely on the vertical direct effect of directives, the right to an effective remedy,<sup>81</sup> the liability of the State for breach of Community law<sup>82</sup> and the different standards of legality for reviewing administrative action<sup>83</sup> have formed the issues through which the challenge of Community law has emerged. Community law forms an external pressure on English

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*Factortame*" (1991) Y.E.L. 221; N. MacCormick "Beyond the Sovereign State" (1993) 56 M.L.R. 1.

<sup>79</sup> Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] E.C.R. 1891; Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] E.C.R. I-4135; *Duke v. Reliance Systems Ltd.* [1988] A.C. 618. See A. Arnall "Interpretation and Precedent in English and Community Law: Evidence of Cross-fertilisation?" in *The Common Law of Europe and the Public Law of the United Kingdom* (S.P.T.L. Seminar, King's College London, 14th June 1997).

<sup>80</sup> Case C-188/89 *Foster v. British Gas* [1990] E.C.R. I-3133, paragraph 22. See also *Doughty v. Rolls Royce plc* [1992] 1 C.M.L.R. 1045. On the notion of "public service" see L. Duguit *Law in the Modern State* (trans. F. and H.J. Laski) (London, 1921) chapter 2.

<sup>81</sup> *Factortame*, *op. cit. supra* no. 78; *In re M.* [1994] 1 A.C. 377. See also *Woolwich Building Society v. Inland Revenue Commissioners* [1993] A.C. 70, 177E per Lord Goff.

<sup>82</sup> Cases C-6&9/90 *Francovich v. Italy* [1991] E.C.R. I-5357; Cases C-46 & C-48/93 *Brasserie du Pêcheur SA v. Germany, R. v. Secretary of State for Transport ex parte Factortame Ltd. (No. 3)* [1996] 1 C.M.L.R. 889; *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716.

administrative law which will become more acute with the development of the Community and legal challenges brought before the English courts. It is not simply the extent of the encroachment of actual Community laws but rather the *philosophy* and *style* underpinning Community law that is having an impact on English law.<sup>84</sup> The European jurisprudence is based on a very different philosophy of law, government and the individual to that underpinning English law and the rational and more principled approach typical of Continental legal styles clashes with the traditional pragmatic common law method. In other words, the difference between the more purposive orientation of Continental administrative law and the common law is no longer of mere comparative interest but forms a central issue in the effectiveness of European Community law within the United Kingdom. The challenge presented by Community law must therefore be viewed as essentially a cultural challenge for the distinctive nature of the common law method.

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<sup>83</sup> See J. Steiner *Enforcing EC Law* (London: Blackstone, 1995) pages 82-92.

<sup>84</sup> Loughlin, *op. cit. supra* no. 32, page 195. See also House of Lords European Communities Committee *Special Report* (Session 1974-75) H.L. 38; J. Temple Lang "The Constitutional Principles Governing Community Legislation" (1989) 40 N.I.L.Q. 227, 242-245.

The challenge of Community law was perhaps first identified by J.D.B. Mitchell, a writer who worked within the functionalist style in public law.<sup>85</sup> Mitchell recognised that as public power was no longer being contained at the national level but was being extended to the European Community, the issue of law in relation to the exercise of that power would arise. As English law has a very distinct approach to law and government, the exercise of power at the Community presented problems for English law as it would have to accommodate the influence of Community law which, being drawn from the Continental tradition, substantially differed from the English approach. Mitchell argued that English law would have to be modernised in order to meet the challenge presented by Community law. For example, Mitchell argued that the principle of Parliamentary sovereignty had to be developed in light of changing circumstances such as accession to the European Community.<sup>86</sup> In 1969 Mitchell observed that "there is emerging a

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<sup>85</sup> See generally M. Loughlin "Sitting on a Fence at Carter Bar: In Praise of J.D.B. Mitchell" (1991) 36 *Juridical Review* 135.

<sup>86</sup> J.D.B. Mitchell "The Sovereignty of Parliament and Community Law: The Stumbling-Block That Isn't There" (1979) 55 *International Affairs* 33; J.D.B. Mitchell "What Happened to the Constitution on 1st January 1973?" (1980) 11 *Cambrian L.R.* 69.

new order of European public law between traditional international law and domestic law...[which]...means that terms such as 'Administrative/constitutional' must in this larger context be re-interpreted."<sup>87</sup> Mitchell was concerned that English law should be able to meet the challenge faced by the external influence of Community law. His answer was for English lawyers to think in terms of a system of public law that was both purposive and susceptible.<sup>88</sup> Public law should be purposive in that it focuses on the objectives sought to be achieved by the administration and would therefore be less technical and more creative. The counterpart to which was a "susceptibility of lawyers in understanding the realities and problems of the governmental process".<sup>89</sup>

Mitchell argued that "[t]here is no reason why rational constructive thought should not be brought to bear on government" and as experiment was

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<sup>87</sup> J.D.B. Mitchell "Why European Institutions?" in J.D.B. Mitchell and L.J. Brinkhorst *European Law and Institutions* (Edinburgh: University Press, 1969) page 30, 41.

<sup>88</sup> J.D.B. Mitchell "Administrative Law and Policy Effectiveness" in J.A.G. Griffith (ed.), *From Policy to Administration. Essays in Honour of William A. Robson.* (London: Allen & Unwin, 1976) page 174, 193.

<sup>89</sup> "Why European Institutions?", *op. cit. supra* no. 87, page 44.

impossible "[t]he only substitute...can be the comparative method pursued in depth."<sup>90</sup> However, Mitchell did caution that "[s]uperficiality remains a real danger which is enhanced by facile but misleading translation of terms".<sup>91</sup> Underpinning this functionalist approach is a view of law as part of the apparatus of government as opposed to Dicey's view of law as an autonomous analytical discipline. Mitchell would then have argued that lawyers ought to seek means of constructively dealing with both the efficient achievement of governmental objectives and the fair treatment of individuals. The interpretation of English law in the light of the new emerging European public law could therefore help to achieve this purposive orientation.

If the central issue facing English law since the use of legislation on a large scale for social purposes has been to develop a conception of legality appropriate to the developing system of governance, then the challenge of Community law places this issue into a sharper focus by highlighting the differential approaches to the role of law in government. Other European States

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<sup>90</sup> *Ibid.*, pages 49-50.

have experienced a similar socialisation of the law and their legal systems have sought to constructively deal with the issues arising from this,<sup>92</sup> which in turn has influenced Community law. The impact which Community law will have on English law can only increase with the normative importance of the Community. While Mitchell could not have anticipated how the challenge presented by Community law would develop, it will be important to bear in mind his views when comparing the development of legitimate expectations and proportionality by the English Courts with the case-law of the European Court.

The challenge Community law presents in relation to the general principles of law arises because of the different legal standards placed on the administration between English and Community law. According to Laws J. "...*Wednesbury* and European review are different models - one looser, one tighter - of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of

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<sup>91</sup> *Ibid.*, page 50.

<sup>92</sup> See generally G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (Berlin/New York: Walter de Gruyter, 1986).

arbitrary power."<sup>93</sup> The Government itself has recognised that "European Community law has provided new rights and expectations, some of which may only be vindicated within the context of judicial review...".<sup>94</sup> The English courts have to apply differential standards of legality which are determined by whether an applicant's case comes under the scope of either Community law or English law. If an individual seeks to rely on a Treaty right, such as the free movement of workers, which has direct effect then the national court will have to determine whether that right has been infringed by reference to European principles.<sup>95</sup> The general principles will also fall to be applied to action by the Member State which is required by Community

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<sup>93</sup> *R. v. Ministry of Agriculture, Fisheries and Food ex parte First City Trading Ltd.* [1997] 1 C.M.L.R. 250, 279. Cf. J. Laws "English & Community law: Uniformity of Principle" *The European Advocate* (Autumn 1994) page 2.

<sup>94</sup> Government evidence to the Treasury and Civil Service Select Committee 26th April 1994 quoted in A. Marr *Ruling Britannia. The Failure and Future of British Democracy.* (Harmondsworth: Penguin, 1996) page 288. Judge D. Edward "Proportionality and Legitimate Expectations" (A talk given at the Judicial Studies Board Seminar on UK and EC Law, 8th January 1993) page 5 has stated that "the Community Court will go further towards what a U.K. judge would regard as a review of the merits than at least a strict traditionalist would regard as proper in the U.K. context."

<sup>95</sup> On direct effect see P.P. Craig and G. de Búrca *EC Law. Text, Cases, and Materials.* (Oxford: Clarendon Press, 1995) chapter 4.

law.<sup>96</sup> Most Community administration is indirect; the Community institutions exercise policy-making powers but the implementation and enforcement of schemes, such as the Common Agricultural Policy, is devolved to national bodies. Not only are European schemes of regulation more juridified and legalistic than the more discretionary British style of regulation,<sup>97</sup> but the exercise of such powers will require the national courts to apply the general principles of Community law as the source of the power stems from Community law. As Daintith observes "[n]ational courts, as well as national administrators...find themselves cast as actors in the process of ensuring the faithful implementation of Community law."<sup>98</sup> National courts are not under any obligation to apply the general principles of Community law when a challenge is made to an administrative decision under domestic

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<sup>96</sup> *R. v. Ministry of Agriculture, Fisheries and Food ex parte First City Trading Ltd.*, *supra* no. 93, 268-269. See also J. Temple Lang "The Sphere in Which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles" [1991/2] L.I.E.I. 23; Lord Slynn "European Law and the National Judge" in *Butterworth Lectures 1991-92* (London: Butterworths, 1993) page 18, 27.

<sup>97</sup> See A. Hunt "Regulation of Telecommunications: the Developing EU Regulatory Framework and its Impact on the United Kingdom" (1997) 3 E.P.L. 93, 114; T. Daintith (ed.), *Implementing EC Law in the United Kingdom: Structures For Indirect Rule* (Chichester: Wiley, 1995).

<sup>98</sup> Daintith, *ibid.*, page 14.

law. Their obligation as Community courts is to apply different legal principles depending on the source of law under which the impugned decision was made. The impetus behind this is the European Court's purpose to ensure the effectiveness of Community law.<sup>99</sup> As Community law draws the boundaries of legality more tightly than English law there may be considerable pressure to provide the same standard of legal protection under domestic law as is required by Community law for the following reasons.

First, the method of interpretation which the European Court draws from comparative law acts as a powerful lever for the interpenetration and reconciliation of the national laws of the Member States.<sup>100</sup> The European Court adopts the most progressive principles from the national law of the Member States in order to develop the general principles of Community law. If the European Court has adopted a principle from a national legal order this may lead to an evaluation of how such

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<sup>99</sup> See generally F. Snyder "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" (1993) 56 M.L.R. 19.

<sup>100</sup> Y. Galmot "Réflexions sur le recours au droit comparé par la Cour de Justice des Communautés européennes" (1990) 6 R.F.D.A. 255, 261. See also Y. Galmot "L'apport des principes généraux du droit

principles compete with the law of other Member States. As Community law imposes more constraints on the exercise of public power it raises the question of whether it is more successful in the avoidance of arbitrariness than English law. According to Sir Gordon Slynn, if the general principles of law "are applied in a Community law context, it seems not improbable that they will have their effect on decisions in an analogous context under domestic law."<sup>101</sup> Secondly, the Community can act as a forum for seeking common solutions to common problems.<sup>102</sup> As "Community law...derives from not only the economic but also the legal interpenetration of the Member States"<sup>103</sup> it can act as a means of resolving common national problems through shared Community solutions. For example, Lord Diplock as part of his quest to determine how the courts should control administrative power came to acknowledge the principles through attending conferences on

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communautaire à la garantie des droits dans l'ordre juridique Français" [1997] C.D.E. 67.

<sup>101</sup> G. Slynn "But in England there is no..." in W. Fuerst (ed.), *Festschrift für Wolfgang Zeidler Volume 1* (Berlin, 1987) page 397, 400. See also *Laws, op. cit. supra* no. 93, 5-6.

<sup>102</sup> T. Koopmans "European Public Law: Reality and Prospects" [1991] P.L. 53, 54.

<sup>103</sup> Case 155/79 *AM & S Europe Limited v. Commission* [1982] E.C.R. 1575, paragraph 18.

European administrative law. From a functionalist perspective, Mitchell, who had consistently argued that England lacked a distinct system of public law,<sup>104</sup> was optimistic about the possible reformative effects of the "richness" of Community law on English law: "[t]here is an excitement about ideas even if couched in arid terms like 'proportionality', or 'legitimate expectation'...which invigorates debate, and the debate then corresponds to current reality."<sup>105</sup>

Thirdly, the national courts are under a duty to apply Community law. This obligation is "profoundly altering the constitutional role of British judges as law makers by widening the scope of judicial review of substance and merits as well as form and procedure."<sup>106</sup> An effect of this new judicial approach under Community law is that it highlights areas of national law where a different approach is adopted which may result in inconsistent legal protection for the individual.

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<sup>104</sup> See J.D.B. Mitchell "The Causes and Effects of the Absence of a System of Public Law in the United Kingdom" [1965] P.L. 95; *ibid.* "The State of Public Law in the United Kingdom" (1966) 15 I.C.L.Q. 133.

<sup>105</sup> Mitchell "The Sovereignty of Parliament and Community Law: The Stumbling-Block That Isn't There", *op. cit.* *supra* no. 86, 45-46.

<sup>106</sup> Lester, *op. cit.* *supra* no. 4, 288.

For example, in *re M.*<sup>107</sup> the House of Lords reconsidered the rule that interim injunctions were not available against the Crown following the *Factortame*<sup>108</sup> case where the European Court had held that Community law required the possibility that such injunctions could be granted. Lord Woolf stated that "it would be most regrettable if an approach which is inconsistent with that which exists in Community law should be allowed to persist if...[it]...was not strictly necessary."<sup>109</sup> Community law required a remedy which English law did not by itself provide. The result was that English law provided less legal protection than Community law and therefore created an unjust dichotomy by not treating like cases alike.<sup>110</sup> The House of Lords resolved this problem by reconsidering the rule. The case shows that the

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<sup>107</sup> *Supra* no. 81.

<sup>108</sup> *Factortame*, *supra* no. 78.

<sup>109</sup> *re M.*, *supra* no. 81., 422G. Cf. H. Woolf "Judicial Review: A Possible Programme For Reform" [1992] P.L. 221, 233. See also *M. v. Home Office* [1992] 2 W.L.R. 73, 100A-B, 101C per Lord Donaldson M.R.; *Woolwich Building Society v. Inland Revenue Commissioners* [1993] A.C. 70, 177E per Lord Goff; The Law Commission Consultation Paper No. 126 *Administrative Law: Judicial Review and Statutory Appeals* (London: HMSO, 1993) paragraph 2.10; J. Goudie "Judicial Review" in D. Bean (ed.), *Law Reform For All* (London: Blackstone, 1996) page 134, 137.

<sup>110</sup> H.L.A. Hart *The Concept of Law* (Oxford: Clarendon Press, 1961) page 156. See also I. Ward "Fairness, Effectiveness and Fundamental Rights: The Case For a

English courts will have to be aware of the level of legal protection that is provided under Community law and attempt to reconcile English and Community law in the case of inconsistency or risk the development of a two-speed system of guarantees for litigants. Sedley J. has recognised that as the standards of the European Convention of Human Rights inform the jurisprudence of the European Court of Justice it would be "unreal and potentially unjust to continue to develop English public law without reference to them."<sup>111</sup> The potential inequality arising from such differences would appear to be just as great in relation to the principles of proportionality and legitimate expectations. Such judicial concerns are a reflection of the profound changes in public power which have been occurring. As administrative power is no longer a self-contained national phenomenon, the administrative law concerning the exercise of such powers can similarly be no longer self-contained. This Europeanisation of administrative power and law must inevitably have an impact on the national legal systems. For example, Walker has

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Unified Administrative Law Within the European Community" (1994) 5 *Touro International L.R.* 279.

suggested that "[a]s English administrators come to take more and more decisions in the exercise of Community law powers, the case for recognition in domestic law of the principle of proportionality as developed in the European Court of Justice will become increasingly compelling."<sup>112</sup>

When English courts are required to apply the general principles of Community law which find no equivalent in English law then the disparity will be more evident and the potential injustice for the individual will be great. The inconsistency in legal protection may be more apparent in English law than in other Member States where a higher level of legal protection is guaranteed or where a constitutional provision of equality would prevent such inconsistent legal protection. English administrative law does not recognise any substantive restraint on discretionary power other than that of *Wednesbury* unreasonableness and it is unrealistic to hope this ground will provide protection equal to that afforded by the general

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<sup>111</sup> *R. v. Secretary of State for the Home Department ex parte McQuillan* [1995] 4 All E.R. 400, 422h.

<sup>112</sup> P. Walker "Irrationality and Proportionality" in J. Goudie and M. Supperstone (eds.), *Judicial Review* (London: Butterworths, 1992) page 119, 137. See also Lord Slynn "European Law and the National Judge", *op. cit. supra* no. 96, pages 18, 27-28.

principles of Community law.<sup>113</sup> According to Mitchell "[a] reconciliation of concepts becomes essential if the individual is not to suffer."<sup>114</sup> More recently, van Gerven has argued that in order to prevent an undesirable drifting apart of Community and national rules which govern similar situations, a principle of homogeneity must be recognised in order to keep the two sets of rules together.<sup>115</sup> There seems to be a growing awareness amongst the English judiciary of the influence of Community law and the need to maintain a consistent approach. Neill L.J. has intimated that "there is much to be said for the view that all the courts in the European Community should apply common standards in the field of administrative law."<sup>116</sup>

Such pressures may create an osmotic or spill-over effect of European law whereby principles which need only be applied by the national court when it is concerned with Community law may

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<sup>113</sup> See, e.g., *R. v. Secretary of State for the Home Department ex parte Adams* [1995] All E.R. (EC) 177.

<sup>114</sup> Mitchell "Administrative Law and Policy Effectiveness", *op. cit. supra* no. 88, page 192.

<sup>115</sup> W. van Gerven "Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?" (1995) 32 C.M.L.Rev. 679, 699-702.

<sup>116</sup> *R. v. Secretary of State for the Environment ex parte National and Local Government Officers' Association* [1993] 5 Admin. L.R. 785, 800G. See also Lord Slynn

nevertheless filter through into the court's elaboration of domestic law.<sup>117</sup> As a result of such "osmotic reciprocal influence"<sup>118</sup> between Community and national law and the development towards a model of European public administration<sup>119</sup> it has been argued that a common European administrative law is now developing.<sup>120</sup>

However, while the impact of Community law is potentially profound, its actual influence will inevitably be uneven. The infection of legal concepts tends to depend upon immediate exposure to

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"European Law and the National Judge", *op. cit. supra* no. 96, pages 27-29; Laws, *op. cit. supra* no. 93.

<sup>117</sup> L. Neville Brown and J.S. Bell *French Administrative Law* (Oxford: Clarendon Press, 4th edn., 1993) page 286; Y. Cripps "Some Effects of European Law on English Law" (1994) 2 *Indiana Journal of Global Legal Studies* (<http://www.law.indiana.edu/glsj/vol2/cripps.html>); G. Ress quoted in G.F. Schuppert "On the Evolution of a European State: Reflections on the Conditions of and Prospects for a European Constitution" in J.J. Hesse and N. Johnson (eds.), *Constitutional Policy and Change in Europe* (Oxford: University Press, 1995) pages 329, 349-350.

<sup>118</sup> Ress, *ibid.*

<sup>119</sup> S. Cassese "Towards a European Model of Public Administration" in D.S. Clark (ed.), *Comparative and Private International Law: Essays in Honour of John Henry Merryman on his Seventieth Birthday* (Berlin, 1990) page 353.

<sup>120</sup> See J. Rivero "Vers un Droit Commun Européen: Nouvelles Perspectives en Droit Administratif" in M. Cappelletti (ed.), *New Perspectives For a Common Law of Europe* (Florence, 1978) page 389; J. Schwarze *European Administrative Law* (Sweet & Maxwell, 1992); J. Schwarze (ed.), *Administrative Law under European Influence. On the Convergence of the Administrative Laws of the EU Member States.* (London: Sweet & Maxwell, 1996). See also J. Bell "Convergences and Divergences in European

a source.<sup>121</sup> This sort of infection does not include general issues such as the doctrinal or theoretical underpinning of Continental administrative law. In the absence of the consideration of such wider issues, English judges exposed to Community law may attempt to "patch-up" English law to attain equality of protection for the individual. However, precisely because such wider issues are not considered the English courts will be unable to effectively integrate the European jurisprudence. The danger is that the courts will view English law as providing equality of protection because it has changed its conceptual language into European terminology. In order that the common law is able to respond effectively to the challenge of Community law the English courts will need to avoid this specious remedy but instead need to seek an understanding of law that is appropriate to meeting the challenge. National approaches to law and administration reflect different styles, methods and cultural attitudes which may constitute strong forces against the convergence of administrative

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Administrative Law" [1992] *Rivista Italiana di Diritto Pubblico Comunitario* 3.

<sup>121</sup> J.D.B. Mitchell "Law, Democracy and Political Institutions" in M. Cappelletti (ed.), *New Perspectives For a Common Law of Europe* (Florence, 1978) page 361,

law. Classifications such as private law and public law are fundamental to ways of thinking and the approach to the subject. This difference of approach is particularly pronounced between the English and Continental traditions of administrative law.

The emergence of a European administrative law has created pressures for convergence between English and Continental administrative law. However, equally strong pressures for divergence exist. As Community law is predicated upon a different philosophy of law and government than English law, this will simultaneously create tensions both for and against the convergence of administrative law. The common law may experience the influx of new principles which provide greater protection for the individual and therefore pressure for the common law to "level up". However, precisely because this difference in legal protection is predicated upon a different underlying philosophy to law and government, the common law may be unable to effectively meet the challenge presented by Community law. There can be no escape from the external pressure of Community

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388. Cf. the *Factortame* and *re M* cases *supra* no. 78 and

law on English administrative law apart from the unlikely prospect of the United Kingdom withdrawing altogether from the European Union. Either the common law faces the challenge presented by seeking to modernise its approach to law and government or risks becoming irrelevant and out of date.

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## Chapter 4: The Principle of the Protection of Legitimate Expectations in European Community Law

### 1. The Principle of Legitimate Expectations

The principle of legitimate expectations is one of the general principles of Community law developed through the jurisprudence of the European Court and "forms part of the Community legal order".<sup>1</sup> The purpose of this chapter is to give an account of the principle as it has evolved in the case-law of the European Court.<sup>2</sup> The principle means that "certain expectations which a natural or legal person, as a result of his consistent conduct, arouses on the part of a person with whom he has legal relations or on the part of any persons with a legal interest in the matter, produce legal effects."<sup>3</sup> It requires the administration to respect

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<sup>1</sup> Case 112/77 *August Töpfer & Co. GmbH v. Commission* [1978] E.C.R. 1019, paragraph 19. See also Case 112/80 *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen* [1981] E.C.R. 1095, paragraph 48.

<sup>2</sup> For an economic analysis of the case-law see E. Sharpston "Legitimate Expectations and Economic Reality" (1990) 15 E.L.Rev. 103.

<sup>3</sup> J.P. Müller *Vertrauensschutz im Völkrecht* (Cologne-Berlin, 1971) page 1 quoted in Case 338/85 *Fratelli Pardini SpA v. Ministero del commercio con l'estero and Banca toscana (Lucca branch)* [1988] E.C.R. 2041, paragraph 34 of the opinion of Advocate General Darmon and by P. Tavernier "Le juge communautaire et

those expectations it raised in the mind of the individual or provide compelling reasons as to why the public interest now requires those expectations to be disappointed. The principle of legitimate expectations is omnipresent in all dealings between the individual and the administration and is a guide to good administrative conduct.

According to Borchardt, the protection of legitimate expectations requires a situation of trust between the individual and the administration and a reconciliation of the inherent conflict between the interests of the individual and the Community.<sup>4</sup> A situation of trust will exist when the conduct of the administration has raised an expectation giving the individual reason to believe that it will act towards him or her in a particular way. At this stage the expectation is no more than a mere hope or aspiration. In order for the European Court to consider protection of the expectation, it must be an objectively reasonable expectation. The expectation must be capable of being reasonably entertained in light of the

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l'application dans le temps des règlements C.E.E."  
[1976] A.F.D.I. 169, 195.

<sup>4</sup> K.-D. Borchardt "Vertrauensschutz im Europäischen Gemeinschaftsrecht. Die Rechtsprechung des EuGH von Algera über CNTA bis Mulder und von Deetzen." (1988) 15 Eu.GR.Z. 309, 311-312.

conduct of the administration or any changes in the overall situation. However, the reasonableness of an expectation is a necessary but not sufficient requirement. To be worthy of protection the expectation must also be capable of being sustained against the public interest. The legitimacy of an expectation is to be determined by weighing up the individual's interest in protection of his or her expectation against the public interest. An expectation is legitimate therefore if the European Court finds it worthy of protection.

The principle of legitimate expectations needs to be distinguished from the related principles of legal certainty and vested rights. Legal certainty requires that "there be no doubt about the law applicable at a given time in a given area and, consequently, as to the lawful or unlawful nature of certain acts or conduct."<sup>5</sup> This principle has prevented penal statutes having retroactive application<sup>6</sup> and requires that non-penal statutes are generally precluded from taking effect from a

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<sup>5</sup> Case C-331/88 *R. v. Minister for Agriculture, Fisheries and Food ex parte Fedesa* [1990] E.C.R. I-4023, paragraph 8 of the opinion of Advocate General Mischo. See generally J. Schwarze *European Administrative Law* (London: Sweet & Maxwell, 1992) chapter 6; J.A. Usher *General Principles of EC Law* (London: Longman, 1998) pages 65-71.

<sup>6</sup> Case 63/83 *R. v. Kent Kirk* [1984] E.C.R. 2689.

point of time before their publication except where the purpose of the measure requires otherwise and the legitimate expectations of those concerned are respected.<sup>7</sup> Although legal certainty and legitimate expectations are related values which find a common justification in the need for security and predictability in the law, they form distinct principles. Legal certainty is an objective value which places substantive limits on Community acts whereas legitimate expectations will arise as a result of the conduct of the administration and only operate in the context of a specific relationship between an individual and the administration.<sup>8</sup> As the case-law on retroactivity<sup>9</sup> suggests, the principle of legitimate expectations can protect the legal certainty an individual may have in respect of a specific relationship with the administration. A vested or acquired right derives from "objective factors inherent in the provisions

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<sup>7</sup> Case 98/78 *Firma A. Racke v. Hauptzollamt Mainz* [1979] E.C.R. 69, paragraph 20. See F. Lamoureux "The Retroactivity of Community Acts in the Case Law of the Court of Justice" (1983) 20 C.M.L.Rev. 269.

<sup>8</sup> Case 161/88 *Binder v. Hauptzollamt Bad Reichenhall* [1989] E.C.R. 2415, paragraph 28 of the opinion of Advocate General Darmon.

<sup>9</sup> *Supra* no. 6.

which in law govern the sector concerned."<sup>10</sup> Such a right is vested or acquired because it is based upon a provision which cannot be withdrawn. It is only because the right cannot be withdrawn or revoked that it enjoys this status.<sup>11</sup> A vested right has a much more absolute character than a legitimate expectation which can be overridden if the public interest so requires.<sup>12</sup>

The principle of legitimate expectations has been most carefully considered in German public law<sup>13</sup> and it seems that the German principle of

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<sup>10</sup> Case 74/74 *Comptoir National Technique Agricole (CNTA) S.A. Commission* [1975] E.C.R. 533, 556 (col. 2) of the opinion of Advocate General Trabucchi.

<sup>11</sup> Joined Cases 7/56 and 3 to 7/57 *Algera v. Common Assembly of the European Coal and Steel Community* [1957-8] E.C.R. 39, 55.

<sup>12</sup> J. Mertens de Wilmars "The Case-Law of the Court of Justice in Relation to the Review of the Legality of Economic Policy in Mixed-Economy Systems" [1983/1] L.I.E.I. 1, 15-16. See also Lord Mackenzie Stuart "Legitimate Expectations and Estoppel In Community Law and English Administrative Law" [1983/1] L.I.E.I. 53, 54-55.

<sup>13</sup> See F. Ossenbühl "Vertrauensschutz im sozialen Rechtsstaat" (1972) 25 D.Ö.V. 25; K. Schmidt "Die Vertrauensschutzrechtsprechung des Bundesverwaltungsgerichts und das Bundesverfassungsgericht" (1972) 25 D.Ö.V. 36; Schwarze, *op. cit. supra* no. 5, pages 886-901; G. Nolte "General Principles of German and European Administrative Law - A Comparison in Historical Perspective" (1994) 57 M.L.R. 191, 195, 203. On the principle in Dutch administrative law see R. Widdershoven and R. de Lange "Dutch Report" in J. Schwarze (ed.), *Administrative Law under European Influence. On the convergence of the administrative laws of the EU Member States*. (London: Sweet & Maxwell, 1996) page 529, 568-572. The principle has also been applied by the Strasbourg Administrative Tribunal in *Entreprise Freymuth c. Ministre de l'Environnement*, 8th December

"Vertrauensschutz" provided the inspiration for the European Court to develop the principle of legitimate expectations.<sup>14</sup> The influence of the German principle has found a route to the European Court through the use of Article 177 references and the opinions of Advocates General. Though the principle first emerged as a corollary of the principles of legal certainty and vested rights,<sup>15</sup> since the 1970s the European Court has explicitly referred to legitimate expectations as an independent principle of law. This development can be seen in *Westzucker GmbH v. Einfuhr- und*

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1994. See R. Errera "Recent Decisions of the French Conseil d'Etat" [1995] P.L. 657; M. Heers "La sécurité juridique en droit administratif français: vers une consécration du principe de confiance légitime?" (1995) 11 R.F.D.A. 963.

<sup>14</sup> See Case 169/73 *Compagnie Continentale France v. Council* [1975] E.C.R. 117, 140 (col. 1) of the opinion of Advocate General Trabucchi; Case 338/85 *Fratelli Pardini SpA v. Ministero del commercio con l'estero and Banca toscana (Lucca branch)*, *supra* no. 3, paragraph 34 of the opinion of Advocate General Darmon; Case 161/88 *Friedrich Binder GmbH & Co. KG v. Hauptzollamt Bad Reichenhall*, *supra* no. 8, paragraph 26 of the opinion of Advocate General Darmon. See also J.A. Usher "The Influence of National Concepts on Decisions of the European Court" (1976) 1 E.L.Rev. 359, 363; Schwarze, *op. cit. supra* no. 5, page 1170, T.C. Hartley *The Foundations of European Community Law* (Oxford: Clarendon Press, 1994) page 152.

<sup>15</sup> See Case 111/63 *Lemmerz-Werke GmbH v. High Authority of the European Coal and Steel Community* [1965] E.C.R. 677, 691. See also Schwarze, *op. cit. supra* no. 5, page 872; F. Hubeau "Le Principe de la Protection de la Confiance Legitime dans la Jurisprudence de la Cour de Justice des Communautés Europeennes" [1983] C.D.E. 143, 149-150; Borchartdt, *op. cit. supra* no. 4, 309-311.

*Vorratsstelle für Zucker*<sup>16</sup> where the Finance Court of Hesse sent a reference to the European Court asking whether a Regulation infringed "a principle of legal certainty by which the confidence of persons concerned deserves to be protected (Vertrauensschutz)."<sup>17</sup> In his opinion Advocate General Roemer stated that the issuing of a licence may create an expectation on the behalf of the individual and if the administration decides to change the situation, then the individual may consequently suffer loss. Advocate General Roemer stated that what is required is a "weighing up of respective interests" as interference with an individual's confidence could "only be sanctioned if public interests predominate".<sup>18</sup>

It may be surmised that the European Court developed the principle of legitimate expectations

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<sup>16</sup> Case 1/73 [1973] E.C.R. 723.

<sup>17</sup> *Ibid.*, paragraph 6. See also 81/72 *Commission v. Council* [1973] E.C.R. 575, paragraph 13 where the European Court referred to "the rule relating to the protection of legitimate confidence." When the principle was first used the phrase "protection of confidence" was used as the translation of "Vertrauensschutz". However, according to Usher, *op. cit. supra* no. 5, page 54 the translation was changed to the "protection of legitimate expectations" in order to avoid misunderstandings over the special meaning given to the word confidence in the English legal system.

<sup>18</sup> *Ibid.*, 741 (col. 1) of the Advocate General's opinion. Advocate General Roemer relied upon a decision of the German Federal Constitutional Court of 23rd March 1971 reported in (1971) 24 D.Ö.V. 605.

for two reasons. First, the European Court presumably considered the principle to be "progressive"<sup>19</sup> in that it enhanced the legal protection of the individual against the arbitrary use of administrative power. The principle provides a mechanism for determining when individuals can justifiably rely in confidence on the conduct of the administration and so must have been seen as the "most carefully considered"<sup>20</sup> solution to this problem. Secondly, the adoption of the principle might have been considered by the European Court as another step towards a Community administrative law which provided protection equal to the best performing national legal orders. Had the European Court refused to recognise the principle then it could have been seen as falling behind those national legal systems which protected legitimate expectations and only offering "second-class" legal protection.<sup>21</sup>

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<sup>19</sup> Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v. High Authority of the European Coal and Steel Community* [1962] E.C.R. 253, 283-4 of the opinion of Advocate General Lagrange.

<sup>20</sup> Joined Cases 63 to 69/72 *Wilhelm Wehahn Hansamühle v. Council* [1973] E.C.R. 1229, 1260 (col. 1) of Advocate General Roemer's opinion.

<sup>21</sup> The importance of the need for Community law to provide protection equal to the most successful national legal systems can be seen in Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v. High Authority of the European Coal and Steel Community*,

## 2. The Justification of the Principle

The European Court has not explicitly drawn out any theoretical justification for the principle of legitimate expectations though some Advocate Generals have suggested various justifications. The question to be asked is why should legitimate expectations be worthy of protection? The answer to this can be found in the concepts of fairness in public administration, the Rule of Law and an administrative morality of trust. It has been stated that the principle of legitimate expectations has a "specific equitable function"<sup>22</sup>

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*supra* no. 19, 279 of the opinion of Advocate General Lagrange; Case C-49/88 *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v. Commission* [1991] E.C.R. I-3187, paragraph 16; Case C-371/92 *Elliniko Dimosio (Greek State) v. Ellinika Dimitriaka AE* [1994] E.C.R. I-2391, paragraphs 38 and 39 of the opinion of Advocate General Van Gerven. However, the need to protect expectations by the national legal systems may sometimes conflict with the efficiency of Community law. See Case C-5/89 *Commission v. Federal Republic of Germany* [1990] E.C.R. I-3437. See also D. Triantafyllou "Zur 'Europäisierung' des Vertrauensschutzes (insbesondere § 48 VwVfg) - am Beispiel der Rückforderung staatlicher Beihilfen" [1992] N.Vw.Z. 436; F. Schulze "Vertrauensschutz im EG-Recht bei der Rückforderung von Beihilfen" [1993] Eu.Z.W. 279.

<sup>22</sup> Case 5/75 *Deuka, Deutsche Kraftfutter GmbH B.J. Stolp v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1975] E.C.R. 759, 777 (col. 2) of the opinion of Advocate General Trabucchi.

which ensures "fair dealing and good faith"<sup>23</sup> by the Community administration and that "assurances relied upon in good faith should be honoured."<sup>24</sup> By enabling the European Court to decide whether the individual can legitimately have confidence in his expectations, the principle of legitimate expectations allows "a balance between equity and the rigour of law."<sup>25</sup> It would be unfair and contrary to good faith for the administration to raise certain expectations as to its future conduct which are then subsequently disappointed. Other justifications advanced have focused on the importance of the principle in upholding the Rule of Law. According to Schwarze, the principle is merely a general maxim derived from the notion that the Community is based on the Rule of Law.<sup>26</sup> In order for individuals to arrange their lives, the

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<sup>23</sup> Case 74/74 *CNTA*, *op. cit.* no. 10, 560 (col. 1) of the opinion of Advocate General Trabucchi. See also Lord Mackenzie Stuart, *op. cit. supra* no. 12, 73.

<sup>24</sup> Case 169/73 *Compagnie Continentale v. Council*, *supra* no. 14, paragraph 4 of the opinion of Advocate General Trabucchi.

<sup>25</sup> Case 210/87 *Remo Padovani and the successors of Otello Mantovani v. Amministrazione delle finanze dello Stato* [1988] E.C.R. 6177, paragraph 32 of the opinion of Advocate General Darmon.

<sup>26</sup> Schwarze, *op. cit. supra* no. 5, page 867. Cf. The German idea of *Rechtstaat* enforces a substantive conception of the Rule of Law. See M.P. Singh *German Administrative Law in Common Law Perspective* (Berlin: Springer-Verlag, 1985) pages 5-6; Nolte, *op. cit. supra* no. 13, 200-201, 203.

law should be certain, regular and predictable.<sup>27</sup>

Legal certainty is a basic value of the Rule of Law and the protection of legitimate expectations promotes the certainty and predictability of the law in specific relationships between the individual and the administration by allowing the individual to rely on administrative conduct as to its future intentions.

Another justification for protecting legitimate expectations views the principle as imposing an administrative morality of trust. For Advocate General Trabucchi, the importance of the principle lies in the recognition that "trust in the Community's legal order must be respected".<sup>28</sup> According to Luhmann, trust is a basic fact of social life.<sup>29</sup> If the individual is to carry out his life then placing some trust in the administration is inevitable. For example, a trader could not

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<sup>27</sup> See J. Rawls *A Theory of Justice* (Oxford: Clarendon Press, 1972) pages 235-245; J. Raz "The Rule of Law and Its Virtue" in *The Authority of Law. Essays on Law and Morality*. (Oxford: Clarendon Press, 1979) page 210, 222.

<sup>28</sup> Case 5/75 *Deuka, Deutsche Kraftfutter GmbH B.J. Stolp v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, supra no. 22, 776 (col. 1) of the opinion of Advocate General Trabucchi. See also Case 2/75 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Firma C. Mackprang* [1975] E.C.R. 607, 623 (col. 2) of the opinion of Advocate General Warner.

<sup>29</sup> N. Luhmann "Trust: a mechanism for the reduction of social complexity" in *Trust and Power. Two works by Niklas Luhmann*. (Chichester: Wiley, 1979) page 4.

operate at all without placing at least a minimum of trust in the Community administration. The principle of legitimate expectations forces the administration to be trustworthy because the trader may have no choice but to trust the administration as to its future conduct. For instance, in the *Mulder* case<sup>30</sup> the applicant undertook not to produce milk for a certain period of time and was therefore compelled to place trust in the administration that he would not be placed in a worse position precisely because he made this undertaking. The principle of legitimate expectations was held to preclude the application of restrictive measures which specifically affected the applicant because he had made the undertaking. Protecting legitimate expectations can be seen as enforcing the individual's trust in the administration in order to prevent the breakdown of that trust which would otherwise result and with it the end of a workable relationship between the individual and the administration.

The function of the principle is to ensure protection of those expectations created by the administration but not at the expense of the wider

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<sup>30</sup> Case 120/86 *Mulder v. Minister van Landbouw en*

public interest. Good administration can be served by the realisation of such expectations but not if the public interest requires their disappointment. The principle forms part of the judicial tool-kit for administrative law, a central principle of which is that the public and private interests should be balanced against each other. This need to balance the competing interests is required in the application of the principle of legitimate expectations. Administrative bodies have powers to act in the public interest. The exercise of such powers may interfere with private rights and interests of individuals. Expectations do not form strict legal rights but can be created through the relationship between the administration and individual and as such form a private interest. The creation of an expectation by the administration will require protection but when the gain to the public interest in frustrating that expectation is clearly greater than its protection, then the public interest will have to take precedence. The principle of legitimate expectations is then a specific articulation of the principle of European

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*Visserij* [1988] E.C.R. 2321.

administrative law that the competing interests need to be properly weighed and fairly balanced.

It might be argued that the principle of legitimate expectations has an unintended ulterior function of promoting a defensive administration unwilling to conduct itself in such a way as to raise any expectations as to its future conduct. Alternatively, it could be that the principle of legitimate expectations has had an educative effect on administrative decision-making and encouraged administrators to make special provision for those individuals who have reasonably entertained such expectations. In the absence of empirical evidence it is impossible to determine what the consequences of upholding legitimate expectations have been. While the principle has a potentially wide scope of being invoked, the European Court has gradually narrowed down its application.<sup>31</sup> The Court has imposed a high standard on claimants to ensure that any change made to their expectations was not reasonably foreseeable. Even if the claimant holds

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<sup>31</sup> Judge D. Edward "Proportionality and Legitimate Expectations" (A talk given at the Judicial Studies Board Seminar on UK and EC Law, 8th January 1993) page 10. See also M. Waelbrock "Examen de Jurisprudence (1971 à 1977)" [1978] *Revue Critique de Jurisprudence Belge* 73, 76-77; Lord Mackenzie Stuart, *op. cit. supra* no. 12, pages 57-59, 73; E. Sharpston, *op. cit. supra* no. 2, 160.

a reasonable expectation, the administration may argue that the public interest overrides the need for the protection of that expectation. Relatively few arguments based on legitimate expectations have succeeded before the European Court and cases of legitimate expectations being protected are exceptional whatever their wider impact on the administration may be.

### **3. The Inducement of an Expectation**

For an individual to invoke the principle, an expectation must have been induced into the individual's mind by conduct of the administration. The European Court has stated that the principle "extends to any individual who is in a situation in which it appears that the administration's conduct has led him to entertain reasonable expectations."<sup>32</sup> Whether an expectation has been induced therefore concerns the issues of whether administrative conduct has raised an expectation and what exact type of conduct is capable of inducing an expectation.

## A. Conduct by the Administration

The requirement that an expectation must have been raised by conduct of the administration ensures that the principle protects only those expectations which exist as a result of administrative conduct and not by virtue of the subjective hopes and aspirations of the individual as to how the administration should act. Were it otherwise then the principle could be used to cover those expectations which the individual undertook to follow at his own risk and not at the encouragement of the administration.<sup>33</sup> The European Court has been keen to ensure that the principle is not expanded beyond its justifiable limits and therefore has consistently required that the expectation be based on administrative conduct. The litigation concerning milk production provides a good example.

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<sup>32</sup> Case 289/81 *Mavrides v. European Parliament* [1983] E.C.R. 1731, paragraph 21.

<sup>33</sup> Cf. Luhmann, *op. cit. supra* no. 29, pages 32-33 who states that placing trust relies on incomplete and unreliable information given to the individual which is not enough to guarantee success. Therefore, the individual overdraws on the available information in order to anticipate the future conduct of the trustee.

The milk market had been over-supplied for many years.<sup>34</sup> In 1977 the Council adopted two Regulations which sought to regulate the sector and solve this problem. Regulation 1078/77<sup>35</sup> aimed at encouraging milk producers to stop production. If a producer made an undertaking not to produce milk for a five-year period he would in return be awarded a non-marketing premium. Regulation 1079/77<sup>36</sup> introduced a 'co-responsibility levy' for all milk processing. Several milk producers made an undertaking to cease milk production for five years. However, as this did not solve the problem of surplus production the Council adopted more stringent measures in 1984.<sup>37</sup> Regulation 856/84<sup>38</sup> introduced a 'super-levy' to be imposed on top of the 'co-responsibility levy'. This levy was to be payable when milk deliveries exceeded a given 'reference quantity'. Regulation 857/84<sup>39</sup> set out the method of calculation for a reference quantity. Under Article 2(1) the reference quantity for a

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<sup>34</sup> See M. Cardwell *Milk Quotas. European Community and United Kingdom Law*. (Oxford: Clarendon Press, 1996) pages 5-8.

<sup>35</sup> OJ 1977 L 131, p. 1.

<sup>36</sup> OJ 1977 L 131, p. 6.

<sup>37</sup> See G. Avery "The Common Agricultural Policy: a Turning Point?" (1984) 21 C.M.L.Rev. 481; Cardwell, *op. cit. supra* no. 34, pages 11-23.

<sup>38</sup> OJ 1984 L 90, p. 10.

<sup>39</sup> OJ 1984 L 90, p. 13.

producer was to be equal to the quantity of milk or milk equivalent delivered by the producer in 1981 plus 1%. Under Article 2(2) the Member State could decide to calculate the reference quantity as equal to the amount of milk production or milk equivalent delivered or purchased in 1982 or 1983 (the relevant 'reference year') which was then to be weighted by a percentage in order that it did not exceed the guaranteed quantity laid down for the Member State.

In *Mulder v. Minister van Landbouw en Visserij*<sup>40</sup> the applicant was a Dutch farmer who had made an undertaking in 1979 to cease milk production for a five-year period ending in September 1984. Near the end of this period the applicant, intending to resume milk production, applied for a reference quantity which was refused by the Dutch Minister for Agriculture and Fisheries. As the applicant could not provide proof of milk production in 1983 no reference quantity could be awarded to him and without one the applicant would be charged the super-levy for his milk production. The applicant claimed that the

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<sup>40</sup> Case 120/86, *supra* no. 30. See also Case 170/86 *von Deetzen v. Hauptzollamt Hamburg-Jonas* [1988] E.C.R. 2355.

Regulation introducing the reference quantity violated his legitimate expectations because when the non-marketing undertaking was made there was no indication that the Council would subsequently introduce other restrictive measures. The European Court reasoned that a producer had given up and later resumed milk production could not expect to do so under exactly the same market conditions as existed when they had ceased production. It was not legitimate to expect that such producers would not be subject to any market or structural policy which had been introduced in the meantime.<sup>41</sup> However, the European Court held that the applicant could expect to be able to resume production without being restricted from doing so precisely because he was encouraged to cease his milk production:

"The fact remains that where a producers, as in the present case, has been encouraged by a Community measure to suspend marketing for a limited period in the general interest and against payment of a premium he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he availed himself of

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<sup>41</sup> *Ibid.*, paragraph 23.

the possibilities offered by the Community provisions."<sup>42</sup>

The applicant's legitimate expectation was that he would be able to resume his milk production and not be prevented from doing so precisely because of the encouragement by the Community to cease milk production for a five-year period. That is what had happened here. The applicant had been effectively precluded from being awarded a reference quantity for the relevant year and from resuming milk production because he had made the non-marketing undertaking. When the applicant made the undertaking it was unforeseeable that he would not be awarded a reference quantity in order to be exempt from the super-levy because the reference quantity system was not introduced until 1984. The conduct of the Community which induced the expectation were the two 1977 Regulations as they encouraged the applicant to cease milk production. The expectation was that the ability of the producers who had made a non-marketing undertaking to resume production would not be any the less because they had made this undertaking.

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<sup>42</sup> *Ibid.*, paragraph 24.

This case is to be contrasted with *Kuhn v. Landwirtschaftskammer Weser-Ems*.<sup>43</sup> The applicant was a milk producer who had leased his farm to two tenants successively for the period of 1981 to 1983 inclusive. He applied for a reference quantity to be calculated on the basis of the farm's 1981 or 1982 production as an exceptional case because the lessee had mismanaged the farm and deliberately reduced milk production. As a result the applicant could not show a representative level of deliveries for that year. As the Regulation did not allow account to be taken of a change of hands during the reference year the applicant claimed a legitimate expectation. The European Court rejected this argument reasoning that the applicant could not legitimately expect the change of hands during the reference year to be taken account of as he had leased the farm by his own decision and not as the result of any encouragement by the Community. The European Court stated:

"...the principle of the protection of legitimate expectations may be invoked as against Community rules, only to the extent that the Community itself has previously created a

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<sup>43</sup> Case C-177/90 [1992] E.C.R. I-35.

situation which can give rise to a legitimate expectation."<sup>44</sup>

The principle of legitimate expectations will therefore not extend to an individual who did not act due to the conduct of the Community but at his own risk which he freely took without any encouragement by the Community. In *Kuhn* the applicant had freely decided to lease his farm whereas in *Mulder* the applicant had been encouraged to do so by the Community. An expectation can only be considered worthy of protection if it was induced by the conduct of the Community administration.

That the expectation must have been induced by conduct of the Community presupposes that the individual actually held the expectation. The individual who acts to his detriment in ignorance of any expectations induced by the Community and then later seeks to establish a legitimate expectation to make good any loss suffered would be unlikely to succeed as he acted at his own risk in ignorance of the expectation. In such a situation there was no expectation at all induced by the

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<sup>44</sup> *Ibid.*, paragraph 14.

Community into the individual's mind. However, the position is not so clear-cut as the case of *Siegfried Rauh v. Hauptzollamt Nurnberg-Furth*<sup>45</sup> demonstrates. In 1985 the applicant had inherited his farm from his parents who had made a non-marketing undertaking which expired in December 1984 just before the applicant took over the farm. The applicant was refused a reference quantity for the farm. Before the European Court it was argued that it would be contrary to the applicant's legitimate expectations to be refused a reference quantity because he had only taken over the holding after the non-marketing period had expired. The Commission argued that the expectation protected by Article 3a (inserted into the Regulation after the *Mulder* case) only belonged to those farmers who had actually made the non-marketing undertaking. As the applicant had inherited the farm after the expiry of the undertaking he had no expectation as there was no conduct of the Community towards the applicant which could have induced an expectation. Nevertheless, the European Court found that the applicant did have a legitimate expectation. It reasoned that the restrictions imposed upon those

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<sup>45</sup> Case C-314/89 [1991] E.C.R. I-1647.

farmers, as in *Mulder*, had affected them precisely because of their non-marketing undertakings. Such restrictions would be maintained because the rules were not to be interpreted as providing for an heir or successor to apply for a reference quantity in the same way as the producer himself. The judgment of the European Court may seem to question the basic requirement that there be conduct of the Community which induced the expectation in the applicant's mind. However, it is consistent with principle if the heir or successor is seen as stepping into the shoes of their predecessor. If so, then there is no objective reason for treating the heir or successor any differently than the predecessor.<sup>46</sup> The European Court treated the applicant as an objective entity, the "farmer", regardless of the change of personnel that occurred following the expiry of the undertaking. The relationship between heir or successor and predecessor is not a means of evading the requirement that conduct by the Community induce an expectation but rather a fulfilment of that requirement in that the heir or successor takes over the business exactly as the predecessor left

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<sup>46</sup> *Ibid.*, paragraphs 30-34 of the opinion of Advocate

it and any expectations the predecessor may have had are also transferred.

### *B. The Type of Conduct*

Exactly what forms of conduct are capable of raising an expectation? The inducement of an expectation by an express representation or assurance is a clear case of conduct by the administration. For example, in *Commission v. Council*<sup>47</sup> (hereinafter the "staff salaries" case) a decision was adopted by the Council to end the difficulties concerning the remuneration of Community officials. The decision introduced for a three year period a method of calculating increases in salaries which resulted in an increase of 3.75% in staff salaries. Some months later the Council adopted a Regulation<sup>48</sup> which changed the increase in the salaries to only 2.5%. The Commission challenged the validity of the Regulation. The European Court appraised the decision within the framework of the Staff Regulations and held that by adopting the decision the Council had gone beyond

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General Mischo.

<sup>47</sup> Case 81/72, *supra* no. 16. See L. Dubouis (1973) 9 R.T.D.E. 761.

mere preparatory considerations and had begun a decision-making process. The European Court found that the decision amounted to an undertaking by the Council towards the staff that the new method of calculation would be used for the stipulated length of time otherwise "the rule of protection of the confidence"<sup>49</sup> would be violated. The Council had failed to provide sufficient justification in order to justify departing from its undertaking. The Regulation was therefore declared void. The Council's decision amounted to an undertaking which gave rise to a legitimate expectation that the system of salary calculation would be used.<sup>50</sup>

The *Mulder* case is another example of an express representation inducing an expectation. The difference is that in *Mulder* the expectation was raised as a result of the non-marketing undertaking which was an express representation. The undertaking did not explicitly state that the applicant would not be subject to restrictions which specifically affected him precisely because he ceased milk production. However, it was

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<sup>48</sup> Regulation No 2647/72, OJ 1972 L 283, p. 1.

<sup>49</sup> *Ibid.*, paragraph 10.

<sup>50</sup> In his opinion, *ibid.*, 593 (col. 1) Advocate General Warner stated that in English law there was no exception to the general principle that an administration cannot

reasonable for the applicant to expect not to be treated any differently because he had made the non-marketing undertaking. The inducement of expectations through express representations therefore includes those expectations which arise from the content of the representation and those which are reasonable to expect as a result of the representation. The content of a Regulation can also form an express representation capable of inducing a legitimate expectation.<sup>51</sup>

The existence of a settled practice may also amount to similarly clear conduct by the administration capable of inducing an expectation. For example, in *Ferriere San Carlo v. Commission*<sup>52</sup> the European Court declared void the Commission's decision to impose a fine on the applicants for exceeding its production quota for steel reinforcing bars because of the existence of a continuing practice by the Commission to tolerate the disposal of stock in addition to the delivery quota. The Commission's practice had applied to excess production of reinforcing bars existing on

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bind itself as to the exercise of its discretion which could possibly apply in the present case.

<sup>51</sup> Case C-152/88 *Sofrimport SARL v. Commission* [1990] E.C.R. I-2477.

<sup>52</sup> Case 344/85 [1987] E.C.R. 4435.

the two preceding years. The applicant, acting in reliance on this practice of toleration, had over-produced and proceeded to dispose of the excess when the Commission imposed a fine. The legitimate expectation arose from the past practice of toleration which amounted to conduct capable of inducing an expectation. Similarly in *Decker v. Caisse de pension des employés privés*<sup>53</sup> the existence of a practice of passing transfer requests made by staff through the European Parliament to the national administrative body created a legitimate expectation which defeated the application of a national time-limit of one year for such requests.

Schwarze states that legitimate expectations may be created by an action on the behalf of the EC administration by a consistent administrative practice and by an undertaking or an assurance.<sup>54</sup> While this is correct in many cases of legitimate expectation, it is not a comprehensive statement as the European Court has allowed conduct other than practice or assurance to create a legitimate

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<sup>53</sup> Case 129/87 [1988] E.C.R. 6121.

<sup>54</sup> Schwarze, *op. cit. supra* no. 5, pages 950-951.

expectation. For example, in *Grogan v. Commission*<sup>55</sup> the issue was raised as to whether delay by the administration could amount to conduct capable of inducing an expectation. The applicant, who had worked as a Staff Official, retired in 1975 and had resumed his residence in Ireland. He had chosen to have his pensions paid in Belgian Francs which he would then change into Irish pounds at the exchange rate at the time. Due to the devaluation of the Irish pound in the 1970s the Council had increased the weightings for those who had their pension paid directly into Irish pounds. Those in the position of the applicant did not suffer a similar possible reduction in purchasing power yet the weighting was increased as it was of general application. The pension benefits of people in the applicant's position gradually increased in real value compared with those who had their pension paid directly into Irish pounds. In 1978 the Council put an end to this by adopting two Regulations, one of which updated exchange rates and the other restored the weightings to the level necessary to serve the function they had previously served which was

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<sup>55</sup> Case 127/80 [1982] E.C.R. 869. See also Case 164/80 *De Pascale v. Commission* [1982] E.C.R. 909; Case 167/80 *Curtis v. European Parliament* [1982] E.C.R. 931.

compensating for the difference in living conditions. The applicant's pension was to be decreased from BFR 30 145 to BFR 13 080 by a reduction of one tenth per month for a ten months. The applicant claimed that the new system infringed his legitimate expectations because he was entitled to expect the continued payment of the pension at the same level because this has "guided him in choosing his mode of living during his years of retirement".<sup>56</sup> The European Court rejected this as none of the Community institutions had committed themselves to the maintenance of the system.<sup>57</sup> However, the European Court accepted the plea of legitimate expectations with regard to the arrangements for the introduction of the new system of calculating pensions. The deterioration of the system had worsened with time. Nothing the pensioners had done was responsible for the change in exchange rates, rather it was the inaction and delay of the Council to ensure that the exchange rates bore a proper relationship to economic reality. The European Court stated:

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<sup>56</sup> *Ibid.*, paragraph 27.

<sup>57</sup> *Ibid.*, paragraph 30.

"Whilst there may be some explanation for the Council's inaction it must none the less not be overlooked that pensioners benefiting from that inaction were entitled to expect the Council to take account of the situation in which they had been placed by the prolonged application of the system temporarily used."<sup>58</sup>

The transitional period of ten months for the reduction of the applicant's pension did not adequately protect this legitimate expectation because the Council was making those in the applicant's position bear the loss of the increase in their pensions after seven years of inaction by the Council. The applicant therefore had a legitimate expectation that the Council would progressively reduce the pension payments but over a length of time which allowed suitable transition to be made by the applicant.

Conduct through delay has also given rise to a legitimate expectation in a different context to that in *Grogan*. In *Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v. Commission*<sup>59</sup> a challenge was made to a decision concerning state

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<sup>58</sup> *Ibid.*, paragraph 33.

<sup>59</sup> Case 223/85 [1987] E.C.R. 4617.

aid. In 1982 the applicant had been given a subsidy by the Dutch government which the Commission had shown an interest in as possibly incompatible with the common market. In December 1984 the Commission decided that the subsidy was incompatible with the Community rules. The applicant claimed that the Commission's delay of 26 months had given rise to a legitimate expectation that it did not find the aid objectionable. The European Court held that the Commission's delay was due to its own inactivity and had given rise to reasonable grounds for believing that the state aid was lawful. Therefore a legitimate expectation existed that the state aid was lawful. This case should be contrasted with *Italian Republic v. Commission*<sup>60</sup> where the Commission allowed 55 months to pass before holding that the grant of aid was unlawful. The claim of a legitimate expectation was, however, rejected by the European Court as the applicant had shown reluctance in complying with the Commission's procedure by delaying the provision of necessary information thereby protracting the whole procedure. The Commission's delay could not raise

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<sup>60</sup> Case C-303/88 [1991] E.C.R. I-1433.

an expectation as the applicant was partly to blame for causing and prolonging the delay.

The conclusion to be drawn from *Grogan, RSV* and *Italian State v. Commission* is that delay or inaction by the administration can induce an expectation provided that the delay has not in part been caused by the applicant. This is entirely consistent with the reasoning which underlies the requirement for conduct by the administration to induce a legitimate expectation: the principle does not exist in order to allow any loss which the claimant suffers through his own fault to be passed onto the Community but only that loss which can be attributed to conduct of the Community.

#### **4. Objectively Reasonable Expectations**

After conduct of the administration has induced an expectation it becomes necessary to determine whether the expectation is objectively reasonable. The question is whether it was reasonable for the applicant in all the circumstances to have relied on the expectation.<sup>61</sup> In determining this the European Court will require

that the expectation is reasonably clear and precise and that any change in the situation was not reasonably foreseeable. The European Court adopts an objective test to determine the reasonableness of the expectation in order that the Community is only liable for those losses which it was responsible for. Under the principle of legitimate expectations the European Court has sought to ensure that the Community should only be held liable for "unreasonable treatment" of an individual or undertaking and not for the "hard business luck"<sup>62</sup> which a business can expect to risk in the market.

#### A. *Quality of Inducement*

It will be necessary to determine whether the conduct relied upon could reasonably have given rise to the expectation held. There must therefore be a reasonable relationship between the actual conduct of the administration and the applicant's expectation. An example of this is provided by *Koninklijke Scholten-Honig N.V. and de Verenigde*

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<sup>61</sup> Case 74/74, *supra* no. 10, 557 (col. 2) of the opinion of Advocate General Trabucchi.

*Zetmeelbedrijven "De Bijenkorf" B.V. v. Hoofdprodukschap voor Akkerbouwprodukten.*<sup>63</sup> The applicant had invested in the manufacture of isoglucose, a product technically similar to sugar and new to the market. Such manufacturers had for a time benefited from production refunds. However, the Commission had adopted Regulations which abolished the making of production refunds for isoglucose. The applicant claimed that its legitimate expectations had been frustrated because it had not been notified of the possibility that such measures might be adopted. The European Court held that the provisions under which the manufacturers had been given production refunds were introduced before isoglucose existed and so it did not fall within the category of products which the system was designed to help. That the manufacturers of isoglucose had benefited from refunds awarded under a system intended to regulate the common organisation of the market in cereals could not raise a reasonable expectation that the refunds would continue. Furthermore, as the product was similar to sugar the manufacturers should have

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<sup>62</sup> Case 120/86 *Mulder*, *supra* no. 30, 2341 (col. 2) of the opinion of Advocate General Slynn.

<sup>63</sup> Case 125/77 [1978] E.C.R. 1991.

known that the growing sugar surplus would require intervention. According to Advocate General Reischl:

"...there can only be said to be a breach of the principle of legitimate expectation that a given legal position will continue if, having regard to all the relevant circumstances and especially to the conduct of the Community institutions, there were grounds for being absolutely certain that a specific legal situation would not be altered."<sup>64</sup>

In this case there had not been any conduct from which it was reasonable to infer that the awarding of production refunds for isoglucose would continue. If the producers had got into unexpected difficulties because they had decided to invest in the product on the basis of specific forecasts of the market which later turned out to be wrong then that was at their own risk as the Community had not given them any indication that production refunds for isoglucose would continue. In *Finsider v. Commission*<sup>65</sup> the applicant sought to claim a legitimate expectation from a favourable opinion of

the Commission concerning an adjustment of reference production in steel. The Commission claimed that a mere opinion could not give rise to any legal obligations as to the future. The European Court accepted this but acknowledged that a favourable opinion could make an undertaking entertain certain expectations in view of the fact that the Commission took account of the current situation and forecasts and was well placed to be aware of possible future directions. However, the European Court recognised that it was not necessary in this case to decide whether a favourable opinion could raise an expectation in view of the serious crisis in the steel market. It therefore left open the question of whether it would be reasonable to have an expectation as a result of a favourable opinion by the Commission.

*B. The Administrative Body Against Which the Expectation is Claimed*

Another issue which may determine the reasonableness of an expectation is whether the expectation is induced by one administrative body

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<sup>64</sup> *Ibid.*, 2032 of the opinion of the Advocate General.

that a second administrative body will act in a certain way. Must there be conduct by the administrative body against which the expectation is sought to be enforced or is it possible that conduct of another administrative body can raise an expectation? In *Salerno v. Commission and Council*<sup>65</sup> the applicant was a staff official who claimed a legitimate expectation against the Commission and the Council on the basis of a resolution of the European Parliament which was adopted from a Commission proposal. The resolution concerned the formation of a European Agency for Co-operation. The Parliament had stated that the staff for this agency were to retain their established rights and that the new provisions were to apply retroactively to the day when they were to be engaged by the agency. The European Court found that a resolution of the European Parliament could not give rise to a legitimate expectation that the other Community institutions would comply with it.<sup>67</sup> The judgment could be interpreted as meaning that it was not reasonable for the applicant to claim a legitimate expectation from one body on the basis of the

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<sup>65</sup> Joined Cases 63 and 147/84 [1985] E.C.R. 2857.

<sup>66</sup> Joined Cases 87 and 130/77, 22/83, 9 and 10/84 [1985] E.C.R. 2523.

conduct of another. The European Parliament had the power to make a resolution but this did not mean that it also spoke for the Commission and the Council. It would not therefore have been reasonable to allow the applicant to raise an expectation against one body on the basis of another's conduct. Similarly, in *Friedrich Binder GmbH & Co. KG v. Hauptzollamt Bad Reichenhall*<sup>68</sup> the European Court refused to allow the applicant to claim a legitimate expectation against the Community on the basis of the report of a proposed Council Regulation reported in a German customs tariff handbook. The handbook could not reasonably have induced an expectation on the behalf of the Community. The only tariffs that the applicant could reasonably expect to be imposed were to be found in the Official Journal of the Community.

It will not be reasonable to expect one administrative body to act in a certain way on the basis of conduct of another administrative body if the claimant could reasonably have known that the body inducing the expectation had no power to do so or the inducement of the expectation could be checked against official Community information.

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<sup>67</sup> *Ibid.*, paragraph 59.

Were the general rule otherwise then the principle of legitimate expectations would have a free-standing basis under which any expectation held by the applicant would be capable of being considered worthy of protection. This limitation of the principle serves to protect legal certainty for there is no infringement of legal certainty if an administrative body violates a subjective expectation which was raised by another administrative body. Conduct of an administrative body cannot raise an expectation against another body unless it was reasonable for the claimant to hold such an expectation. Cases falling within this exception are, for example, where the Commission has announced a policy to be implemented by national administrative bodies. Should a national body fail to implement the policy as the Commission announced then the applicant would have a reasonable expectation induced by the Commission's conduct as regards how the national administrative body ought to act.

*C. Reasonably Foreseeable Changes to Expectations*

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<sup>68</sup> Case 161/88, *supra* no. 8.

A reasonable expectation cannot exist if the possibility of change was reasonably foreseeable.<sup>69</sup> This distinguishes an expectation from a mere hope or aspiration. If the individual fails to foresee the possibility of change then any confidence he had in the fulfilment of the expectation is held, if the change was reasonably foreseeable, at his own risk and not due to the Community. The individual will only have himself to blame for undertaking such a risk in the light of reasonably foreseeable changes being made. This limitation on the operation of the principle is in order to ensure that expectations do not become immutable. The principle therefore does not operate in a vacuum as an objective restraint on administrative power but is responsive to the reasonably foreseeable changes that can occur in the administration of the Community.

Many cases of legitimate expectation have arisen in the context of the monetary compensatory amounts system which was introduced in agricultural sectors from the early 1970s. The purpose of the compensatory amounts was to compensate for

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<sup>69</sup> Case C-337/88 *Società agricole fattoria alimentare SpA v. Amministrazione delle finanze dello Stato* [1990]

different price levels of agricultural produce due to the difference in exchange rates for national currencies.<sup>70</sup> The value of an agricultural product was to remain the same but if it was expressed in a currency which was devalued or revalued then a distortion of trade could occur which was to be remedied by the compensatory amounts. Allowing Member States to charge compensatory amounts on imports, and grant them on exports, prevented the fluctuation of exchange rates having an immediate effect on agricultural prices in national currency and thereby keeping the values of the product the same in whatever currency it was expressed in. It is within the conflict between the requirement of constant re-adjustments of the compensatory amount levels to prevent a distortion of trade and the requirements of traders to be certain and secure in their commercial transactions that the principle of legitimate expectations has been applied. The trader who applied for the advance fixing of compensatory amounts subject to a deposit holds an

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E.C.R. I-1, paragraph 9 of the opinion of Advocate General Tesouro.

<sup>70</sup> See generally J.A. Usher "Agricultural Markets: Their Price-Systems and Financial Mechanisms" (1979) 4 E.L.Rev. 147; F. Snyder *Law of the Common Agricultural Policy* (London: Sweet & Maxwell, 1985) pages 111-121; J.A. Usher *Legal Aspects of Agriculture in the European Community* (Oxford: Clarendon Press, 1988) pages 108-121.

expectation that those compensatory levels will be applied to its transactions. However, if it is reasonably foreseeable that changes will be made to the compensatory levels then it will not be reasonable to expect that the amounts will remain the same. In assessing whether the possibility of change the European Court asks whether a reasonable and prudent trader could have foreseen the possibility of change and acted upon it.

In *Groupement d'Intérêt Economique 'Union Malt' v. Commission*<sup>71</sup> the applicant traded in malt and barley. To export such goods from the EC a licence was required which was to be valid for 11 months. This particular sector had been incorporated within the system of monetary compensatory amounts. Community rules provided that in the case of some products, including malt and barley, the refund could be paid to the exporter before the products were exported. A Regulation made provision for the exporter to place the products under customs control before the licence expired. Two procedures were set up to enable this. The first is not of direct concern, however, the second was the bonded warehouse procedure under

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<sup>71</sup> Joined Cases 44 to 51/77 [1978] E.C.R. 57.

which the products could remain for six months. A Regulation, which entered into force after the applicant had fixed the refund in advance, reduced the period that products would remain under the bonded warehouse procedure to either the remaining length of time of the export licence or one month if the export licence was valid for under one month. Contracts for malt and barley were usually entered into for 15 to 18 months allowing for delivery of the goods to be made after 12 months. The bonded warehouse procedure allowed the period which passed before the placing of orders and the making of deliveries to be recovered when the export licence expired. The applicant claimed that by changing the period such products would remain within the procedure the Commission had infringed its legitimate expectations.

The European Court held that the applicant's expectation was not reasonable as it could not have been unaware that some action by the Commission was to be undertaken in order to resolve the difficult situation in the malt market. During 1972-3 the number of export licences had increased each year and so had the advance fixing of the refund resulting in difficulties in the market. During

July 1975 the Soviet Union had purchased vast quantities of the product precipitating a crisis. The Court found that traders who had been negotiating contracts for the year 1975-6 could not have been unaware that the maintenance of the system and the time-limits caused grave difficulties and an increasing financial burden for the Community.<sup>72</sup> In light of this and the presentation by the Commission to the Management Committee of the strategy of reducing either the length of time products were to remain in warehouses or the periods of validity for licences, it was reasonably foreseeable that change was imminent. Therefore the applicant could not claim a legitimate expectation. According to Advocate General Mayras to claim a breach of legitimate expectations the interference with the expectation "must have occurred without warning and with immediate effect and without any transitional measure of such a nature as to enable a prudent trader to avoid losses or to be compensated for them."<sup>73</sup> It must sound like a "clap of thunder in a

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<sup>72</sup> *Ibid.*, paragraph 34.

<sup>73</sup> *Ibid.*, 91 (col. 1) of the opinion of the Advocate General.

clear sky".<sup>74</sup> As the introduction of the new measure was reasonably foreseeable the export licence had not induced a reasonable expectation in the mind of the applicant.

The European Court has on many occasions found that a legitimate expectation did not exist as it was reasonably foreseeable that changes could happen.<sup>75</sup> For example, if a proposal made by the Commission to change the compensatory amounts then this should alert the experienced trader to the possibility of change.<sup>76</sup> In *British Beef Company Limited v. Intervention Board for Agricultural Produce*<sup>77</sup> Advocate General Caportorti explained the "general criterion" which emerged from the case-law:

"...no legitimate expectations may be placed in the maintenance of rules, nor therefore is it possible to claim the protection of such an

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<sup>74</sup> *Ibid.*, 92 (col. 1) of the opinion of the Advocate General.

<sup>75</sup> See Case 97/76 *Merkur Außenhandel GmbH & Co. KG v. Commission* [1977] E.C.R. 1063, paragraph 9; Case 78/77 *Firma Johann Lühns v. Hauptzollamt Hamburg-Jonas* [1978] E.C.R. 169, paragraph 6; Case 127/78 *Hans Spitta & Co. v. Hauptzollamt Frankfurt Am Main-Ost* [1979] E.C.R. 171, paragraph 9; Case 245/81 *Edeka Zentrale AG v. Federal Republic of Germany* [1982] E.C.R. 2745, paragraph 27.

<sup>76</sup> See, e.g., Joined Cases 95 to 98/74, 15 and 100/75 *Union Nationale des Coopératives Agricoles de Céréales v. Commission and Council* [1975] E.C.R. 1615, paragraph 45.

expectation, if the possibility of legislative amendment is reasonably foreseeable at the time a contractual obligation is entered into, where it is in relation to the performance of that undertaking that exemption from the intervening detrimental changes in the rules is sought."<sup>78</sup>

As Advocate General Capotorti continued, it then becomes important to determine exactly which factors could make a change in expectations reasonably foreseeable. In relation to monetary compensation amounts, the effectiveness of the system required that variations be made very quickly. Furthermore, the purpose of the system was not to protect individual traders but to prevent monetary instability and its consequent difficulties for the functioning of the common market.<sup>79</sup> As those affected by the system must have known of this the European Court has demanded a high standard of what is objectively reasonable in the circumstances.<sup>80</sup> For example, the *British Beef* case concerned the application of a Regulation levying compensatory amounts in export contracts

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<sup>77</sup> Case 146/77 [1978] E.C.R. 1347.

<sup>78</sup> *Ibid.*, 1360-1 of the opinion of the Advocate General.

<sup>79</sup> See Case 74/74 *CNTA*, *supra* no. 10, paragraphs 39-40.

<sup>80</sup> *Schwarze*, *op. cit. supra* no. 5, page 1142.

which were concluded before the adoption of the Regulation. The European Court found that the applicant could not have been unaware of the uncertainties typical of the situation or that a proposal by the Commission to the Council to alter the representative rate of the pound might fail and that following this new compensatory amounts would have to be fixed. Legitimate expectations will only arise if a reasonable and prudent trader would have omitted to cover itself against the exposure to the risk of the exchange rate.<sup>81</sup> According to Lord Mackenzie Stuart "...the Court is less susceptible...to the blandishments of the large and experienced undertaking well able to see in which direction the economic wind is blowing and able to make for a safe anchorage before the storm cloud breaks."<sup>82</sup>

#### *D. Speculative Activity*

The reasonableness of an expectation can also be determined by whether it was compatible with the purposes of the system in which it was created. If

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<sup>81</sup> Case 74/74 *CNTA supra* no. 10, paragraph 41.

<sup>82</sup> Lord Mackenzie Stuart *The European Communities and The Rule of Law* (London: The Hamlyn Lectures, 1977) page 96.

the expectation runs counter to the policy and purposes behind the system then it may not be reasonable for the applicant to hold such an expectation. This issue arose in *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Firma C. Mackprang*.<sup>83</sup> The applicant, who traded in cereals, offered the German intervention agency a quantity of wheat. The agency accepted the offer and took delivery of some of the wheat. However, the Commission gave the intervention agency the power to temporarily confine its purchases of wheat to that grown on its own territory. This power had been given in order to remedy the making of speculative profits by buying wheat in France and selling to the German intervention agency following the fall in the French franc. Following this the agency repudiated the contract with the applicant who then claimed a legitimate expectation that it could expect to be excluded from the application of the decision as it had made arrangements under the previous system with the agency. It would seem that the applicant had a strong case of legitimate expectations: it had made concrete arrangements, relied on the expectation and the introduction of

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<sup>83</sup> Case 2/75, *supra* no. 28.

the decision was not reasonably foreseeable. Nonetheless both Advocate General Warner and the European Court rejected the applicant's case. Advocate General Warner held that the expectation was not legitimate because the activity of the applicant had been subversive of the intervention system:

"No trader who was exploiting that system in order to make out of the system profits that the system was never designed to bestow on him could legitimately rely on the persistence of the situation. On the contrary, the only reasonable expectation that such a trader could have was that the competent authorities would act as swiftly as possible to bring the situation to an end."<sup>84</sup>

The European Court concluded that the challenged decision was not an infringement of legitimate expectations but "a justified precaution against purely speculative activities."<sup>85</sup> The applicant's expectation was of making a speculative profit which threatened to contribute to the undermining

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<sup>84</sup> *Ibid.*, 623 (col. 2) of the opinion of the Advocate General.

<sup>85</sup> *Ibid.*, paragraph 4.

of the intervention system. As the changes had been introduced to prevent speculation the applicant could not claim a legitimate expectation to that effect.

#### *E. Mistake of Fact*

If the conduct of the administration raising an expectation is predicated on a mistaken basis of fact which is known to the applicant then this may prevent the expectation from being reasonable. *Pauvert v. Court of Auditors*<sup>86</sup> demonstrates how a mistake of fact by the administration which is known by the applicant can lead to the expectation being no more than a mere hope. The applicant had been employed by the Court of Auditors as a chauffeur from 1973 to 1978 and as an official from 1978. In 1983 he accepted the position as head chauffeur. The Court of Auditors had required that candidates must have had fifteen years' experience as a chauffeur. The applicant was never appointed to the post as it was re-advertised. Now applicants must have a minimum of fifteen years' relevant experience of which eight must have been as a

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<sup>86</sup> Case 228/84 [1985] E.C.R. 1969.

chauffeur. The applicant claimed a legitimate expectation of being appointed to the position as the Court of Auditors had agreed to appoint him. The Court of Auditors claimed that the appointment had been made under a mistaken view of the facts: the applicant had only five years' experience as a chauffeur and so did not fulfil the conditions. The European Court held that the applicant was precluded from relying on the principle of legitimate expectations as he was the best placed person to know that as he had only been employed for five years as a chauffeur he did not fulfil the necessary conditions. It was not reasonable for the applicant to expect the Court of Auditors to employ him when he knew that the conditions which had been laid down were not fulfilled by him. All he could reasonably expect was that the conditions set out would be followed and that the mistake of fact by the Court of Auditors would not be ignored once it had been discovered.

##### **5. Policy, Discretion and Legitimate Expectations**

In applying the principle of legitimate expectations the European Court has sought to

ensure that while an individual's legitimate expectations are not infringed, the powers of the administration are not impeded either. It has therefore been necessary to achieve a balance in order that the protection of the individual is not a threat to the functioning of the Community whilst not being altogether ignored either. This is illustrated by the cases where a legitimate expectation is claimed that a policy will not be changed. Policy-making within the Community<sup>87</sup> is decided by the Community institutions. Such bodies are concerned with the implementation of such policies and are frequently given wide discretionary powers to achieve policy objectives. The need for the Community institutions to change policy is as important as it is for national administrative bodies. A variation of policy may be necessary for several reasons. For example, technological developments may compel change. A policy which was tried and then failed will need to be replaced by a new policy. Change in the political complexion of the Council of Ministers may call for changes in policy. Perhaps most

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<sup>87</sup> See generally P.P. Craig and G. de Búrca *EC Law. Text, Cases and Materials*. (Oxford: Clarendon Press, 1995) chapter 3.

important in practical terms is the need for the Community administration to respond quickly to changes in economic and market forces.<sup>88</sup> A crisis in a certain policy area will command action by the Community to ensure the proper functioning of the common market. Policy must be allowed the freedom to change. An administrative body which had been given a discretionary power must be able to use that power should it need to do so. According to Advocate General Trabucchi "it must be borne in mind...that when exercising a discretion, an administrative authority is always at liberty to adopt a different view from those previously taken on particular issues. The adoption at a particular time of one of the possible alternatives does not deprive the authority of the power to take a different view in future."<sup>89</sup> If the principle of legitimate expectations could prevent the administration from enjoying a margin of discretion

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<sup>88</sup> The European Court has frequently emphasised this need. See, e.g., Case 84/78 *Angelo Tomadini S.n.c. v. Amministrazione delle Finanze dello Stato* [1979] E.C.R. 1801, paragraph 22; Case 112/80 *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen*, *supra* no. 1, paragraph 48.

<sup>89</sup> Case 47/75 *Federal Republic of Germany v. Commission* [1976] E.C.R. 569, 589 of the opinion of the Advocate General. See also Joined Cases 17 and 20/61 *Klockner v. High Authority of the European Coal and Steel Community* [1962] E.C.R. 325, 342; Lord Mackenzie Stuart *The*

in the exercise of its power then this could hamper a change in policy and effectively prevent the administration from effectively responding to the changing needs of the Community administration.

Not surprisingly therefore the European Court has consistently stated that the principle of legitimate expectations cannot operate so as to prevent a change in policy. One of the earliest cases concerning this was *Edeka Zentrale AG v. Federal Republic of Germany*.<sup>90</sup> The applicant was an importer of mushrooms from Taiwan and South Korea. Having applied for and been refused two import licences the applicant challenged a Regulation which had ceased the issuing of such licences. The Regulation had been adopted following a commercial agreement between the Community and China which formed part of the Community commercial policy. Under the Regulation all import licences for preserved mushrooms had been suspended apart from those granted to imports of Chinese mushrooms. The European Court rejected the claim that this frustrated the applicant's legitimate expectations:

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*European Communities and the Rule of Law, op. cit. supra* no. 82, page 54.

<sup>90</sup> Case 245/81 [1982] E.C.R. 2745.

"Since Community institutions enjoy a margin of discretion in the choice of means needed to achieve their policies, traders are unable to claim that they have a legitimate expectation that an existing situation which is capable of being altered by decisions taken by those institutions within the limits of their discretionary power will be maintained."<sup>91</sup>

The Regulation had been adopted to give effect to the commercial agreement agreed under the commercial policy under the wide powers of the Community to choose the means necessary to achieve such policies. If the principle of legitimate expectations could cover an expectation to the effect that the existing situation would be maintained then this would result in both the powers of the administration being fettered and an inability to change the choice of the means to achieve the policy. All that the applicant could

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<sup>91</sup> *Ibid.*, paragraph 27. See also Case 52/81 *Offene Handelsgesellschaft in Firma Werner Faust v. Commission* [1982] E.C.R. 3745, paragraph 27; Case 278/84 *Federal Republic of Germany v. Commission* [1987] E.C.R. 1, paragraph 36; Case 256/84 *Koyo Seiko Company Limited v. Council* [1987] E.C.R. 1899, paragraph 20; Case 258/84 *Nippon Seiko KK v. Council* [1987] E.C.R. 1923, paragraph 34; Case 203/86 *Spain v. Council* [1988] E.C.R. 4563, paragraph 19; Joined Cases 424 and 425/85 *Coöperatieve Melkproducentenbedrijven Noord-Nederland BA ('Frico') v.*

therefore legitimately expect was that it would be treated in accordance with the terms of whatever means were to be chosen in order to achieve the policy decided upon.

Similarly in *Société française des Biscuits Delacre v. Commission*<sup>92</sup> the European Court again stressed the need of the Community not to be prevented by the expectations of individual traders in developing its policies. By a Regulation the Commission introduced a system of aid thereby allowing traders to make tenders to obtain aid for the use of butter. The applicant had lodged a tender for aid with the French intervention agency. However, a week later the Commission changed the maximum amount of aid that could be tendered for. As the applicant's tender exceeded this new limit, its tender was rejected. The applicant claimed that this change suddenly and unforeseeably frustrated its expectations and its plan of future production. The European Court recognised that "the Commission had a margin of discretion in choosing the means necessary for carrying out its policy in its

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*Voedselvoorzienings In- en Verkoopbureau* [1987] E.C.R. 2755, paragraph 33.

<sup>92</sup> Case C-350/88 [1990] E.C.R. I-935. See also Joined Cases C-258/90 and C-259/90 *Pesquerias de Bermeo SA and Naviera Laida SA v. Commission* [1992] E.C.R. I-2901.

capacity as authority responsible for the management of butter stocks, in which it has to adjust its policy of aid and butter consumption to meet the fluctuating market conditions."<sup>93</sup> The Regulation had been a special measure designed to dispose of butter on particularly favourable terms in order to deal with the situation where the market is encumbered with heavy stocks which cannot be disposed of in the normal way. Due to the increase in butter sales and prices, the maximum amount of aid had steadily decreased since the invitation to tender had been open. The applicant could not legitimately claim an expectation to be treated favourably under a system which was introduced to deal with market conditions which no longer existed and the principle of legitimate expectations could not be used to defeat the Commission's powers to reformulate policy in the light of fluctuating market conditions.

In such cases the public interest in changing policy prevails over the private interest in the protection of expectations. The rule that legitimate expectations cannot be applied so as to interfere with changes of policy forms an absolute

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<sup>93</sup> *Ibid.*, paragraph 32.

and strictly enforced limitation on the operation of the principle. The justification is in the need for the administration to change and develop policy. Alternatively, it could be reasoned that if the protection of expectations is concerned with an administrative morality of trust, then the general public can trust the administration to effectively exercise its powers in the public interest. Should the protection of an individual's expectation threaten to prevent the administration's duty to act in the public interest, then it must give way. The principle of legitimate expectations operates inside the area of changes from one policy to another and not in order to prevent changes of policy. For example, in *Mulder* the European Court recognised that the applicants could not legitimately expect not to be subject to any rules of market or structural policy adopted whilst the producers had made their non-marketing undertaking. However, the applicants could legitimately expect not to be subject to restrictions which specifically affected them because they agreed not to market milk when they resumed their production. The confidence an individual can have in the administration is not that new policies or measures

will not be adopted but that the individual will be treated fairly when such changes are made.

## **6. Legality and Legitimate Expectations**

The relationship between the principles of legitimate expectations and legality raises fundamental issues of how to reconcile potentially conflicting interests. On the one side, there is the public interest in the administration acting within the limits of its legal powers and, on the other, the individual's private interests in being treated fairly by the administration which raised the expectation. The European Court has stated that an individual cannot claim a legitimate expectation which the administration did not have the legal power to raise and has restricted the application of the principle to the confines of lawful expectations.

For example, in *SpA Acciaierie e Ferriere Lucchini v. Commission*<sup>94</sup> the applicant claimed a legitimate expectation on the ground that the Commission had treated infringements of the same rules by other undertakings permissively. However,

this acquiescent attitude had ceased when the Commission adopted a decision against the applicant from breaching the rules. Advocate General Capotorti stated that "conduct of the authorities which is outside the normal application of the law to which it is itself subject cannot however give rise to a legitimate expectation on the part of a person subject to those authorities."<sup>95</sup> The European Court refused to allow a concession by the Commission to make the infringement of the rules legitimate.<sup>96</sup> The issue also arose in *Hauptzollamt Krefeld v. Maizena GmbH*<sup>97</sup> where the applicant challenged a decision by the German Customs Office demanding repayment of a production refund. The practice for calculating the production refund was contrary to the Community rules<sup>98</sup> and the applicant claimed a legitimate expectation that this established practice would not be departed from by the German authorities. The European Court rejected this argument:

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<sup>94</sup> Case 1252/79 [1980] E.C.R. 3753. See also Case 188/92 *Thyssen AG v. Commission* [1983] E.C.R. 3721.

<sup>95</sup> *Ibid.*, 3771 (col. 2) of the opinion of the Advocate General.

<sup>96</sup> *Ibid.*, paragraph 9.

<sup>97</sup> Case 5/82 [1982] E.C.R. 4601. See also Case 316/86 *Hauptzollamt Hamburg-Jonas v. Krücken* [1988] E.C.R. 2213.

"A practice of a Member State which does not conform to Community rules may never give rise to legal situations protected by Community law and this is even so where the Commission has failed to take the necessary action to ensure that the State in question correctly applies the Community rules."<sup>99</sup>

The unlawful practice by the German authorities could not have given rise to a legitimate expectation as it was contrary to the relevant Community rules.

While the case-law of the European Court clearly supports the view that any conduct of either a Community or a national administrative body which is outside or contrary to Community law cannot give rise to a legitimate expectation, this may not be wholly satisfactory. Some of the national legal orders allow the protection of legitimate expectations which are contrary to the law. For instance, German administrative law allows the protection of legitimate expectations contrary to the law to be resolved by a balancing of the interests of legality with those of legal

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<sup>98</sup> *Ibid.*, paragraphs 3-10.

<sup>99</sup> *Ibid.*, paragraph 22.

certainty.<sup>100</sup> Also section 48(2) of the German Administrative Procedure Act 1976 provides that "an unlawful administrative decision granting a pecuniary benefit may not be revoked insofar as the beneficiary has relied upon the decision and his expectation, weighed against the public interest in revoking the decision, merits protection."<sup>101</sup> Under Dutch administrative law, legitimate expectations contrary to the strict application of the law may be protected if the individual concerned acted in reliance on the expectation and that the interests of any third parties are not affected.<sup>102</sup> In order to understand why the European Court has so restricted the application of the principle of legitimate expectations it is essential to know its reasoning. However, the European Court has omitted to explain why it is impossible for an individual

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<sup>100</sup> Decision of the Berlin Administrative Court (1957) 72 D.V.B1 503 affirmed by the Federal Administrative Court (1959) 9 BwerGE 251. See Nolte, *op. cit. supra* no. 13, 203. It may not be a coincidence that the references in the above cases, *Maizena* and *Krücken*, came from German courts. See also Joined Cases 205 to 215/82 *Deutsche Milchkontor GmbH v. Federal Republic of Germany* [1983] E.C.R. 2633; Case C-5/89 *Commission v. Federal Republic of Germany* [1990] E.C.R. I-3437.

<sup>101</sup> Translation taken from Joined Cases 205 to 215/82 *Deutsche Milchkontor GmbH v. Federal Republic of Germany*, *ibid.*, paragraph 28. See also Singh, *op. cit. supra* no. 26, page 46.

<sup>102</sup> Widdershoven and de Lange, *op. cit. supra* no. 13, pages 569-570. See also C.J. Bax "Judicial Control on

to entertain a legitimate expectation as a result of conduct of the administration which is outside Community law. Lord Mackenzie Stuart simply states that it follows logically from an examination of the principle that a practice contrary to Community law cannot give rise to a legitimate expectation.<sup>103</sup> The reasons can only be speculated at. Arguments which could support the rule will therefore be put forward in order that the basis of the rule can be examined.

It could be argued that if unlawful conduct could induce a legitimate expectation then this would allow an administrative body to expand its powers at will.<sup>104</sup> The public is protected from the arbitrary and capricious exercise of public power by ensuring that such bodies only act within the limits of their powers. Just as a body cannot be prevented from exercising its powers, it cannot exercise power which it does not have. The purpose of this restriction on the scope of legitimate expectations could therefore be said to prevent the

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the Administration in the Netherlands" (1992) 4 E.R.P.L. 71, 76-77.

<sup>103</sup> Lord Mackenzie Stuart "Legitimate Expectations and Estoppel in Community Law and English Administrative Law", *op. cit supra* no. 12, 64.

<sup>104</sup> Cf. Lord Greene M.R. in *Minister of Agriculture and Fisheries v. Hulin*, unreported but cited in *Minister of*

arbitrary use of public power. However, it is questionable whether the rule achieves this purpose. Arbitrary administrative conduct may be caused not only by acting outside its powers but also by allowing an innocent individual to rely to their detriment on its unlawful conduct which is later ignored. The harm caused to the individual may be classified as arbitrary. The limitation on legitimate expectations fails to prevent such administrative action because the harm suffered by the individual is not capable of being passed onto the administrative body which created it. Instead the individual has to shoulder the sole burden for the loss it has suffered as a result of relying on the unlawful administrative conduct. It is difficult to see how placing the loss on the individual can deter arbitrary action by the administrative body.

It might be argued that the individual should be expected to know the law applicable in the relevant area and therefore know whether the administrative conduct was lawful or not. However, this is to impose a high burden on the individual. For example, in *Hauptzollamt Hamburg-Jonas v.*

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*Agriculture and Fisheries v. Matthews* [1950] 1 K.B. 148,

*Krücken*<sup>105</sup> the customs official thought that the applicant's export certificate was valid under Community law. It was only after the European Court itself had ruled on the issue that the law became certain. A ruling by the European Court on the interpretation of a provision can of course differ from that of an administrative body but until the European Court makes a ruling the individual will have to submit to the administration's view of the law. The facts of the *Pardini*<sup>106</sup> case provide a good example. A Regulation on the common organisation of cereals provided that the levies to be charged in respect of imports were to be those applicable on the day of importation. The Italian authorities applied this provision so that in the event of a change in the levy rate after acceptance of the import declaration in the customs office, the authority could apply the more favourable rate so long as the goods had not been released. In 1976 the European Court held that this interpretation was invalid.<sup>107</sup> The Italian authority proceeded to recover the difference between the actual levy rate

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153-4.

<sup>105</sup> Case 316/86 [1988] E.C.R. 2213.

<sup>106</sup> Case 338/85 *Fratelli Pardini SpA v. Ministero del commercio con l'estero and Banca toscana (Lucca branch)*, *supra* no. 3.

and the more favourable rate. In such a situation the individual innocently relied on the interpretation given to the rules by the administration. Is it reasonable to suppose that the individual should be able to know that any conduct based on the previous interpretation of the rules was unlawful? What if the individual did take a different view of the legality of an administrative practice which was subsequently vindicated by the European Court. Failure to conform with the different (illegal) view of the administration could risk other hardships. While the principle of legitimate expectations is based on the concept of trust in the administration, the limitation of the principle to only lawful expectations does not protect the trust that the individual may be forced to place in the administration. If the individual is expected to know the law applicable in the face of the administration inadvertently telling him otherwise then the principle would not be protecting trust that could reasonably be expected in the administration. Instead it would impose on the individual impossibly high standards such as

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<sup>107</sup> Case 113/75 *Frecassetti v. Amministrazione delle*

foreseeing a future decision of the European Court reversing a previously accepted interpretation of Community rules.

Finally, it has been stated by the Court of First Instance in *Societe Anonyme à Participation Ouvrière Compagnie Nationale Air France v. Commission*<sup>108</sup> that it follows from the hierarchy of legal rules as laid down in the Treaty and upheld in the case-law that "a Community institution cannot be forced, by virtue of the principle of legitimate expectations, to apply Community rules *contra legem*."<sup>109</sup> The hierarchy of legal rules sets out a validity ranking of Community norms.<sup>110</sup> An act of general application such as a Regulation cannot be altered by an individual decision. As regards legitimate expectations, the reasoning is that if an unlawful decision induces a legitimate expectation, the Regulation, against which the decision is held to be unlawful, would have to be altered. As the hierarchy of legal rules cannot allow an individual decision to amend a general normative measure therefore an unlawful decision cannot induce a legitimate expectation. However, is

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*finanze dello Stato* [1976] E.C.R. 983.

<sup>108</sup> Case T-2/93 [1994] E.C.R. II-323.

<sup>109</sup> *Ibid.*, paragraph 102.

it correct to state that the individual decision would in such a situation be altering the general measure or that the principle of legitimate expectations, as one of the general principles of law, would be enforcing the expectation induced by the decision? The hierarchy of rules demands in a moral situation that an individual decision cannot alter a Regulation. However, if a decision has induced an expectation which was to be enforced, then it would not be the decision itself which would be altering the Regulation but the principle of legitimate expectations. The European Court would be altering the operation of the Regulation as regards the individual by use of the principle of legitimate expectations and not the unlawful decision. If so, then this would be entirely compatible with the hierarchy of rules as the principle of legitimate expectations "forms part of the Community legal order"<sup>110</sup> and is a "fundamental principle"<sup>112</sup> against which Regulations can be declared void.<sup>113</sup> The general principles of law have a validity over all other norms except the Treaty provisions. If the principle of legitimate

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<sup>110</sup> Schwarze, *op. cit. supra* no. 5, pages 248-252.

<sup>111</sup> Case 112/77 *Töpfer*, *supra* no. 1, paragraph 19.

<sup>112</sup> Case 112/80 *Dürbeck*, *supra* no. 1, paragraph 48.

expectations was extended to protecting expectations arising due to unlawful conduct then there would be no contravention of the hierarchy of rules.

An alternative to the limitation of the principle to only lawful expectations has been proposed by Advocate General Darmon who has argued that the European Court should not restrict itself to its previous *dicta* in cases such as *Maizena* in order to reject the possibility of legitimate expectations arising out of unlawful administrative conduct.<sup>114</sup> Rather the European Court ought to determine the scope of such *dicta* with regard to its previous decisions which show that the principle exists in order to achieve a balance between equity and the rigour of law. If the principle were to be restricted as in *Maizena* then a large part of its purpose to temper the rigidity of the law would be removed. It is just as possible, if not more so, for administrative bodies to unfairly frustrate the expectations of individuals where that expectation was induced by

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<sup>113</sup> See, e.g., Case 120/86 *Mulder supra* no. 30.

<sup>114</sup> Case 210/87 *Padovani, supra* no. 25, paragraph 32 of the opinion of the Advocate General. See also Case 161/88 *Binder, supra* no. 8, paragraph 9 of the opinion of the same Advocate General.

unlawful administrative conduct. Therefore, the inducement of an unlawful legitimate expectation should in principle be possible of being considered as to whether it is legitimate or not. This approach does not accept that every unlawful expectation should be enforced as legitimate but that there seems no good reason why such expectations should not be capable of being considered as to whether they are worthy of protection. Were the European Court to allow unlawful conduct to raise an expectation then this would necessarily involve a weighing up of the competing interests to determine whether the balance lay with the public interest in legality or the private interest in legal certainty as in German and Dutch administrative law. Support for such an approach can be found in the *SNUPAT* case<sup>115</sup> which concerned the withdrawal of unlawful measures. The European Court stated that in determining whether unlawful measures could be withdrawn depended on a balance of interests:

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<sup>115</sup> Joined Cases 42 & 49/59 *Société Nouvelle des Usines de Pontlieue - Aciéries du Temple (SNUPAT) v. High Authority of the European Coal and Steel Community* [1962] E.C.R. 53.

"...the principle of respect for legal certainty, important as it may be, cannot be applied in an absolute manner, but that its application must be combined with that of legality; the question which of these principles should prevail in each particular case depends upon a comparison of the public interest with the private interests in question..."<sup>116</sup>

If conduct outside the scope of Community law were to be allowed to induce an expectation then a similar balancing act would be required in order to determine the comparative weight between the competing interests. That such an approach already exists in a related area of law and in two of the national legal systems provides strong reasons for the adoption of a similar balancing act in relation to the protection of unlawful legitimate expectations in Community law.

## **7. The Legitimacy of an Expectation**

Should an expectation pass the tests of objective reasonableness, it then becomes necessary to determine whether it has a legitimacy which

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<sup>116</sup> *Ibid.*, 87.

makes it worthy of protection. The European Court will assess the legitimacy of an expectation by a careful weighing up of the competing interests involved.

#### *A. The Balancing of Interests*

For an individual to place trust in his expectations is to anticipate his future relationship with the administration.<sup>117</sup> The protection of such expectations concerns the temporal dimension of how far they can be sustained in light of the changing circumstances and needs of public administration. The principle of legitimate expectations enables the European Court to determine whether the individual's trust can be maintained in view of such changes by undertaking a balancing exercise of the individual's expectation against the competing public interest considerations put forward by the administration. Determining whether an expectation is legitimate and therefore worthy of protection presupposes a weighing up of the competing private and public

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<sup>117</sup> See generally Luhmann, *op. cit. supra* no. 29, chapter 2.

interests.<sup>118</sup> The legitimacy of an expectation is not absolute but is relative to the competing strengths of the public and private interests and it may change with the requirements of the public interest.

It is for the administration to determine what the public interest requires, for example, whether protective measures ought to be adopted. In doing so the individual's expectations are relevant. Should the public interest require such a change then the administration will have to decide whether it overrides the individual's expectation. Deciding what the requirements of the public interest are and the primary weighing up of it with the affected private interests are tasks for the administration. However, should the individual claim an unjustifiable disappointment of his expectation it is clear that the European Court will review it on the basis of whether there is a fair and proportionate nexus between the public interest objective sought after and the measure adopted. As will be shown below, the European Court asks

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<sup>118</sup> See Case 1/73, *supra* no. 16, 741 (col. 1) of the opinion of Advocate General Roemer; Borchardt, *op. cit. supra* no. 4, 311-312, 314; Schwarze, *op. cit. supra* no. 5, pages 952-953; Widdershoven and de Lange, *op. cit. supra* no. 13, page 569.

whether the public interest relied upon is predicated on a logical and consistent basis and, if so, whether there were alternative means of protecting the public interest which do not necessitate the infringement of the individual's expectation or, alternatively, could the expectations if enforced possibly subvert the public interest claimed. If the public interest might well be undermined by the protection of the expectation, then it is clear that it must be disappointed. Advocate General Trabucchi has stated that "there can be no doubt that the interests of individuals, even if they form a group of some size, must take second place" when the demands of the public interest require it.<sup>119</sup> The function of the European Court is not to substitute its view of the desired public interest objective for that of the administrator but to determine whether the disappointment of the individual's expectation is indispensable for the attainment of that objective. Should another option be open to the administrator which does not require the infringement of the expectation but is still capable of securing the public interest then this will be preferred.

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<sup>119</sup> Case 74/74 *supra* no. 10, 559 (col. 1) of the opinion

Conversely, should the protection of the expectation lead to the subversion of the public interest then it cannot be enforced. This process of the European Court reviewing the balance struck by the administration between the competing public and private interests determines the legitimacy of an expectation and whether it is worthy of protection.

In the *CNTA* case the European Court found that the public interest did not override the applicant's expectation. The case arose in the context of monetary compensatory amounts. The applicant had sought the advance fixing of refunds for the export of colza seeds subject to a deposit and had agreed to export the products. Before the goods were exported the Commission abolished the compensatory amounts applicable in that Community sector. The applicant claimed a legitimate expectation that the compensatory amounts would continue for deliveries in progress and that any losses suffered would be compensated. The European Court found that the Commission had ignored the legitimate expectations of the traders in the applicant's position. It is in the opinion of

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of Advocate General Trabucchi.

Advocate General Trabucchi that the reconciliation of the competing interests was considered. The Advocate General approached the matter by acknowledging that if the public interest so required then private interests must be subordinated. However, it would be dangerous to a general answer to the question of when the Community should adopt appropriate measures in order to protect such interests. The Advocate General preferred to deal with such issues as and when they arise. In view of the particularity of each case, it does seem dangerous to lay down any generalised principles to be applied in all cases. The balancing of interests will always be coloured by their nature and context. Advocate General Trabucchi proceeded to examine the competing interests involved in the present case by asking what was the reason for the abolition of the applicable compensatory amounts. The Regulation had declared that the application of compensatory amounts was no longer necessary in relation to the colza seed sector as 84% of Community production had either been sold or was in the process of being sold. The purpose of compensatory amounts had been to protect the Community market by preventing

agricultural prices from being compromised. The Commission had reasoned that as only 16% of the internal market in colza seeds remained, this did not present a threat to the Community and therefore abolished the relevant compensatory amounts. However, of that 84% of production, 30% was regarded as having been committed for sale because it had either been the subject of advance fixing in respect of export refunds or supplementary aids but had not yet been delivered to the purchaser. So while 84% of the Community production was considered to have been sold or in the process of being sold, 30% of this had been subject to advance fixing but had not yet been delivered. Were the compensatory amounts to be abolished then this would affect that 30% yet to be delivered as compensatory amounts are paid or levied only on the delivery of the goods. The Commission had done nothing to meet the expectations in respect of the advance-fixing certificates obtained by the producers within this 30% band of production. In Advocate General Trabucchi's view, to place support on the fact that this proportion of Community production had for all intents and purposes now gone out of the Community in order to conclude that

this same percentage ought not to have the benefit of compensatory amounts appeared to have "little in common with the principles of fair dealing and good faith which should govern the attitude of a public authority towards those subject to control."<sup>120</sup> An inconsistency existed between the reason for the abolition of the compensatory amounts and the fact that no account had been taken of the 30% production which had not yet been delivered. The purpose of compensatory amounts was to maintain traditional trade patterns. The Commission was claiming that this purpose had been fulfilled on the basis that some traders, like the applicant, had undertaken commercial transactions due to the advance-fixing of exports refunds whilst simultaneously wanting to abolish the compensatory amounts applicable to such traders due to the advance-fixing of export refunds. According to Advocate General Trabucchi:

"There is, therefore, a discernible inconsistency between the underlying reason for the provision...[abolishing the compensatory amounts]...and the fact that no account was taken

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<sup>120</sup> *Ibid.*, 560 (col. 1) of the opinion of the Advocate General.

also in another respect of that part of Community output which, being for all intents and purposes committed for export, was an important element in building up the economic situation which led to the decision to abolish compensatory amounts."<sup>121</sup>

As an inconsistency existed in the justification for the abolition of compensatory amounts for the 30% of production committed for sale but not yet delivered, the expectations of traders in that group, such as the applicant, were legitimate.

The reasoning of the Advocate General is instructive. By inquiring into the basis of the provision which infringed the applicant's expectation, it could be examined whether it had a well-reasoned basis. As an illogicality existed, the expectations could not be infringed. The public interest which the Commission argued compelled the disappointment of the expectation was predicated on a misconception: that the infringement of the expectations was justified by a measure which in fact ignored such expectations. The public interest could not therefore override the applicant's interests in the maintenance of its expectations.

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<sup>121</sup> *Ibid.*, 560 (col. 2) of the opinion of the Advocate General.

Should the administration claim that the public interest requires the disappointment of an expectation then a logical and coherent justification must support the existence of the public interest. How the European Court resolves a direct conflict between the public interest and the protection of an expectation is shown in the next case.

In *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen*<sup>122</sup> a challenge was made to a Regulation which provided for the temporary suspension of imports of Chilean apples into the Community. The applicant, who had concluded contracts for the importation of apples before the adoption of the Regulation, claimed a legitimate expectation that transitional measures should have been introduced with regard to traders in its position. The public interest underpinning the temporary suspension of imports was that the sector was threatened with serious disturbances which could have endangered the objectives of the Common Agricultural Policy.<sup>123</sup> The European Court held that if this public interest was to be achieved then the expectations of traders must give way:

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<sup>122</sup> Case 112/80 [1981] E.C.R. 1095.

".. in view of the needs which the temporary suspension of imports met, transitional measures which exempted contracts already entered into from the suspensions of imports would have robbed the protective measure of all practical effect by opening the Community market in dessert apples to a volume of imports likely to jeopardise that market."<sup>124</sup>

If transitional measures had been made to protect the expectations of traders such as the applicant then this could have had the effect of making the temporary suspension ineffective and thereby undermining the public interest in protecting the market from serious disturbances. The need for transitional measures and protective measures were in direct conflict: one could not be achieved without the other. In the absence of any other means available to achieve the public interest

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<sup>123</sup> See Article 39 EC Treaty.

<sup>124</sup> *Ibid.*, paragraph 50. See also Case 78/77 *Firma Johann Lührs v. Hauptzollamt Hamburg-Jonas* [1977] E.C.R. 169, paragraph 6; Case 127/78 *Hans Spitta & Co. v. Hauptzollamt Frankfurt am Main-Ost* [1979] E.C.R. 171, paragraph 9.

objective, the applicant's expectation had to give way.<sup>125</sup>

In *Spagl v. Hauptzollamt Rosenheim*<sup>126</sup> the European Court found that although the public interest required the adoption of new measures, this could be achieved without the infringement of the applicant's expectations. The case followed the *Mulder* litigation on milk quotas. Following that ruling new provisions had been introduced<sup>127</sup> which were also challenged as contrary to the principle of legitimate expectations. The applicant had a made non-marketing undertaking which ended on 31st March 1983 and his application for a reference quantity was refused. The first question concerned whether Article 3(a), inserted into Regulation 857/84<sup>128</sup> following *Mulder*, could exclude the grant of a special reference quantity to producers whose period of non-marketing ended before 31st December 1983 or before 30th September 1983. The introduction of this cut-off period for the grant

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<sup>125</sup> See also Case C-152/88 *Sofrimport SARL v. Commission*, supra no. 51 where the Commission did not demonstrate the existence of an overriding public interest to justify the application of suspensory measures to Chilean apples in transit.

<sup>126</sup> Case C-189/89 [1990] E.C.R. I-4539. See also Case C-217/89 *Pastätter v. Hauptzollamt Bad Reichenhall* [1990] E.C.R. I-4585.

<sup>127</sup> See Cardwell, *op. cit. supra* no. 34, pages 48-51.

of a special reference quantity excluded those producers, such as the applicant, whose non-marketing undertaking had expired at any time between 1981 and 1983. For those producers who had made a non-marketing undertaking their legitimate expectations had been affected because the cut-off date affected them precisely because they had made the undertaking. The Council and Commission had argued that the public interest required the insertion of a cut-off date as the effectiveness of the system could be impaired by encouraging other producers to resume production who would not otherwise have done so but wished to profit from the precious asset of a milk quota. The European Court stated that the specific restriction of a cut-off date could not be justified by reasons relating to the public interest as that interest could be safeguarded by measures of a general nature.<sup>129</sup> If the general public interest required a restriction to the scheme, then such an objective could have been better served by a measure of general application rather than specific restrictions which affected such producers

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<sup>128</sup> Article 3(a) was inserted by Regulation 764/89 OJ 1989 L 84, p. 2.

precisely because they had made a non-marketing undertaking. Any restriction to be made in the general interest could have been achieved by a general measure which affected everyone in the sector and did not specifically affect those producers such as the applicant. An alternative course was therefore open to the Community which it should have pursued rather than infringe the applicant's expectations.

The second question concerned whether Article 3(a) could restrict the special reference quantity provided for the producers who had made a undertaking to only 60% of the quantity of milk delivered by the producer during the twelve months preceding the non-marketing undertaking. As those producers who had made an undertaking had not produced any milk during the reference year chosen by the Member State, some other form of calculation had to be devised in order to determine the special reference quantity they were to be given. The chosen method was to use a representative period before the undertaking was made. From this figure a reduction was to be made to ensure that such producers were not accorded an undue advantage when

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<sup>129</sup> *Ibid.*, paragraph 15. See also paragraph 32 of the

compared with those producers who had delivered milk during the chosen reference year. The special reference quantity of a producer who had made an undertaking was to be limited to only 60% of the milk delivered or produced in the year preceding the non-marketing undertaking. The restriction was also challenged as contrary to the principle of legitimate expectations. The European Court stated that the principle precluded the reduction rate being fixed at such a high level (40%) which affects those producers precisely because they made a non-marketing undertaking. Having obtained information from the Commission the European Court found that the rates of reduction applicable to producers who had not made an undertaking did not exceed 17.5%.<sup>130</sup> Therefore, the 40% reduction was over twice the highest reduction for the other producers. This difference in treatment specifically affected such producers precisely because of their non-marketing undertaking. In response the Council and Commission claimed that it was not possible to give such producers special

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opinion of Advocate General Jacobs.

<sup>130</sup> The 17.5% reduction being the highest reduction applicable for any producer awarded a reference quantity following a chosen reference year was made by the United Kingdom, *ibid.*, paragraph 43 of the opinion of Advocate General Jacobs.

reference quantities of more than 60% of their milk deliveries without undermining the objective of the scheme to deal with structural surpluses in the milk market. The Commission had estimated that one million tonnes of milk would be covered by the requests for the grant of a special reference quantity by those producers who had made an undertaking whereas the Council considered that 600,000 tonnes of milk was the largest volume compatible with the objective of the scheme. The Community reserve had been increased by 600,000 tonnes and the reference quantities of the other producers had remained unchanged. In other words, the producers who had made the undertakings were getting as much as was thought possible without undermining the operation of the whole scheme. The European Court rejected this argument. It stated that even if a larger increase than the Community reserve could not be contemplated without the risk of disturbing the balance of the milk market, an alternative existed to the 60% rule. The Community could have reduced the reference quantities of the other producers proportionally by a corresponding amount so as to enable the allocation of larger reference quantities to the producers who had made

an undertaking.<sup>131</sup> It was possible for the reference quantities of the other producers to be lowered in order that producers who had made an undertaking could have a reference quantity that was the same. This was an alternative way of protecting the legitimate expectations of such producers whilst upholding the effectiveness of the scheme.

The nature of the expectations recognised in *Mulder* was that those producers who had made a non-marketing undertaking would not be treated any differently as a result. In the *Spagl* case the European Court rejected the other restrictions placed on such producers as the public interest objective of those restrictions could have been achieved by other means which did not require the infringement of the producers' expectations. The tenor of the ruling is that other producers should similarly be affected by any restriction made in the public interest and not only those producers who made an undertaking. What was decisive was the matching up of the content of the expectation with the Regulation which infringed it and the public interest purpose. The case shows that the European Court is prepared to examine alternative options

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<sup>131</sup> *Ibid.*, paragraph 28.

which may require the reprocessing of all reference quantities in order to protect the legitimate expectations of a certain class of producer.

The following comments can be made with regard to the balancing of interests and the legitimacy of expectations. When a reasonable expectation is infringed in the absence of an overriding public interest it is a legitimate expectation worthy of protection. When a public interest is claimed to justify the infringement of an expectation, it must be balanced against the interests of the individual. This balance is first of all for the administration to strike but it can be reviewed by the European Court. If the public interest so requires then the individual's expectation must be infringed. If the public interest is predicated on an illogical or inconsistent basis, as in *CNTA*, then it cannot override the expectation. Should the content of the expectation and of the public interest conflict so that the public interest cannot be safeguarded without infringement of the expectation, as in *Dürbeck*, then the public interest must prevail. Alternatively, if fulfilment of the expectation might well subvert the public interest the expectation must be disappointed.

However, if there are other means of safeguarding the public interest open to the administration which do not necessitate the infringement of expectation, as in *Spagl*, then the expectation is worthy of protection. In deciding this question the European Court will take account of the following: the nature of the expectation, the public interest objective and the justification underpinning this, the availability of alternative measures and any detrimental reliance by the applicant. The case-law shows that the European Court will determine whether the infringement of the individual's expectations was indispensable for the achievement of the public interest objective by looking at all the relevant circumstances.

#### *B. Detrimental Reliance*

Whether the applicant has acted to his detriment in reliance on an expectation will be a relevant factor in assessing whether that expectation deserves protection. For example, in *CNTA* a deposit was paid by the applicant in order to be awarded the advance fixing of aid and refunds on exports, which would have been lost had the

expectation been frustrated. Also the applicant had concluded contracts on the basis of the advance fixing. Both of these actions formed detrimental reliance by the applicant which went into the determination of whether the expectation was legitimate.<sup>132</sup> In the *Mulder* case the detrimental reliance by the applicant was crucial for the protection of their expectations. The European Court reasoned that it was because producers who voluntarily made the non-marketing undertaking that they had a legitimate expectation not to be treated any differently precisely because they made the undertaking. The producers' detrimental reliance was their suspension of milk production. However, while the existence of detrimental reliance may be an indication that an expectation is worthy of protection, it is not always a necessary condition.<sup>133</sup> For example, in the "staff salaries" case the European Court found that the staff officials had a legitimate expectation without the expectation being detrimentally relied upon by the officials. The existence of detrimental reliance will therefore be a factor to be taken into account

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<sup>132</sup> Case 74/74 *supra* no. 10, paragraphs 42 and 42 of the Court's judgment and 560 (col. 1) of the opinion of Advocate General Trabucchi.

when the European Court balances the competing interests.

### **8. Liability for the Frustration of Legitimate Expectations**

If an individual has successfully claimed the breach of a legitimate expectation, then it is also possible to claim damages for the loss arising from that breach. Article 215(2) provides that the Community shall, in accordance with the general principles of law, make good any damage caused by it. As regards the liability of the Community for legislative acts which involve choices of economic policy the European Court has held that the Community will not incur non-contractual liability unless there has been a sufficiently flagrant violation of a superior rule of law for the protection of the individual.<sup>134</sup> An applicant can then secure damages for the losses resulting from the breach of a legitimate expectation if there was

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<sup>133</sup> Schwarze, *op. cit. supra* no. 5, page 952.

<sup>134</sup> Case 5/71 *Aktien-Zuckerfabrik Schöppenstadt v. Council* [1971] E.C.R. 975, paragraph 11. See generally H.G. Schermers, T. Heukels and P. Mead (eds.), *Non-Contractual Liability of the European Communities* (Martinus Nijhoff Publishers, 1988); S. Weatherill and P. Beaumont *EC Law. The Essential Guide to the Legal*

a sufficiently serious violation of a legitimate expectation. In *CNTA* the European Court held that the Community could be held liable to compensate for damage suffered as a result for the breach of legitimate expectations.<sup>135</sup> However, in subsequent proceedings it was found that the applicant had not in fact suffered any loss due to the disappointment of the legitimate expectation and was therefore not entitled to compensation.<sup>136</sup> In *Sofrimport SARL v. Commission*<sup>137</sup> the Commission was found to have breached the expectations of those traders with goods in transit by adopting protective measures prohibiting such goods from the Community market. The European Court held that the Commission had completely failed to take account of traders with goods in transit, that the applicant had suffered damage beyond the limits of risks inherent in the business and that no overriding public interest existed. Therefore the Commission had to make good that damage resulting from its failure to adopt transitional measures.

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*Workings of the European Community.* (London, 2nd edn., 1995) pages 313-319.

<sup>135</sup> Case 74/74, *supra* no. 10, paragraph 43.

<sup>136</sup> Case 74/74 [1976] E.C.R. 797.

<sup>137</sup> Case C-152/88, *supra* no. 51.

Following the *Mulder* and *Spagl* cases the milk producers sought damages for loss arising from both the total and permanent exclusion from the Community milk market and the more limited exclusion due to the 60% rule.<sup>138</sup> The European Court followed its earlier case-law that liability for the choice of economic policy will only arise where there has been a manifest and grave disregard by the Community for the limits of its powers. Concerning liability for the total and permanent exclusion of the producers from the milk market, the European Court found that the Community had committed a manifest and sufficiently serious breach of legitimate expectations. The Community had completely failed to take account of the situation of those producers who had made a non-marketing undertaking without invoking any higher public interest. The European Court considered that the breach of a superior rule for the protection of the individual was all the more obvious because the total and permanent exclusion from the market was unforeseeable and went beyond the bounds of normal economic risks inherent in the milk market. The

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<sup>138</sup> Joined Cases C-104/89 and C-37/90 *Mulder v. Council and Commission* [1992] E.C.R. I-3061. See T. Heukels

Community had therefore exceeded the margin of error allowed in such decisions and made an inexcusably unlawful decision<sup>139</sup> and was liable for loss arising from this breach. The European Court then considered liability for the more limited exclusion from the milk market arising from the rule that such producers could be awarded special reference quantities equal to 60% of their milk deliveries in the year before they entered into the undertaking. While this rule had been found to be contrary to the legitimate expectations of the producers in the *Spagl* case, it was not a sufficiently serious breach of that principle for the Community to incur liability for the loss arising from it. The European Court gave two reasons why the 60% rule did not give rise to damages. First, the rule did allow the producers to resume their activities as milk producers and therefore the Council had not failed to take account of their situation. Secondly, the rule was a choice of economic policy made in pursuance of a higher public interest. The European Court did not consider that the margin of error allowed to the

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(1993) 30 C.M.L.Rev. 368; Cardwell, *op. cit. supra* no. 34, pages 60-65.

Community had been exceeded as the rule had been adopted in the interests of a higher public interest: the need to tackle the problem of milk surpluses and the need to strike a balance between those producers who had made an undertaking and the other producers subject to the scheme. As the Community had taken account of the producers' expectation and acted for a higher public interest, it had not manifestly or gravely disregarded its powers or made an inexcusable breach of legitimate expectations in adopting a legislative measure which involved choices of economic policy. The European Court did not take account of the higher public interest as a means of repeating the balancing test undertaken in *Spagl* to determine the legitimacy of the producers' expectation but in order to determine whether the Community was liable for the losses consequent upon the breach of their expectations. While a measure may be found to be contrary to the principle of legitimate expectations the European Court will require that the error be both manifest and inexcusable in order that the Community be liable to compensate for the loss accruing from it.

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<sup>139</sup> See paragraph 15 of the opinion of Advocate General

## 9. Conclusion

No attempt will be made to summarise the preceding analysis.<sup>140</sup> While the principle of the protection of legitimate expectations is a central part of the unwritten general principles of Community law, its enforcement has been limited because of the importance attributed to the functioning of the market and the need for the Community to have a broad scope of discretion. While in most cases the European Court has found some reason why an expectation does not require protection, in a few cases it has protected expectations even though this demanded administrative changes, as in the *Mulder* and *Spagl* cases. A claim of legitimate expectation will only be successful if there is a clear case of unreasonable treatment and the administration grossly misjudged the protection of the individual's expectations. The principle is therefore a means of protecting the individual's

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Van Gerven.

<sup>140</sup> The European principle of legitimate expectations will be compared with the English principle in chapter 5, section 9.

expectations without defeating the public interest requirements in public administration.

## Chapter 5: The Principle of Legitimate Expectations in English Law

### 1. Introduction

The introduction of the principle of legitimate expectations into English law is an example of the means and difficulties of transplanting a new principle within an established legal framework. At first *obiter* comments refer to the phrase without elucidating its meaning. Second, dissenting judgments show it to be gaining more ground. This is followed by cases where the principle is argued before the court but found not to apply on the facts of the instant case. Finally, a court makes a decision relying on the principle. However, the ambit and extent of that principle seems uncertain. Judges may state that the principle has an important place in the growing case-law of judicial review but decline to examine it thoroughly<sup>1</sup> or if there is discussion it seems incomplete.<sup>2</sup> The development of the principle of

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<sup>1</sup> *In re Findlay* [1985] A.C. 318, 338C-D per Lord Scarman.

<sup>2</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 (hereinafter the *GCHQ* case).

legitimate expectations reflects each of these evolutionary stages. The purpose here is to examine the case-law of the English courts concerning the principle in order to enable a comparative evaluation with Community law.

## **2. The Origins of "Legitimate Expectations" in English Law**

While the use of legitimate expectations by the courts is comparatively modern, it is possible to trace the principle further back into history. A precursor to the principle of legitimate expectations can be found in the work of Bentham who advanced a "disappointment-prevention principle" as part of his principle of utility. An expectation was to be fixed if it was rational and consistent with the greatest-happiness principle.<sup>3</sup> Judicial use of the phrase legitimate expectations can be traced back to 1881 when James L.J. stated that it was a presumption of statutory interpretation that an Act of Parliament is not to be interpreted as interfering with any legal rights

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<sup>3</sup> J. Bentham "Official Aptitude Maximised; Expense Minimised" (1830) in *The Works of Jeremy Bentham Volume*

or any legitimate expectations of any person whatsoever if the statute would allow that interpretation.<sup>4</sup> The application of the principle to the exercise of public power has featured in the work of Hayek. In a discussion of governmental interference with the private sphere, Hayek recognised that "it is necessary that the individuals affected be not harmed by the disappointment of their legitimate expectations but be fully indemnified for any damage they suffer as a result of such action."<sup>5</sup> The modern origins of the phrase by the English courts stem from its use by Lord Denning M.R.

In *Schmidt v. Secretary of State for Home Affairs*<sup>6</sup> Lord Denning M.R. used the phrase "legitimate expectations" in an *obiter* comment. The case concerned two U.S. citizens who had come to the U.K. in order to study at a college of scientology. The time limits on their permits to stay in the UK had expired and they had applied to the Home Secretary for an extension which was refused without giving them a hearing. Lord Denning

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Five (J. Bowring (ed.), New York, 1962) pages 263, 266, 277.

<sup>4</sup> *In re Barker* (1881) 17 Ch. D. 241, 243.

<sup>5</sup> F.A. Hayek *The Constitution of Liberty* (London, 1960) page 217.

<sup>6</sup> [1969] 2 Ch. 149.

found it was not necessary in this case to give the applicants an opportunity to make representations. A hearing would only have to be given where a person had a right or an interest or, Lord Denning added, "some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."<sup>7</sup> Such a legitimate expectation would arise, continued Lord Denning, if the applicants' permits had been revoked before their time limits had expired. In such a case the applicant "ought, I think, to be given an opportunity of making representations; for he would have a legitimate expectation of being allowed to stay for the permitted time."<sup>8</sup>

This passing mention of the phrase "legitimate expectation" shines out from the judgment. The arguments of counsel did not refer to it and no case was cited to support it as a legal concept. Where did it come from? According to Lord Denning, some twenty years later, his use of the phrase "came out of my own head and not from any continental or other source."<sup>9</sup> The next use of the

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<sup>7</sup> *Ibid.*, 170F.

<sup>8</sup> *Ibid.*, 171A per Lord Denning M.R. See also Widgery L.J. (as he then was) at 173F.

<sup>9</sup> From a letter by Lord Denning quoted in C.F. Forsyth "The Provenance and Protection of Legitimate Expectations" (1988) 47 C.L.J. 238, 241. See also *The*

phrase was also by Lord Denning in *Breen v. Associated Engineering Union*.<sup>10</sup> Breen had been elected as a shop steward at his place of employment. The district committee of Breen's trade union refused approval of the appointment to the post without giving him either a hearing or the reasons for the decision. When Breen challenged this a majority of the Court of Appeal dismissed his appeal. Lord Denning, dissenting, stated that the law regarding the right to be heard was the same as when he had set it out in *Schmidt*: if someone sought an appointment or some other post that was a privilege the applicant could be rejected without first being given a hearing or reasons. If, on the other hand, the applicant had some right, interest or legitimate expectation then a hearing and reasons should be given if it would be unfair to do otherwise. Lord Denning went on to find in favour of the applicant on the basis that he had a legitimate expectation of being approved unless there were good reasons given by the district committee because he had been elected to

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*Denning Interviews - Administrative Law* (V.H.S. Videocassette, Interviewer: Professor H.W.R. Wade, Butterworths, 1984).

<sup>10</sup> [1971] 2 Q.B. 175.

the post.<sup>11</sup> Some commentators view these *dicta* as the foundation of the inception of the phrase and the concept of legitimate expectations in English law.<sup>12</sup> Whether this is correct compels close attention.

Arguably the example instanced by Lord Denning in *Schmidt* and the basis of his dissent in *Breen* are not applications of the concept of legitimate expectations. In both cases the phrase was used by Lord Denning as a general belief that the claimant was entitled to justice and for "fair-play" to be done by giving the applicants procedural protection because of the threat to their interests. This view would appear to sit comfortably with Denning's distinctive views on the ability of the judge to fashion justice to the requirements of the particular case. Furthermore, the existence of a representation or a settled practice is an essential requirement for the application of the

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<sup>11</sup> *Ibid.*, 191F.

<sup>12</sup> G. Ganz "Legitimate Expectation: A Confusion of Concepts" in C. Harlow (ed.), *Public Law and Politics* (London: Sweet & Maxwell, 1986) page 146; R. Baldwin and D. Horne "Expectations in a Joyless Landscape" (1986) 49 M.L.R. 685, 694; P. Elias "Legitimate Expectations and Judicial Review" in J. Jowell and D. Oliver (eds.), *New Directions in Judicial Review* (London: Stevens & Sons, 1988) page 37; B. Hadfield "Judicial Review and Legitimate Expectations" (1988) 39 N.I.L.Q. 103, 104.

concept.<sup>13</sup> However, in the example given in *Schmidt* there was no administrative conduct which could have induced the belief in the individual's mind that he would be given a hearing if the permit was revoked before its time limit had expired. It would be more accurate to say that the right to be heard was based on a deprivation of a right or interest and not a legitimate expectation.<sup>14</sup> In *Breen* the district committee of the trade union had neither made an undertaking or built up a past practice which could raise a reasonable expectation that a hearing and reasons would be given to the applicant. Neither was there a policy adopted by the district committee to the same effect. Exactly what was the basis of the legitimate expectation in that case is difficult to discern. Lord Denning thought the expectation arose because the applicant had been democratically elected by his fellow employees. The concept requires the public authority to induce a reasonable expectation, yet this expectation was not induced by the district committee. The usage of the phrase by Lord Denning in both cases is contrary to the modern cases on

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<sup>13</sup> *Supra* no. 2, per Lord Fraser, 401B.

the principle of legitimate expectations. For example, Lord Denning classified the *Padfield* case<sup>15</sup> which concerned the rule that an exercise of discretion must not frustrate the policy and objects of a statute, as a legitimate expectation case.<sup>16</sup>

Judging such early cases against more recent cases may, for some, be looking back with hindsight but it is necessary to do so in order to discern the origins of the principle in English law. It is contended here that Lord Denning was using the phrase in the *Schmidt* and *Breen* cases as a way of achieving procedural protection for the applicants when the rules of natural justice, or the duty to act fairly, did not by themselves extend to such situations. This, of course, involved a sleight of hand: what compels the giving of a hearing and, in *Breen*, the giving of reasons, when the existing law on administrative procedures would not provide such procedural protection? Lord Denning's failure to answer this may explain why so little was said about the content and operation of this principle

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<sup>14</sup> S.A. deSmith, H. Woolf and J. Jowell *Judicial Review of Administrative Action* (London: Sweet & Maxwell, 5th edn., 1995), page 429, footnote 50.

<sup>15</sup> *Padfield v. Ministry of Agriculture, Fisheries and Food* [1968] A.C. 997.

<sup>16</sup> *Supra* no. 10, 191C.

except the merest reference to the catch-phrase of "legitimate expectation".<sup>17</sup> The truth is that it was only ever a way of achieving what was thought to be required by justice when more established concepts could not do so. *Cinnamond v. British Airports Authority*<sup>18</sup> provides further support for this view. There six taxi-cab drivers, each of which had convictions for illegally touting for passengers outside Heathrow airport, challenged a by-law which prohibited any person from entering the airport except if they were a genuine airline passenger. The applicants claimed that as this prohibition affected their livelihood they had a legitimate expectation of a hearing. Lord Denning rejected this submission. The applicants had no legitimate expectation of being heard because of their conduct. Lord Denning reasoned that the taxi-cab drivers' long record of convictions and unpaid fines allowed the British Airport Authority to make the by-law without affording them a hearing. However, if the conduct of the applicants had precluded them from having a legitimate expectation

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<sup>17</sup> In *Lloyd v. McMahon* [1987] A.C. 625, 714G Lord Templeman refused to be persuaded by extravagant language (that an oral hearing was an objective fundamental right) to elevate the "catch-phrase [of legitimate expectation] into a principle."

<sup>18</sup> [1980] 2 All E.R. 368.

of being heard, there was, as in *Schmidt* and *Breen*, no undertaking or existence of a past practice upon which to base such an expectation. This case is not an example of the application of the principle or of the cancellation of a legitimate expectation because the possibility of such an expectation never existed. The public authority's conduct is directly related to the existence of a legitimate expectation. For the court to maintain that a legitimate expectation did not exist or that it was cancelled due to the conduct of the claimants, as it did in *Cinnamond*, is contrary to this and only serves to explain the real nature of the usage of the phrase by the court. In that case the court used the phrase "legitimate expectations" as a mask to cover the non-intervention by the court upon the basis of the court's own subjective assessments as to the requirements of justice needed to satisfy the applicant's generalised expectation of justice. Due to their unmeritorious conduct the claimants could not expect to be justly treated by being afforded a hearing.

If the real basis of such decisions is that the individual has some form of protectable interest which required procedural protection, then

they cannot be justified as examples of the principle of legitimate expectations. Although this class of case has been recognised as an instance of legitimate expectation,<sup>19</sup> as Cane states, the use of the phrase in this sense is redundant as the basis of procedural protection is the applicant's interest and calling it a legitimate expectation does not make the interest any stronger.<sup>20</sup> Simon Brown L.J. has acknowledged that this class of case is "no more than a recognition and embodiment of the unsurprising principle that the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit."<sup>21</sup> In such cases there were not any reasonable expectations induced by the conduct of the public authority in question. Such expectations

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<sup>19</sup> See *R. v. Devon County Council ex parte Baker* [1995] 1 All E.R. 73, 88j-89a per Simon Brown L.J.

<sup>20</sup> P. Cane *An Introduction to Administrative Law* (Oxford: Clarendon Press, 3rd edn., 1996) page 180. For examples of legitimate expectations being used to require procedural fairness for protectable interests see *McInnes v. Onslow Fane* [1978] 3 All E.R. 211, 218b-g; *O'Reilly v. Mackman* [1983] 2 A.C. 237, 275E-F; *R. v. Secretary of State for Transport ex parte Greater London Council* [1986] 1 Q.B. 556, 587H; *R. v. Rochdale Metropolitan Borough Council ex parte Schemet* (1993) 91 L.G.R. 425, 445-446.

<sup>21</sup> *R. v. Devon County Council ex parte Baker*, *op. cit.* *supra* no. 19, 91a.

as existed were just hopes which arose due to the interests of the claimants which, Lord Denning thought, in justice deserved some form of procedural protection. Therefore, the phrase "legitimate expectations" was used to enable procedural protection to fasten on the individual's protectable interests. The conceptual distinction between the concept of legitimate expectations proper and the "protectable interest" cases is this: legitimate expectations impose a duty to act fairly, to honour reasonable expectations raised due to the conduct of the public authority whereas protectable interests may compel a right to a hearing for the claimant because the decision threatens to affect his interest which arises regardless of the conduct of the public authority.<sup>22</sup> The protection of a legitimate expectation due to the conduct of the public authority promotes certainty and consistent administration which is distinct from the imposition of procedural fairness in a decision which may affect an individual's rights or interests.<sup>23</sup> The "protectable interest" type of case involves nothing more than the courts

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<sup>22</sup> deSmith, Woolf and Jowell, *op. cit. supra* no. 14, pages 423-424.

<sup>23</sup> *Ibid.*

requiring a greater content of procedural fairness as "[t]he requirements of natural justice must depend on the circumstances of the case."<sup>24</sup> This type of case has been seen as resurrecting the distinction between rights and privileges in a different form.<sup>25</sup>

The difference between a protectable interest and a legitimate expectation is well illustrated by the case of *R v. Assistant Commissioner of Police of the Metropolis ex parte Howell*.<sup>26</sup> The applicant had been a taxi-cab driver for 12 years and, at the age of 50, was required to provide medical evidence of his fitness to continue to hold his licence. The Assistant Commissioner refused to renew his licence and did not let Howell know the objections to renewal or give him a fair hearing. Ackner L.J. (as he then was) in the Court of Appeal, found that Howell had a reasonable expectation of the renewal of his licence because the Assistant Commissioner had told him that before the licence could be renewed a doctor's certificate would have to be

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<sup>24</sup> *Russell v. Duke of Norfolk* [1949] 1 All E.R. 109, 118E per Tucker L.J. See also *Lloyd v. McMahon*, *supra* no. 17, 702H-703A per Lord Bridge.

<sup>25</sup> *Baldwin and Horne*, *op. cit.* *supra* no. 12, 694-698; P.P. Craig *Administrative Law* (London: Sweet & Maxwell, 3rd edn., 1994) pages 288-289, 293-4.

produced, which Howell had performed. Ackner L.J. found that the Assistant Commissioner's decision therefore ought to be quashed because this legitimate expectation had been unfairly frustrated.<sup>27</sup> Slade L.J. agreed that the decision could not stand but because natural justice had required a hearing to have been given first.<sup>28</sup> The reasoning employed by Ackner L.J. is that of legitimate expectation whereas Slade L.J. relied on the protectable interest of the applicant which deserved procedural protection. Though the two principles may overlap there should nonetheless be kept conceptually distinct: legitimate expectation fastens upon the public authority's conduct and the requirements of procedural fairness to protectable interests arise from the context in which a dispute arises and is not dependent on the public authority's conduct.<sup>29</sup>

The view of Sir Thomas Bingham that the *Schmidt* and *Breen* cases "may not amount to

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<sup>26</sup> [1986] R.T.R. 52. See also *R v. Secretary of State for the Environment ex parte Greater London Council* [1985] J.P.L. 543.

<sup>27</sup> *Ibid.*, 60b.

<sup>28</sup> *Ibid.*, 61k.

<sup>29</sup> See also *R v. Great Yarmouth Borough Council ex parte Botton Brothers Arcades Ltd.* (1988) 56 P. & C.R. 99; *R v. Secretary of State for Education ex parte Islam* [1993] 5 Admin.L.R. 177; *R v. Birmingham City Council ex parte Dredger* (1993) 91 L.G.R. 532.

parentage"<sup>30</sup> of the principle of legitimate expectations is correct, despite those cases containing the first usage of the phrase. If so, then where does the concept originate from? There is, however, no simple answer. Rather it is a question of pulling together the various strands which led to the principle of legitimate expectations. The *Schmidt* and *Breen* cases did not contribute to the development of legitimate expectations, but they merely introduced the phrase.

Another strand in the development of legitimate expectation comes from the Court of Appeal decision in *R v. Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association*.<sup>31</sup> The case arose from a proposal by the authority to increase the number of taxis and an undertaking was made to the effect that the present taxicab owners would be consulted before any decision was made. Later another undertaking was made that the number of taxis would not exceed 300 until legislation had been passed. However, the authority later confirmed a resolution that the number of taxis would be

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<sup>30</sup> T.H. Bingham "'There Is a World Elsewhere': The Changing Perspectives of English Law" (1992) 41 I.C.L.Q. 513, 523 footnote 34.

increased without giving the existing taxi cab owners an opportunity to make representations. Lord Denning M.R. found that the authority had acted wrongly because it denied the owners an opportunity to be heard and had broken its undertaking without sufficient cause. Lord Denning considered that the authority was not at liberty to disregard its undertaking and should not have departed from this except after the most serious consideration, hearing what the other party had to say and then only if the overriding public interest required it. It is important to note the terms of the relief granted. A prohibition order was made to the effect that the authority was not to act on its resolutions and not to grant any further taxi licences (above the total number of 300) without first giving the applicants a hearing concerning the relevant matters raised, which included the undertaking given by the Corporation. Roskill L.J. agreed with the terms of this order, but was not in total agreement with Lord Denning. For Roskill L.J. it was unnecessary to decide whether the Corporation was under a duty to hear the taxicab owners' representations. As regards the

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<sup>31</sup> [1972] 2 Q.B. 299.

undertaking, this could be departed from by the Corporation but only after the consideration of representations made by all those concerned.<sup>32</sup> Sir Gordon Willmer also agreed with the order made and thought the case to be one in which the court could intervene "in order to ensure that a decision is arrived at only after fair discussion and after hearing all proper representations of the parties interested."<sup>33</sup> What seems clear is that Lord Denning envisaged the possibility that the Corporation might be bound by its undertaking despite the applicants having been heard, whilst Roskill L.J. and Sir Gordon Willmer did not. If one looks at the basis upon which Lord Denning found that the Corporation would be bound to its undertaking it seems unclear. The duty to act fairly was not employed with regard to the undertaking and the phrase legitimate expectation was not mentioned. Ganz sums up the enigma of the undertaking:

"It sprang autochthonically from the case itself.  
It was in later cases that the link was forged

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<sup>32</sup> *Ibid.*, 311E.

<sup>33</sup> *Ibid.*, 313F.

between legitimate expectations and the *Liverpool Corporation Case*."<sup>34</sup>

Lord Denning did refer to two cases which concerned the estoppel of a public authority<sup>35</sup> which better explain the nature of the undertaking. Only in retrospect, however, can the judgment of Lord Denning be placed within the principle of legitimate expectations which was neither referred to nor applied in this case.<sup>36</sup>

There is also some uncertainty over the provenance of the principle. When Lord Diplock first referred to the principle he emphasised that the principle belonged to public law: "[i]n public law, as distinguished from private law...such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award."<sup>37</sup> However, in the *Preston* case Lord Templeman recognised that unfairness by a public authority could amount to an

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<sup>34</sup> Ganz, *op. cit. supra* no. 12, page 150.

<sup>35</sup> *Robertson v. Minister of Pensions* [1949] 1 K.B. 227; *Lever Finance Ltd. v. Westminster London Borough Council* [1971] 1 Q.B. 222. See also *H.T.V. Ltd. v. Price Commission* [1976] I.C.R. 170, 185G-186B per Lord Denning M.R.

<sup>36</sup> See the *GCHQ* case, *supra* no. 2, 401B per Lord Fraser.

<sup>37</sup> *O'Reilly v. Mackman*, *supra* no. 20, 275E per Lord Diplock. See also the *GCHQ* case, *supra* no. 2, 408H per Lord Diplock.

abuse of power if it was equivalent to a breach of contract or a breach of representation.<sup>38</sup> The conceptual uncertainty as to whether the principle of legitimate expectations forms an independent public law principle or whether it is simply a consequence of the private law principle of estoppel betrays the lack of a clearly formulated basis of public law. Further uncertainty is demonstrated by some judicial comments to the effect that the principle had a limited role in giving the individual a sufficient interest to challenge the decision.<sup>39</sup> However, if a legitimate expectation only enabled an applicant standing to challenge, then it would surely provide the applicant with little more than he or she already possessed. As Parker L.J. has recognised "to have a sufficient interest to afford a locus standi to challenge is a long way from being entitled to succeed in such challenge."<sup>40</sup>

The answer to question concerning the origins of the concept is unclear. It is submitted here that the development of the principle of legitimate

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<sup>38</sup> *In re Preston* [1985] A.C. 835, 866H-867A.

<sup>39</sup> *O'Reilly v. Mackman*, *supra* no. 20, 275E per Lord Diplock; *Findlay*, *supra* no. 1, 338D per Lord Scarman.

<sup>40</sup> *R. v. Secretary of State for the Home Department ex parte Khan* [1985] 1 All E.R. 40, 46h.

expectations from the early 1980s onwards was influenced by the existence of the principle in Community law. In 1977 Lord Diplock considered the time ripe for the assimilation of the Community law principle of legitimate expectations into English law.<sup>41</sup> While Lord Denning M.R.'s use of the phrase would not appear to have been influenced by the European principle, it seems that other judges, in particular Lord Diplock, used that phrase in order to develop a similar concept of legitimate expectations in English law as that which existed in European Community law.<sup>42</sup> The idea Lord Diplock had in mind was a remedy against action with retrospective effect<sup>43</sup> which he considered to be a progressive principle and regretted that it had not evolved in English law. According to Usher, when the European Court decided to apply the German principle of "Vertrauensschutz", it was translated into French, being the working language of the European Court, as "protection de la confiance légitime". This was originally translated into

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<sup>41</sup> Hansard 379 H.L. Deb. col. 994 (3rd February 1977).

<sup>42</sup> Forsyth, *op. cit. supra* no. 9, 241-245; Lord Mackenzie Stuart "Recent Developments in English Administrative Law - The Impact of Europe?" in F. Capotorti (ed.), *Du droit international au droit d l'intégration. Liber Amicorum Pierre Pescatore*. (Baden-Baden: Nomos Verlagsgesellschaft, 1987) page 411, 417. See chapter 3, section 1.

English as "legitimate confidence"<sup>44</sup> which was considered misleading in view of the technical meaning of confidence in English law and so was changed to the more appropriate phrase "legitimate expectation".<sup>45</sup> Forsyth suggests that it is likely that the label "legitimate expectation", as used by Lord Denning, was subsequently borrowed from English law by commentators to describe the concept used by the European Court.<sup>46</sup> If so, then this makes Lord Denning's reference made in 1969 all the more remarkable. Although this did not introduce the principle of legitimate expectations it could have been subsequently used to describe that principle as developed by the European Court. Also the principle could have mistakenly been seen as doing little more than vindicating the more well-known common law principle of estoppel.

Regardless of the labels used it is clear that the principle of legitimate expectations known in

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<sup>43</sup> Hansard 379 H.L. Deb. col. 994 (3rd February 1977).

<sup>44</sup> This wording was used in early decisions of the European Court. See Case 81/72 *Commission v. Council* [1973] E.C.R. 575, paragraphs 10 and 13. In Case 1/73 *Westzucker GmbH v. Einfuhr- und Vorratsstelle für Zucker* [1973] E.C.R. 723, paragraph 6 the European Court described it as "...a principle of legal certainty by which the confidence of persons concerned deserves to be protected (Vertrauensschutz). The literal translation of "Vertrauensschutz" is "confidence protection".

<sup>45</sup> J.A. Usher *General Principles of EC Law* (London: Longman, 1998) page 54.

English law was developed as a response to the same principle in Community law. Equally important is the fact that some judges have allowed the European principle to influence the development of the principle in English law. For example, Sedley J. has recognised that although "Britain...[is]...a relative latecomer to the doctrine...[t]his...may be an advantage, at least to the extent that our case law on the topic has not had a chance to ossify and because it enables us to learn from our neighbours."<sup>47</sup> However, to the extent that Lord Denning's use of the phrase in the *Schmidt* and *Breen* cases is still classified as a category of legitimate expectation,<sup>48</sup> and legitimate expectations is seen as deriving from or equal to the principle of estoppel<sup>49</sup> there remains a lack of

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<sup>46</sup> Forsyth, *op. cit. supra* no. 9, 242 footnote 22.

<sup>47</sup> *R. v. Ministry of Agriculture, Fisheries and Food ex parte Hamble (Offshore) Fisheries Ltd.* [1995] 2 All E.R. 714, 725g.

<sup>48</sup> See, e.g., Lord Diplock's analysis of the principle in the *GCHQ* case which proceeds on the basis that it provides procedural fairness for protectable interests. For criticism see Elias, *op. cit. supra* no. 12, pages 40-42. See also Craig, *op. cit. supra* no. 25, pages 293-294; C.F. Forsyth "Wednesbury Protection of Substantive Legitimate Expectations" [1997] P.L. 375, 377.

<sup>49</sup> See *In re Preston*, *supra* no. 38, 886H-867A per Lord Templeman; *Oloniluyi v. Home Secretary* [1990] Imm.A.R. 135, 146 per Dillon L.J.; *R. v. Independent Television Commission ex parte TSW Broadcasting Ltd.*, House of Lords, 26th March 1992, LEXIS transcript per Lord Templeman; M. Beloff "Natural Justice - (The Audi Alteram Partem Rule) and Fairness" in M. Supperstone and J. Goudie (eds.), *Judicial Review* (London: Butterworths,

conceptual clarity surrounding the precise use of the principle. Through the two separate roots of procedural fairness and estoppel, the European principle of legitimate expectations came to be woven into the common law. However, the courts have not always been clear in which sense the term is being employed. As Simon Brown L.J. has acknowledged, "many semantic confusions...have bedevilled this area of our law."<sup>50</sup>

### **3. The Inducement of Expectations**

To be worthy of protection an expectation must be both reasonable and legitimate. It must be capable of being reasonably held in the circumstances and capable of being protected against any policy or public interest considerations which might override it. Early in the process of introducing the principle into English law, senior judges did not clearly distinguish the senses in which the term was being used. Lord Fraser considered that legitimate meant

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1992) page 152, 178; C. Graham "Towards a European Administrative Law? The English Case" [1993] *Rivista Trimstrala di Diritto Pubblico* 3, 10.

<sup>50</sup> *R. v. Devon County Council ex parte Baker*, *supra* no. 19, 89h.

little more than reasonable<sup>51</sup> but later accepted Lord Diplock's view that although an expectation was reasonable this did not qualify for protection; it had to be legitimate also.<sup>52</sup> Sedley J. has attempted to clarify the confusion in stating that "legitimate expectation" is now "a term of art, reserved for expectations which are not only reasonable but which will be sustained by the court in the face of changes of policy".<sup>53</sup> In this section consideration will be given to what makes an expectation reasonable.

In the *GCHQ* case Lord Fraser stated:

"Legitimate, or reasonable, expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."<sup>54</sup>

This statement has shaped the ways in which an individual can claim a legitimate expectation. The public authority must actually raise an expectation

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<sup>51</sup> *Ng Yuen Shiu v. Attorney-General of Hong Kong* [1983] 2 A.C. 629, 636E.

<sup>52</sup> *GCHQ*, *supra* no. 2, 408H-409A per Lord Diplock, 401C per Lord Fraser.

<sup>53</sup> *Hamble*, *supra* no. 47, 732b.

<sup>54</sup> *GCHQ*, *supra* no. 2, 401B.

in the individual's mind and this can be achieved either by way of an express promise or by a consistent practice. An example of an expectation arising by means of an express promise or statement is *Attorney-General of Hong Kong v. Ng Yuen Shiu*.<sup>55</sup> Illegal immigrants from China into Hong Kong were told by the authorities that they would be interviewed concerning their position and that although no guarantee could be given that they could remain, each case would be treated on its own merits. However, the applicant was detained and removed without being allowed an opportunity to make representations. Lord Fraser, giving the advice of the Privy Council, assumed that in general the applicant's status as an illegal immigrant did not of itself give rise to a right to be heard. Despite this the applicant should have been given a fair hearing in this case because he had a legitimate expectation of being heard which arose from the express statement made by the authorities to that effect. Lord Fraser stated that it was in the interests of good administration and the duty to act fairly for a public authority to fulfil its promise. It was the fact of the promise

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<sup>55</sup> *Supra* no. 51.

and not the status of the applicant which gave rise to a legitimate expectation of a fair hearing.

An example of the inducement of an expectation by means of a settled practice is provided by the *GCHQ* case.<sup>56</sup> A consistent practice had existed between the Minister for the Civil Service and the Civil Service Unions of consulting over changes concerning the conditions of employment for the civil service staff working at the Government Communications Head Quarters (GCHQ). The House of Lords held that the Unions did have a reasonable expectation to be consulted in the future concerning possible changes to the staff's working conditions and that removing the ability of the staff to belong to trade unions without consultation would have been in breach of that expectation but for the claim of national security which superseded the protection of that expectation. Lord Roskill stated that the principle was a particular manifestation of the duty to act fairly imposed upon public authorities.<sup>57</sup> The existence of an administrative practice of consultation raised a reasonable expectation that such consultations would continue in the future.

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<sup>56</sup> *Supra* no. 2.

Legitimate expectations have also arisen through the setting out of criteria for the application of a policy. For example, in *R. v. Secretary of State for the Home Department ex parte Khan*<sup>58</sup> the Home Secretary had set out the criteria by which a child from overseas could be adopted. Parker L.J. held that as the applicant had fulfilled the criteria, the Home Secretary could not change the criteria as regards the applicant unless he was afforded a hearing and then only if the overriding public interest demanded it. The setting out of the criteria for adoption was found to have induced a legitimate expectation that those criteria would be applied in the applicant's case. Although there was no express promise or settled practice that the criteria would be applied, a legitimate expectation had been raised. This case shows the underlying requirement at work here: legitimate expectations must exist as a result of the conduct of the public authority. The need for some form of administrative conduct to raise an expectation can be seen from the following case.

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<sup>57</sup> *Ibid.*, 415C.

<sup>58</sup> *Supra* no. 40.

In *R. v. Secretary of State for Education ex parte London Borough of Southwark*<sup>59</sup> Laws J. refused to accept that a legitimate expectation could arise from a promise to be implied between the relationship of the Education Secretary and the local authority. The Education Secretary had decided to approve proposals for a school to have grant maintained status by 1st January 1994. The local authority had objected to this but was only told of the Secretary of State's decision 8 days before the change of status was to be implemented. It was argued that the local authority had a legitimate expectation of being consulted regarding the implementation date. However, this argument was rejected. Laws J. held that no legitimate expectation of consultation existed:

"It is important to have in mind that while this area of the law is pre-eminently concerned with fairness...we are obliged, sitting here, to pay due respect to another principle: the principle of legal certainty. It would be intolerable if our jurisprudence did not make it reasonably clear to public administrators, whose task extends not to a

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<sup>59</sup> [1995] E.L.R. 308. See also *R. v. Secretary of State for Education and Science ex parte Islam* [1993] 5

single case but to the management of a continuing regime, when the law obliges them to consult persons or bodies affected by their decisions, and when it does not."<sup>60</sup>

Similarly in *Lloyd v. McMahon*<sup>61</sup> the argument that a legitimate expectation of an oral hearing was an objective fundamental right although the applicants did not expect to be invited to a hearing was rejected. Legitimate expectations is a principle which concentrates on the conduct of public authorities. The existence of an expectation will impose a duty to act fairly on the public authority in all the circumstances. Past conduct, either by way of an express statement, settled practice or the setting out of policy, may determine what the future conduct of the public authority should be but only to the extent that fairness is preserved for both the individual and the public authority. The inducement of an expectation by some conduct of the public authority is therefore a necessary requirement because the imposition of other subjectively held expectations would impose unfair

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Admin.L.R. 177.

<sup>60</sup> *Ibid.*, 320D-E.

<sup>61</sup> *Supra* no. 17.

burdens on the public authority and reduce legal certainty.

The requirements of fairness and legal certainty will also condition the form of administrative conduct which can induce reasonable expectations. A refinement of the conditions a representation must fulfil was made in *R. v. Inland Revenue Commissioners ex parte M.F.K. Underwriting Agents Ltd.*<sup>62</sup> which concerned whether taxpayers could justifiably rely on statements made by the Commissioners concerning their tax liabilities. Bingham L.J. (as he then was) stated that in assessing the meaning and effect reasonably capable of being placed on statements by the Commissioners, the factual context was all-important. In seeking a clarification of tax liability it was necessary for the individual to "put all his cards face upwards on the table" and give full disclosure of the details of his transactions.<sup>63</sup> Secondly, the representation made by the Commissioners must be "clear, unambiguous and devoid of relevant qualification."<sup>64</sup> Bingham L.J. stated that the duty to act fairly raised by a reasonable expectation

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<sup>62</sup> [1990] 1 W.L.R. 1545.

<sup>63</sup> *Ibid.*, 1569E.

<sup>64</sup> *Ibid.*, 1569G.

did not work solely in the favour of the applicant but was a two-way street: "[i]t imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen."<sup>65</sup> The guiding principle is what would it be fair and reasonable to expect in all the circumstances. For example, in *R. v. Secretary of State for the Home Department ex parte Sakala*<sup>66</sup> the applicant claimed a legitimate expectation that the Secretary of State would follow the recommendation of a special immigration adjudicator. A Parliamentary statement had been made to the effect that such recommendations would "almost invariably" be followed unless it was perverse or unlawful. However, the Court of Appeal refused to accept that this statement could induce the expectation claimed. Fairly read the statement could not give rise to the expectation that the Secretary of State would always follow the recommendation made.

The existence of an expectation due to a settled practice will be a question of fact and degree. The courts will examine all the circumstances to determine whether it was possible for the applicant to hold a reasonable expectation.

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<sup>65</sup> *Ibid.*, 1570A.

For example, in *R. v. British Coal Corporation ex parte Vardy*<sup>67</sup> the applicant claimed a legitimate expectation that the modified colliery review procedure, which had been in constant use since 1985, would be used prior to the closure of any coal pits. Glidewell L.J. stated that this was a "classic example of legitimate expectation".<sup>68</sup> It is possible for both a settled practice and an express representation to simultaneously induce an expectation as happened in *R. v. Secretary of State for the Home Department ex parte Ruddock*.<sup>69</sup>

Successive Home Secretaries had a practice of publishing the criteria for the interception of telephone communications and the relevant Home Secretary had adopted them. The expectation was induced by both a consistent practice and an express statement. Taylor J. remarked that "[i]t would be harder to imagine a stronger case of an expectation arising".<sup>70</sup>

While the courts have developed these two categories of administrative conduct which can raise an expectation, they have not always been

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<sup>66</sup> [1994] Imm. A.R. 227.

<sup>67</sup> [1993] I.C.R. 720. See also *R. v. Birmingham City Council ex parte Dredger*, *supra* no. 29.

<sup>68</sup> *Ibid.*, 758H.

<sup>69</sup> [1987] 1 W.L.R. 1482.

<sup>70</sup> *Ibid.*, 1497F.

conceptually clear in defining legitimate expectations. In *R. v. Inland Revenue Commissioners ex parte Unilever plc*<sup>71</sup> the applicant claimed that the Revenue should have allowed it to claim tax relief on trading losses incurred within a certain year. As the applicant's claim was outside the two year limit the Revenue had refused to consider it. However, on 30 occasions over a twenty year period the Revenue had not enforced the time limit. Despite the lack of a positive assurance, as required in the *MFK* case, the applicant claimed that it had been led to believe that the time limit would not be enforced. The Court of Appeal found that even though there had not been an unambiguous representation, there was unfairness amounting to an abuse of power and the decision to apply the time limit was irrational. While the decision can be interpreted as a case of legitimate expectation arising from an administrative practice<sup>72</sup> the Court of Appeal did not clearly articulate this reasoning preferring to identify unfairness amounting to an abuse of power and irrationality. The decision

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<sup>71</sup> [1996] S.T.C. 681.

<sup>72</sup> P.P. Craig "Substantive Legitimate Expectations and the Principles of Judicial Review" in *The Common Law of Europe and the Public Law of the United Kingdom* (S.P.T.L. Seminar, King's College London, 14th June 1997) page 11.

could have the effect of weakening the conceptual basis of legitimate expectations. For example, Simon Brown L.J. stated that the *MFK* category of legitimate expectation was "essentially but a head of *Wednesbury* unreasonableness"<sup>73</sup> thereby allowing another developing principle of judicial review to disappear into the "billowing fog of *Wednesbury* unreasonableness."<sup>74</sup>

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<sup>73</sup> *Ibid.*, 695b.

<sup>74</sup> R. Gordon and T. Ward "The Billowing Fog" (1996) 146 N.L.J. 1663, 1664.

#### 4. The Justification of the Principle

It has frequently been stated that the principle is rooted in fairness<sup>75</sup> or imposes a duty to act fairly.<sup>76</sup> The duty to act fairly is usually thought to be closely associated with the rules of natural justice.<sup>77</sup> The use of "the duty to act fairly" has been seen as a more flexible requirement allowing the courts to break down the rigid formalism of separating decision-making into "judicial", "quasi-judicial" and "administrative" that existed before the decision in *Ridge v. Baldwin*.<sup>78</sup> What is to be discussed here is the duty to act fairly and the principle of legitimate expectations. The creation of a reasonable expectation will impose a duty to act fairly on the public authority. However, this should not be confused with the duty to act fairly in the procedural sense of the rules of natural justice. The manifestation of the duty to act fairly in procedural fairness and the rules of natural

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<sup>75</sup> *M.F.K.*, *supra* no. 62, 1569H-1570A per Bingham L.J.; *R. v. Secretary of State for Transport ex parte Richmond upon Thames London Borough Council* [1994] 1 All E.R. 577, 595g per Laws J.

<sup>76</sup> *Ruddock*, *supra* no. 69, 1497A per Taylor J.

<sup>77</sup> See *Re H.K. (An Infant)* [1967] 2 Q.B 617; *O'Reilly v. Mackman*, *supra* no. 20, 275E per Lord Diplock.

justice do not compel the fulfilment of reasonable expectations but relate to the decision-making process independent of any expectations raised. For example, in *Attorney-General of Hong Kong* the duty to act fairly to afford the applicant a hearing existed because of the assurance made by the Government; the applicant's status as an illegal immigrant did not by itself create any right to a hearing. The different justifications underlying the two uses of the duty to act fairly have been used in the above discussion of the "protectable interest" cases.<sup>79</sup> The duty to act fairly imposed by a legitimate expectation is a duty to act consistently in the interests of good administration and to fulfil the expectations raised unless good reasons prevent the public authority from doing so. Conceptual uncertainty exists to the extent that the judiciary have not clearly distinguished between the two senses in which "the duty to act fairly" is being used.

However, as it can be seen that the duty to act fairly is being used in a different sense in relation to legitimate expectations, it is

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<sup>78</sup> [1964] A.C. 40. See Craig *Administrative Law*, *op. cit.* *supra* no. 25, pages 289-292.

<sup>79</sup> *Supra* section 2.

necessary to ask why should it be unfair to frustrate such expectations? A competing number of explanations can be found. First, legal certainty is a value protected by the rule of law. The application of the law must be predictable, regular and certain in order that people can arrange their lives around it.<sup>80</sup> The value of legal certainty requires reasonable expectations to be either fulfilled or for good reasons to be given in support of their disappointment. If an individual has relied in good faith on the reasonable expectations induced by administrative conduct, the disappointment of such expectations may entrap the individual in a worse position than he was in to start with. The protection of legitimate expectations can prevent such entrapment.<sup>81</sup> Secondly, human dignity is a value worthy of protection which would be offended if an individual had been led to expect something which was then unfairly denied.<sup>82</sup> A third justification can be found in public trust and confidence in public authorities. The trust and confidence the public

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<sup>80</sup> J. Raz "The Rule of Law and its Virtue" in *The Authority of Law. Essays on Law and Morality*. (Oxford: Clarendon Press, 1979) page 210, 222.

<sup>81</sup> *Ibid.*

<sup>82</sup> P.P. Craig "Legitimate Expectations: A Conceptual Analysis" (1992) 108 L.Q.R. 79, 86.

has in public authorities is dependent on the extent to which they can legitimately expect such bodies to fulfil their promises or continue with their settled practices. If such expectations are unfairly frustrated then the public would lose their trust and confidence in such bodies. The principle does have more substantial justifications than merely requiring a public authority to act fairly which, in the words of Laws J., is "notoriously a concept giving rise to different views as to its application in practice".<sup>83</sup>

Writers have taken different views on the role the principle is fulfilling. Some commentators have viewed the principle as affording protection in the distribution of governmental property, such as licences or grants rather than more traditional property rights.<sup>84</sup> Richardson views the protection of legitimate expectations of consultation as the common law imposing greater procedural requirements on the processes of policy formulation<sup>85</sup> while

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<sup>83</sup> *R. v. Secretary of State for Education ex parte London Borough of Southwark*, *supra* no. 59, 320E.

<sup>84</sup> See Baldwin and Horne, *op. cit. supra* no. 12. See also Craig, *op. cit. supra* no. 82, 97-98. Cf. C.A. Reich "The New Property" (1964) 73 *Yale L.J.* 733.

<sup>85</sup> G. Richardson "The Legal Regulation of Process" in G. Richardson and H. Genn (eds.), *Administrative Law & Government Action. The Courts and Alternative Mechanisms of Review*. (Oxford: Clarendon Press, 1994) page 105, 116-117, 122.

others see it as promoting consistency in administrative decision-making.<sup>86</sup> Allan states that the principle can be seen as enforcing established practices and statements made by public authorities which form the background of disputes between the administration and the individual: "[b]y deferring to existing or customary arrangements the court permits those subject to its jurisdiction to determine their own rules. In its appeal to the standards and values shared by litigants - citizen and public authority - the law can reflect the practice of government, and share responsibility for shaping the constraints which justice or fairness recommends."<sup>87</sup> From a liberal framework of law Allan views the principle of legitimate expectations as a vehicle for the recognition and application of rights in public law.<sup>88</sup>

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<sup>86</sup> J. Jowell and A. Lester "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] P.L. 368, 377; deSmith, Woolf and Jowell, *op. cit. supra* no. 14, page 424.

<sup>87</sup> T.R.S. Allan *Law, Liberty, and Justice. The Legal Foundations of British Constitutionalism*. (Oxford: Clarendon Press, 1993) pages 198-199. See also F.A. Hayek *Law, Legislation and Liberty. Volume I Rules and Order*. (London, 1973) pages 85-88.

<sup>88</sup> T.R.S. Allan "Pragmatism and Theory in Public Law" (1988) 104 L.Q.R. 422, 435. Cf. the "liberal normativist" style of public law discourse identified by M. Loughlin *Public Law and Political Theory* (Oxford: Clarendon Press, 1992).

Whatever role the principle may be seen to be taking, it also has significant practical implications. While no conclusions can be drawn without detailed empirical evidence,<sup>89</sup> it is possible to make some points. First, judicial uncertainty over the scope of the principle can be particularly unhelpful for administrators.<sup>90</sup> For example, the uncertainty as to whether the principle is merely procedural or also substantive in operation creates administrative uncertainty as to what requirements public authorities will have imposed on them. The courts have stated that a clear and unambiguous representation is required in order to induce an expectation but the courts' own elaboration of the principle has itself been far from clear and unambiguous, thereby diminishing legal certainty for both the administration and the individual.

Secondly, the consequences of protecting legitimate expectations can be seen in a couple of cases. Following the *Khan* case the Home Office responded by "reducing the specificity and

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<sup>89</sup> Cf. G. Richardson and M. Sunkin "Judicial Review: Questions of Impact" [1996] P.L. 79.

<sup>90</sup> S. James "The Political and Administrative Consequences of Judicial Review" (1996) 74 *Public Administration* 613, 624.

precision" of the administrative guideline.<sup>91</sup> The consequence then of enforcing standards of fair dealing on the administrator was to stimulate the adoption of a defensive attitude by the Home Office. A former Treasury Solicitor, Sir Michael Kerry, has recognised that the obvious danger of decisions enforcing legitimate expectations is that administrators will attempt to ensure that further expectations are not created.<sup>92</sup> Therefore, by seeking to ensure fairness by protecting legitimate expectations, the courts may, rather paradoxically, actually encourage the administration not to make any statement as to its possible future action and thereby increase the risk of arbitrary discretion. In this sense, the inability of the courts to require basic standards of certainty and precision in administrative guidance might undermine any positive benefit derived from the principle of legitimate expectations. A more recent case concerning a change in sentencing policy where the Home Office adopted some transitional measures, although the applicant's case did not in fact fall

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<sup>91</sup> A. Mowbray "Administrative Guidance and Judicial Review" [1985] P.L. 558, 563.

<sup>92</sup> M. Kerry "Administrative Law and Judicial Review - The Practical Effects of Developments over the Last 25 Years in Administration in Central Government" (1986) 64 *Public Administration* 163, 170.

within them, suggests that the principle could be having an educative effect on the administration by the implicit acknowledgement of the need to take special account of the special position of individuals caught between changes of policy.<sup>93</sup> However, the unwillingness of the courts to require administrators to provide clearly defined transitional provisions concerning a policy change may weaken any such educative value of the principle as the adoption of transitional provisions is at the discretion of the administration.

It has been suggested that the principle of legitimate expectations should be able to contribute to the structuring of administrative discretion by informing the administration of the values of honesty, open-mindedness and consistency.<sup>94</sup> Perhaps the greatest impediment to this judicial structuring of administrative discretion is the lack of specialist judicial knowledge of how governmental processes actually work and the inability to examine findings of fact

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<sup>93</sup> *R. v. Secretary of State for the Home Department ex parte Hargreaves* [1997] 1 All E.R. 397, 400g per Hirst L.J. Transitional provisions were also provided for in the *Hamble* case, *supra* no. 47, 720j per Sedley J.

<sup>94</sup> D. Feldman "Judicial Review: A Way of Controlling Government?" (1988) 66 *Public Administration* 21, 27.

made by the administration in judicial review proceedings.<sup>95</sup> As the courts labour under such limitations and are themselves precluded from appraising the consequences of protecting legitimate expectations it is difficult to see how the courts can effectively enforce such standards on the administration. The danger is that if judicial conceptions of "fairness" are not fully informed by a real knowledge of the administration, then they may in fact, despite judicial protestations to the contrary, turn out to be little more than ritual incantations of the "justice of the common law"<sup>96</sup> which obfuscate clear understanding of how to ensure that the management of complex public policy programmes are carried out effectively and equitably.

##### **5. Is Detrimental Reliance a Necessary Condition?**

An area of doubt over the operation of legitimate expectations is whether it is necessary for the individual to have relied to his detriment on the conduct of the public authority in order to

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<sup>95</sup> This issue is dealt with more thoroughly in chapter 7, section 5B.

claim a legitimate expectation. According to deSmith, Woolf and Jowell detrimental reliance is not a necessary qualification for the existence of a legitimate expectation.<sup>97</sup> However, in some cases the courts have laid down a requirement of detrimental reliance. For example, in *R. v. Jockey Club ex parte RAM Racecourses Ltd.*<sup>98</sup> Stuart-Smith L.J. stated that the principle had many similarities with the private law principle of estoppel, one of which was that the individual must have relied on the expectation raised by the public authority.<sup>99</sup> Also in *R. v. Lloyd's of London ex parte Briggs*<sup>100</sup> the High Court rejected an argument that once a reasonable expectation had arisen it was unnecessary for the individual to show detrimental reliance which would have been necessary in order to sustain a private law action in estoppel. Some judges have therefore sought to assimilate legitimate expectations with the private law principle of estoppel by requiring the individual to have relied to his detriment on the

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<sup>96</sup> *Cooper v. The Board of Works for the Wandsworth District* (1863) 14 C.B.(N.S.) 180, 194 per Byles J.

<sup>97</sup> deSmith, Woolf and Jowell, *op. cit. supra* no. 14, page 573. See also Cane, *op. cit. supra* no. 20, pages 144-145.

<sup>98</sup> [1993] 2 All E.R. 225.

<sup>99</sup> *Ibid.*, 236h-j. See also Beloff, *op. cit. supra* no. 49, page 178.

conduct which induced the expectation.

Alternatively other judges have stressed that "[t]he test in public law is fairness, not an adaptation of the law of contract or estoppel."<sup>101</sup> Sedley J. has identified a difference between the two principles: the decision-maker's knowledge or ignorance of the extent of reliance placed by the individual does not have any bearing on the existence or legitimacy of an expectation.<sup>102</sup> While some judges have therefore stated that detrimental reliance is a necessary condition as the principle is similar to the private law principle of estoppel, other judges have stressed that legitimate expectations is a public law principle and detrimental reliance is not a necessary condition although it can add to the weight of the legitimate expectation. For example, in the *MFK* case Bingham L.J. stated that "[i]f a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the

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<sup>100</sup> [1993] 1 Lloyd's Rep. 176, 183.

<sup>101</sup> *R. v. Independent Television Commission ex parte TSW Broadcasting Ltd.*, Court of Appeal, 5th February 1992, per Lord Donaldson M.R., quoted in *R. v. Inland Revenue Commissioners ex parte Unilever plc* [1994] S.T.C. 841, 852f. See also deSmith, Woolf and Jowell, *op. cit. supra* no. 14, page 574.

<sup>102</sup> *Hamble, supra* no. 47, 725h-j.

authority were permitted to follow a different course to the detriment of one who entertained the expectations, particularly if he acted on it."<sup>103</sup> The extent to which the individual has relied on the expectation may give its legitimacy a greater weight but is not a necessary requirement in all cases. For example, in the *Ruddock* case there was not any detrimental reliance by the applicant on the expectation that the criteria for tapping telephones would be applied in her case.

#### 6. A Procedural or Substantive Principle?

Whether the principle of legitimate expectations can protect expectations as to procedure or can be extended to matters of substance has proved to be a highly contentious issue. For example, in the *Ruddock* case Taylor J. stated that "[w]hile most of the cases are concerned...with a right to be heard, I do not think that the doctrine is so confined."<sup>104</sup> In *R. v.*

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<sup>103</sup> *MFK case*, *supra* no. 62, 1569H (emphasis added). See also *Silva v. Secretary of State for the Home Department* [1994] Imm.A.R. 352, 357 per Simon Brown L.J.

<sup>104</sup> *Ruddock*, *supra* no. 69, 1497A. See also *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161, 172, 175.

*Council of the Borough of Poole ex parte Cooper*<sup>105</sup>  
Sir Louis Blom-Cooper Q.C. stated that  
"[l]egitimate expectation is...exclusively a  
procedural right. It cannot be extended to  
encompass any substantive right..." It would be  
helpful to focus on what exactly is being disputed  
here. A procedural expectation may arise when the  
applicant expects to be consulted or given a  
hearing or some form of procedural protection<sup>106</sup>  
before a decision is made by the public authority.  
A substantive expectation will arise when the  
applicant expects that a benefit of a substantive  
nature will be received or will continue. A  
substantive expectation goes beyond the procedural  
requirements to be imposed and may concern the end  
benefit itself or some other value of substance.  
For example, in the *Khan* case the legitimate  
expectation was that the criteria set out to give  
expression to the policy would not be changed in  
the applicant's case. The content of this  
expectation went beyond mere procedure and into  
substantive matters. The focus of judicial review

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<sup>105</sup> (1995) 27 H.L.R. 605, 614.

<sup>106</sup> In *R. v. Secretary of State for the Home Department ex parte Duggan* [1994] 3 All E.R. 277 the High Court found a legitimate expectation of being informed of the reasons for the decision.

on procedural protection<sup>107</sup> and the decision-making process<sup>108</sup> rather than substantive review and the sheer difficulty of raising a substantive expectation<sup>109</sup> has led to an early concentration on applying the principle to procedural expectations.<sup>110</sup> Such concerns have also influenced the debate over whether the principle can be extended to protection of substantive expectations as well as procedural expectations.

Recent judicial disagreement over the scope of the principle will be analysed beginning with *R. v. Secretary of State for Transport ex parte Richmond upon Thames Borough Council*.<sup>111</sup> This case concerned the regulation of aircraft noise at night. The Secretary of State had a power to prohibit aircraft of certain descriptions from taking off and landing and to specify the maximum number of times which those aircraft could take off or land. In 1988 the Secretary of State introduced measures which limited aircraft movements at night in the London airports. These measures were due to expire in

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<sup>107</sup> See, e.g., *Ridge v. Baldwin*, *supra* no. 78.

<sup>108</sup> *Chief Constable of North Wales Police v. Evans* [1982] 3 All E.R. 141, 155c per Lord Brightman.

<sup>109</sup> *Hamble*, *supra* no. 47, 724d per Sedley J.

<sup>110</sup> See R.E. Riggs "Legitimate Expectations and Procedural Fairness in English Law" (1988) 36 A.J.C.L. 395; Hadfield, *op. cit.* *supra* no. 12.

<sup>111</sup> *Supra* no. 75.

October 1993 and be replaced by a quota system. A press notice had stated that the new quota policy was designed to keep the overall noise levels below those of summer 1988. On this statement the local authorities claimed a legitimate expectation that the policy of noise levels would not be taken beyond the 1988 levels under any circumstances. In order to claim such an expectation it was argued that the principle of legitimate expectations could be used to protect substantive expectations. However, this submission was rejected by Laws J. for the following reasons.

First, no previous authority existed to justify the proposition that the principle could protect substantive expectations. Laws J. stated that the case-law such as *Ruddock* and *Khan* showed nothing more than that the applicant may have an expectation that it would be unfair if a policy was changed without first giving those affected an opportunity to make representations.<sup>112</sup> However, this view of the case-law is arguably wrong. In *Ruddock* Taylor J. held that the principle was not restricted to procedural expectations. The House of

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<sup>112</sup> *Ibid.*, 595f-596a.

Lords in *re Findlay*<sup>113</sup> had recognised that a substantive legitimate expectation of a certain policy being applied was possible whether the applicants had been consulted. Although the claim of legitimate expectations failed in *Ruddock* due to a lack of evidence, an expectation existed that warrants for the interception of communications would only be made within the terms of the stated criteria unless there was good reason to depart from them. The view that the case only concerned the right to be heard is incorrect. Such a right would have been self-defeating in the context of intercepting communications.<sup>114</sup> The applicants there had a substantive expectation. The *Khan* case was also an example of the protection of a substantive expectation.

Secondly, Laws J. stated that if the principle did extend to substantive expectations it would impose an unacceptable fetter on the power of a public authority to change its policy when it considered that was necessary for the fulfilment of its public responsibilities.<sup>115</sup> The need for public authorities to develop policy and effectively

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<sup>113</sup> *Supra* no. 1.

<sup>114</sup> This was recognised in *Ruddock*, *supra* no. 69, 1497A *per* Taylor J.

exercise their discretionary powers is fundamental.<sup>116</sup> Public authorities exercise their powers in the public interest to determine what policies are best. If the principle of legitimate expectations did operate to emasculate policy or fetter discretionary power, then it would represent an illegitimate brake on the exercise of public power. However, the principle of legitimate expectations does not prevent changes of policy in general but concerns the position of the applicant within such changes of policy. Two policies may be perfectly lawful when put side by side but can create unfairness for the individual if the public authority changes its policy for no good reason after raising an expectation that it would act in a particular way.<sup>117</sup> If a public authority has raised an expectation then it must act fairly toward the individual which may include exempting the individual from the operation of the new policy as in *Khan*. Even then the public authority can argue that the overriding public interest requires the individual to be treated on the terms of the new policy. According to Sedley J. the principle "does

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<sup>115</sup> *Ibid.*, 596a.

<sup>116</sup> See section 7 below.

<sup>117</sup> *Cane, op. cit. supra* no. 20, page 143.

not risk fettering a public body in the discharge of public duties because no individual can legitimately expect the discharge of public duties to stand still or be distorted because of that individual's peculiar position."<sup>118</sup>

Thirdly, Laws J. stated that if the principle was to be extended to substantive expectations and required the court to decide whether the overriding public interest required the individual's expectation to be overridden then this would mean that the court would judge the merits of the public interest and the proposed policy change.<sup>119</sup> That would be an illegitimate interference by the court with the merits of public decisions. Alternatively, Laws J. reasoned that if that was incorrect then all the court can do is decide whether the proposed policy change was unreasonable in the *Wednesbury* sense. The sleight of hand made here is to assimilate the decision regarding which objectives are in the public interest with the task of which means should be used to achieve those objectives. In other words it confuses ends with means. The court cannot substitute its view of the policy objectives for those of the public authority but

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<sup>118</sup> *Hamble, supra* no. 47, 724c.

must this also mean that the court cannot examine whether the frustration of the individual's expectation is indispensable for the achievement of those policy objectives by testing other alternative means equally capable of achieving the same objectives? If the court is to test the legitimacy of an expectation by the existence of an overriding public interest, this means that the court must examine whether other measures could have been adopted in order to attain the policy objective but which do not necessarily disappoint the applicant's expectation.

Despite an evident disapproval for substantive legitimate expectations Laws J. did recognise that "the doctrine is rooted in the ideal of fairness...the question is always whether the discipline of fairness, imposed by the common law, ought to prevent the public authority from acting as it proposes."<sup>120</sup> What is perhaps unclear is whether Laws J. is employing the duty to act fairly in the sense of providing procedural fairness for protectable interests or as requiring the public authority to act consistently in view of the expectation it raised. In *R. v. Ministry of*

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<sup>119</sup> *Ibid.*, 596j.

*Agriculture, Fisheries and Food ex parte Hamble (Offshore) Fisheries Ltd.*<sup>121</sup> Sedley J. referred to this statement by Laws J. in order to justify substantive legitimate expectations:

"...the real question is one of fairness in public administration. It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides to take a particular step."<sup>122</sup>

The need for protecting substantive legitimate expectations was, for Sedley J., as much in the interests of fairness as the protection of procedural expectations. This reasoning is sound in principle: if the principle imposes a duty to act fairly in the sense of acting consistently with regard to the expectations it induced, why should

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<sup>120</sup> *Ibid.*, 595g-j.

<sup>121</sup> *Supra* no. 47.

<sup>122</sup> *Ibid.*, 724b. Sedley J. stated at 724g: "[s]ince some of the leading cases in the Court of Justice concern legitimate expectations of substantive benefits or protections in the face of policy shifts, they furnish

it be limited to a duty to act fairly in regard to procedural and not substantive expectations? The reasoning in the *Hamble* decision expanding the principle to substantive expectations has been accepted in subsequent cases. In *R. v. Secretary of State for the Home Department ex parte Hargreaves*<sup>123</sup> the Court of Appeal did not explicitly address the issue of whether the principle of legitimate expectation extends to substantive expectations as it was concerned with the appropriate test for determining the legitimacy of an expectation. While the Court of Appeal seemed to implicitly accept the possibility of protecting a substantive legitimate expectation, the matter is not altogether free from doubt.<sup>124</sup> Lord Steyn has recognised that the precise

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further support for the view I have expressed...on this topic."

<sup>123</sup> *Supra* no. 93.

<sup>124</sup> S. Foster "Legitimate Expectations and Prisoners' Rights: The Right to Get What You are Given" (1997) 60 M.L.R. 72; T.R.S. Allan "Procedure and Substance in Judicial Review" (1997) 56 C.L.J. 246 and Craig "Substantive Legitimate Expectations and the Principles of Judicial Review", *op. cit. supra* no. 72, page 10 state that the case could be interpreted as authority against the protection of substantive legitimate expectations. See also *R. v. Gaming Board for Great Britain ex parte Kingsley*, Queen's Bench Division, (CO/2506/94) 16th October 1995, LEXIS Transcript where Jowitt J. was prepared to accept that the principle could apply to substantive benefits. See also Forsyth, *op. cit. supra* no. 9, 246-250; deSmith, Woolf and Jowell, *op. cit. supra* no. 14, page 571; Lord Irvine of Lairg Q.C. "Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review" [1996] P.L. 59, 71-72; R. Singh and K. Steyn "Legitimate Expectation in 1996:

scope of the principle is a controversial question.<sup>125</sup> The issue can only be resolved with certainty by the House of Lords.

Craig has advanced a different conceptualisation of the problem of protecting of substantive legitimate expectations based upon the competing interests of legality and legal certainty.<sup>126</sup> The interest in legality is ensuring that changes of policy do not become unduly fettered while legal certainty protects the individual's reasonable expectations. Craig argues that denying any doctrine of substantive legitimate expectations is no longer plausible when it is accepted that two competing values are at stake as the need for policy not to be unduly fettered may not always operate so as to defeat the interests of legal certainty. The benefits of this analysis is that any uncertainty over the duty to act fairly is removed and legitimate expectation is viewed as a separate principle of review arising from the need to balance the competing interests of legality and legal certainty. However, as the very need to

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Where Now?" [1996] J.R. 17 in favour of substantive expectations.

<sup>125</sup> *Pierson v. Secretary of State for the Home Department* [1997] 3 All E.R. 577, 606f.

protect these values still await formal recognition by the courts, this conceptualisation of the problem, while more rationally constructed, is unlikely to be preferred by the courts over their usual assessments of unfairness and unreasonableness.

## 7. Legitimate Expectations and Policy

The principle of legitimate expectations can apply to the policies adopted by a public authority in the exercise of its public duties. An expectation that a certain policy will be applied to the applicant may arise either by an express representation or a settled practice. Where a representation is made the conditions discussed above will apply but whether a settled practice has raised an expectation is not necessarily so clear. When the practice which raised an expectation was adopted because of the policy, which itself can change, then the practice cannot be expected to survive a change in policy.<sup>127</sup> The extent to which a

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<sup>126</sup> P.P. Craig "Substantive Legitimate Expectations in Domestic and Community Law" (1996) 55 C.L.J. 289, 298-304.

<sup>127</sup> *Hamble*, *supra* no. 47, 729b. On the difference between a change of policy and departure from policy see Y.

public authority must apply the old policy even though a new policy has been adopted is resolved by the principle of legitimate expectations. The *Khan* case concerned the question of legitimate expectations within a change of policy. A Home Office circular letter stated that the Home Secretary could exercise his discretion to allow adoption of a foreign child if certain conditions were fulfilled. However, when the applicant came to adopt the child, the Home Office refused; a change of policy and criteria had been made which the applicant did not fulfil. In the Court of Appeal Parker L.J. held that the applicant possessed a legitimate expectation that the procedure and criteria stated in the circular letter would be followed. The Home Office would have to apply the old policy in the applicant's case because of his legitimate expectations. Parker L.J. did recognise that the duty to act fairly imposed by the expectation was not absolute. The Home Secretary could change his policy vis-à-vis the applicant after a hearing had been afforded to him and then only if the overriding public interests required it. The application of the principle of legitimate

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expectations was to safeguard the special position of the applicant within the change of policy.

The ability to make changes of policy is at the centre of the system of government and provided by statutory discretionary powers. According to Lord Diplock: "[a]dministrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government."<sup>128</sup> Similarly, Taylor J. has recognised that "[b]y declaring a policy...[the decision-maker]...does not preclude any possible need to change it."<sup>129</sup> The courts have been careful not to allow the principle of legitimate expectations to prevent or interfere with a change in policy that is fairly carried out. This issue arose in *Re Findlay*<sup>130</sup> where the applicants, who were prisoners, claimed that before a change in sentencing policy was made, each of them could legitimately expect to be released on licence. It was argued that the change of policy frustrated their expectations. In

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Policies" (1997) 17 O.J.L.S. 23.

<sup>128</sup> *Hughes v. Department of Health and Social Security* [1985] A.C. 776, 788A.

<sup>129</sup> *Ruddock*, *supra* no. 69, 1497B.

<sup>130</sup> *Supra* no. 1.

rejecting this claim Lord Scarman emphasised the imperative of changing policy:

"But what was their *legitimate* expectation? Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt provided always that the adopted policy is a lawful exercise of the discretion conferred upon him by the statute. Any other view would entail the conclusion that the unfettered discretion conferred by the statute upon the minister can in some cases be restricted so as to hamper, or even prevent changes of policy."<sup>131</sup>

On the facts of the case it was a contentious point whether the fulfilment of the prisoner's expectations would operate so as to defeat the change in policy and even if there were reasons of overriding public importance for frustrating the expectations these were not articulated by the House of Lords. However, the point of principle to

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<sup>131</sup> *Ibid.*, 338E-F.

emerge from *Findlay* is valid: it will not be legitimate to expect that a public authority will not change its policy in general as it would reduce the powers of the public authority. The need to change policy in general is required by the discretionary power which is given to a public authority to act in the public interest. Policy changes may be required by the change in the political complexion of the decision-maker, or for technological advances or as response to emergency action. The imperative of policy changes cannot be defeated by legitimate expectations. However, expectations can be protected to this extent that they do not subvert the change of policy and are legitimate. Unfortunately the courts have not always distinguished between these two inquiries as the next cases illustrates.

*R. v. Secretary of State for Health ex parte United States Tobacco International Inc.*<sup>132</sup>

concerned a claim of legitimate expectation which was frustrated by a change of policy. The applicant manufactured oral snuff and had been encouraged by Government departments and grants of money to set up a factory. However, in 1988 the Government, on

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<sup>132</sup> [1992] 1 Q.B. 353.

the basis of medical advice, changed its policy; oral snuff was to be banned. The applicant claimed a legitimate expectation implied by the course of conduct with the Government that it would be able to continue its operations. In the High Court, the claim of legitimate expectations was rejected. Taylor L.J., relying on the statement in *re Findlay*, held that if the Secretary of State had concluded that a change of policy was required "his discretion could not be fettered by moral obligations to the applicants deriving from his earlier favourable treatment of them. It would be absurd to suggest that some moral commitment to a single company should prevail over the public interest."<sup>133</sup> The decision has been criticised because the court confused the two issues of whether an expectation existed and whether the public interest overrode the expectation.<sup>134</sup> In assimilating these two separate inquiries the court accepted that because a change of policy had been made, this necessarily frustrated any expectations the applicant had and did not examine whether the

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<sup>133</sup> *Ibid.*, 369G. See also 372F-G per Morland J.

<sup>134</sup> B. Schwehr and P. Brown "Legitimate Expectation - Snuffed Out?" [1991] P.L. 163, 166-167. See also Craig "Legitimate Expectations: A Conceptual Analysis", *op. cit. supra* no. 82, 97.

Secretary of State had shown good reason for changing his mind as regards the applicant. While as in *re Findlay* there may have been good public interest justifications for overriding the applicant's expectations, confusion of whether an expectation existed in the first with whether a higher public interest existed, the approach of the court "dilutes an otherwise healthy and beneficial doctrine."<sup>135</sup>

There is also some uncertainty as to whether the protection of legitimate expectations can be asserted against secondary legislation. Neill L.J. has doubted whether, save in exceptional cases, legitimate expectations could be invoked to invalidate primary or secondary legislation put before Parliament.<sup>136</sup> While the judicial inhibition against reviewing primary legislation is well-recognised,<sup>137</sup> the restriction of the principle in regard to secondary legislation seems unjustifiable. Considering that policies can be implemented by secondary legislation, such a

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<sup>135</sup> *Ibid.*, 167.

<sup>136</sup> *R. v. Secretary of State for the Environment ex parte National and Local Government Officers' Association* [1993] 5 Admin.L.R. 785, 804E.

<sup>137</sup> A.V. Dicey *An Introduction to the Study of the Law of the Constitution* (London: Macmillan, 10th edn., 1959) chapter 1. See also Lord Irvine, *op. cit. supra* no. 124, 75-78.

restriction would seriously limit the applicability of the principle.<sup>138</sup> If a legitimate expectation was raised against secondary legislation it would only require a change made in the individual's case unless the public authority could raise arguments of an overriding public interest.

### **8. The Revocation of Expectations**

Expectations can be revoked at two stages. First, when a reasonable expectation exists, this can be revoked by changes which will no longer make it reasonable for the individual to hold that expectation. Secondly, when a reasonable expectation is claimed and recognised by the court, the public authority may argue that it must be defeated by a change of policy or public interest reasons. If so, then the issue will be whether the expectation is either legitimate and worthy of protection or must be overridden. These two issues will be examined here as will the question of unlawful expectations.

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<sup>138</sup> The courts have declared secondary legislation approved by Parliament as contrary to other common law principles. See *R. v. H.M. Treasury ex parte Smedley* [1985] Q.B. 657 (improper purpose); *R. v. Secretary of State for the Home Department ex parte Leech* [1994] Q.B. 198 (presumption of liberty).

### A. Revocation of Reasonable Expectations

The revocation of a reasonable expectation depends like the inducement of an expectation on the conduct of the public authority. Such conduct may change the expectations previously induced. For example, in *Hughes v. Department of Health and Social Security*<sup>139</sup> the applicants were civil servants who had been compulsorily retired at ages between 60 and 65. The Department of Health and Social Security had for a number of years adopted a code concerning pay and conditions which had stated that while the normal age for retirement was 60, civil servants could continue to work until the age of 65 subject to their efficiency. However, a circular in 1981 announced a change in policy: civil servants in the relevant grades were to be retired at the age of 61 and, later, at 60. The question whether the code had given rise to a legitimate expectation was rejected by the House of Lords. Lord Diplock reasoned that "any reasonable expectations that may have been aroused by the previous circular [were] destroyed and...replaced

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<sup>139</sup> *Supra* no. 128.

by such other reasonable expectations as to the earliest date at which they can be compelled to retire if the administrative policy announced in the new circular is applied to them."<sup>140</sup>

Another example of expectations being revoked is *R. v. Department of Trade and Industry ex parte Blenheim Queensdale Ltd.*<sup>141</sup> which concerned a challenge by two companies to a decision to withdraw financial assistance to organisers of overseas trade fairs and exhibitions. Such financial help had formed part of the overseas advertising scheme, the purpose of which was to help companies extensively promote their events. The Notes for Guidance of the scheme set the maximum amount of aid at £25,000. In March 1990 the Department decided that the maximum aid would be available for the end of that month but after then the scheme would be at an end. Both applicants claimed a legitimate expectation that the scheme would not be withdrawn without sufficient notice being given in order to enable them to adjust their overseas advertising and that the withdrawal would not operate retrospectively to expenditure already

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<sup>140</sup> *Ibid.*, 788B-C.

<sup>141</sup> Queen's Bench Division, (CO/939/90, CO/1002/90) 13th May 1992, LEXIS transcript.

made in reliance on the Notes for Guidance. The first applicant, Blenheim, was rejected. A company employee had a telephone conversation with a Department official in which it had been explained that decisions to be made concerning exhibitions after March 1990 had been deferred pending a report on the scheme and a decision as to its future. Potts J. found that this amounted to a representation that the scheme was in jeopardy and that to have acted in light of this was at the company's own risk and not due to any legitimate expectations it held. The second company, Brintex, was successful in claiming a legitimate expectation. The company had made applications for aid and had incurred expenditure in doing so. Taking this into account Potts J. found that its reasonable expectation had been defeated in an unfair way. This case demonstrates the utility of the foreseeability of changes made to expectations. The first company had been told of the possibility of change to the scheme whereas the second had not. To suspend the assistance scheme did not frustrate the expectations of the company that could reasonably have foreseen change and continued to act in reliance on the scheme. However, it did

frustrate the legitimate expectations of the company which was not told of the possibility of change.

*B. The Test For Determining the Legitimacy of an Expectation*

Once an individual can claim a reasonable expectation, the public authority can claim that this expectation must be defeated for reasons of a higher public interest. This relative nature of an expectation distinguishes it from the more absolute principle of estoppel which once raised cannot be defeated. The issue here concerns how the courts should decide whether the public interest claimed by the public authority should frustrate the individual's expectations. Disagreement over the appropriate test for determining the legitimacy of an expectation and the acceptable limits of judicial review have arisen between Sedley J. and the Court of Appeal.

*R. v. Ministry of Agriculture, Fisheries and Food ex parte Hamble (Offshore) Fisheries Ltd.*<sup>142</sup> concerned the legitimacy of an expectation against

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<sup>142</sup> *Supra* no. 47.

a change of policy. The applicant had bought a vessel, the Nellie, because of the respondent's policy which allowed the transfer of pressure stock licences from one boat to another. Pressure stocks are fish protected by European Community fishing quotas which are laid down under the European Treaty. Member States had to determine the detailed rules and application of the quotas allocated to them. In the UK this had been achieved under the Sea Fish (Conservation) Act 1967 which made it an offence for any British registered vessel to fish without a licence. Each vessel had a given vessel capacity unit (VCU) determined by its size and engine power. The transfer of licences from one boat to another was permissible provided that the total VCU of the operator's fleet was not increased. The applicant had purchased another two vessels with beam trawl licences in order to transfer these licences to the Nellie. However, the Ministry announced a moratorium on the transfer of licences. The applicant claimed that the change of policy had unfairly frustrated its legitimate expectations. Sedley J. accepted that although the case arose under a domestic statute, it would be unreal to treat the point of law as an entirely

domestic one. The purpose of the legislation was to allow the Ministry to implement and give effect to the common agricultural policy. Sedley J. recognised that a major part of this joint exercise would be frustrated if in the implementation of the policy the Member State was governed only by its national law. Furthermore, the possibility of eventual recourse to the European Court through an Article 177 reference required the national courts to have full regard to the jurisprudence of the European Court.<sup>143</sup> Sedley J. continued to define the principle of legitimate expectations by reference to the case-law of the European Court.<sup>144</sup>

After reviewing European and English authorities Sedley J. defined what makes an expectation legitimate. Legitimacy was not an absolute concept but "a relative concept, to be gauged proportionately to the legal and policy implications of the expectation."<sup>145</sup> Legitimacy was "a function of expectations induced by government

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<sup>143</sup> That *Hamble* was a case which fell to be decided under European review is supported by the subsequent classification in *R. v. Ministry of Agriculture, Fisheries and Food ex parte First City Trading Ltd.* [1997] 1 C.M.L.R. 250, 269 per Laws J.

<sup>144</sup> Sedley J. also quoted from J. Schwarze *European Administrative Law* (London: Sweet & Maxwell, 1992) pages 867-868 and some of the cases of the European Court discussed in the European legitimate expectations chapter.

and of policy considerations which militate against their fulfilment."<sup>146</sup> The legitimacy of an expectation was to be determined by balancing the need of protecting the expectation with the public interest in overriding it. Such a balance was in the first place for the policy-maker to strike but this balance could be reviewed by the court on an application for judicial review. Sedley J. stated that while policy was for the policy-maker alone, the fairness of the decision not to accommodate such reasonable expectations which the policy will defeat remains the court's concern. To undertake such a review was not to allow the court to substitute its view of the policy for that of the public authority but to protect "the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate it."<sup>147</sup> Sedley J.'s opinion was clear: the court must review the balance struck by the policy-maker between the need to protect individual expectations and the need to change policy in the

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<sup>145</sup> *Ibid.*, 724c.

<sup>146</sup> *Ibid.*, 731c.

<sup>147</sup> *Ibid.*, 731e.

public interest as applied to the individual.<sup>148</sup> Sedley J. was not advancing the proposition that the court could examine whether the change of policy in general was right or wrong but whether the change of policy as regards the individual's expectation was justifiable.

On the facts of the case, Sedley J. refused the applicant's application. The course of licence aggregation that the applicant had embarked upon was far from completion and the change of policy would not completely destroy the investment made. The fulfilment of the applicant's expectation would mean that the licence policy could not be changed. Sedley J. held that once it was accepted that it cannot be legitimate to expect that a policy will not be changed, the expectation was little more than a hope. Furthermore, the exclusion of the applicant from the transitional provisions was not unfair for fairness did not require the policy change to take account of the applicant's expectations which might well have eventually subverted the policy.

One point deserves attention here. Although Sedley J. drew upon the case-law of the European

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<sup>148</sup> See also deSmith, Woolf and Jowell, *op. cit. supra*

Court, the implication from the judgment is that as a matter of principle the court should undertake a balancing act to determine the legitimacy of an expectation whether under Community or English law. While the courts will have to apply differential standards of judicial review depending on whether the case arose under Community or English law,<sup>149</sup> the approach of Sedley J. as regards legitimate expectation was that the European case-law should be referred to as a means of further defining the application of the principle.<sup>150</sup> In this process of assimilating the English and Community principles of legitimate expectations, the *Hamble* decision represents one of the most explicit cases to date to recognise that principles of judicial review are no longer self-contained and that English courts can develop national principles of law by reference to the development of similar principles in Community law.

However, the *Hamble* decision was soon criticised as wrong in principle. In a speech

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no. 14, pages 575-576.

<sup>149</sup> *R. v. Ministry of Agriculture, Fisheries and Food ex parte First City Trading Ltd.*, *supra* no. 138, 279.

<sup>150</sup> In *Hamble*, *ibid.*, at 724f, neither counsel submitted that there was any difference between the English law and Community law as regards the principle of legitimate expectations. See also *R. v. Secretary of State for the*

reaffirming the need for the courts to maintain their traditional restraint and only apply the *Wednesbury* standard of review, Lord Irvine criticised the *Hamble* approach as "no more than judicial irredentism: it is to advance from a hard-edged decision on the existence and extent of a legitimate expectation (which is proper) to a hard-edged review of the merits of the Secretary of State's overall decision as to whether that legitimate expectation may be overridden (which is improper)."<sup>151</sup> The notion that a balancing test was to be undertaken by the court appeared to exceed the traditional limits of judicial review: that the court should only examine whether the decision-maker acted within the limits of its powers subject to *Wednesbury* limits.<sup>152</sup> If judicial review of substance exceeded these limits then it could be argued that the judge was not taking enough account of the acceptable limits of the judicial role in

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*Home Department ex parte McQuillan* [1995] 4 All E.R. 400, 422h per Sedley J.

<sup>151</sup> Lord Irvine, *op. cit. supra* no. 124, 72. On "hard-edged" questions see *R. v. Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd.* [1993] 1 W.L.R. 23, 32D-F per Lord Mustill. The *Hamble* decision did receive some academic support see Craig "Substantive Legitimate Expectations in Domestic and Community Law", *op. cit. supra* no. 122, and Craig "Substantive Legitimate Expectations and the Principles of Judicial Review", *op. cit. supra* no. 72.

examining whether the public interest required the frustration of an expectation.

Following much the same approach as Lord Irvine, the Court of Appeal in *R. v. Secretary of State for the Home Department ex parte Hargreaves*<sup>153</sup> rejected an invitation to apply the balancing exercise formulated in *Hamble*. The case concerned three prisoners who had been issued with a notice on their admission to prison that they could apply for home leave after serving one third of their sentence. The prisoners had also signed a compact under which the prison promised to consider them for home leave when they became eligible. However, for reasons of improving public safety and confidence in the administration of justice, the Home Secretary decided to change the policy so that the earliest date for home leave was substantially deferred. Though the Home Secretary had the applicants' expectations in mind, it was concluded that the public interest which prompted the change of policy outweighed the extension of the transitional arrangements to them. The applicants claimed that their expectations had been unfairly

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<sup>152</sup> See, e.g., *R. v. Birmingham City Council ex parte O* [1983] 1 A.C. 578, 594H-595A per Lord Brightman.

<sup>153</sup> *Supra* no. 93.

frustrated and could not be overridden by the public interest. It was argued that concerns regarding public safety could be better met by more rigorous testing of prisoners before allowing home leave at all and that public disquiet at the release of prisoners after only serving a short amount of their sentence was caused not by home leave and, finally, that a longer period before home leave would not promote the public interest as it would increase the risk of break-up of families.<sup>154</sup> The Court of Appeal was then met with an invitation to balance up the competing interests in order to determine the legitimacy of an expectation in the face of a given public interest in the change of policy.

The Court of Appeal addressed the question of the proper approach for the court in assessing substantive legitimate expectations. Hirst L.J. reasoned that while on matters of procedure only the court could decide what requirements ought to be imposed, on matters of substance the role of the court was different.<sup>155</sup> Accordingly, the test for determining legitimate expectations would differ

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<sup>154</sup> *Ibid.*, 406g-408d.

<sup>155</sup> Relying on *R. v. Panel on Take-overs and Mergers ex parte Guinness plc* [1990] 1 Q.B. 146, 183 per Lloyd L.J.

according to whether the expectation claimed had a procedural or substantive content. Hirst L.J. stated that Sedley J.'s approach of requiring the court to undertake a balancing exercise was correctly characterised as "heresy": "[o]n matters of substance (as contrasted with procedure) *Wednesbury* provides the correct test."<sup>156</sup> The *Hamble* judgment was overruled to the extent that a balancing exercise was propounded. Pill L.J. stated that the court must consider whether an expectation was created and, if so, whether or not it can be defeated by a change of policy. This would depend on all the circumstances, including the nature of the expectation, the change of policy involved and any justification given for that change in the light of the expectation claimed to exist. However, Pill L.J. disavowed any broader power of the court to judge the fairness of the substance of the decision to frustrate the individual's expectations and to the extent that the *Hamble* judgment required a review of the overall fairness of substance it was "wrong in principle."<sup>157</sup> Applying this test to the change of policy it was found that the decision

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<sup>156</sup> *Ibid.*, 412h.

<sup>157</sup> *Ibid.*, 416c.

to frustrate the applicant's expectations was not unreasonable.

Rather than just distinguishing *Hamble* as a case concerning Community law, the Court of Appeal emphatically denounced and overruled the approach taken there. The proper test to determine the legitimacy of an expectation was whether the decision to frustrate any reasonable expectations was so unreasonable that no reasonable authority could ever have arrived at it. The notion that it was for the court to weigh up and balance the competing public and private interests was viewed as going beyond the limits set by *Wednesbury* unreasonableness and allowing the court to examine the intrinsic merits of the policy decision itself. The Court of Appeal did not consider that it was permissible for a court to examine whether the disappointment of an expectation was indispensable to the achievement of the desired public interest objective by examining whether other means could have been adopted in order to achieve the objective. The Court of Appeal clearly felt that it was beyond the acceptable limits of the judicial role to examine whether the frustration of an individual's expectation was indispensable for the

achievement of the new policy. The only judicial inquiry that was thought to be correct was whether the decision to frustrate the expectations by a change of policy was unreasonable or irrational.

However, there are strong reasons in support of the view that the Court of Appeal's rejection of the need for a balancing of interests, though understandable, was misconceived.<sup>158</sup> Determining the legitimacy of an expectation necessarily involves some balance to be struck between the competing interests. The individual has an interest in the protection of his expectation whereas the public authority has an interest in developing policy. The question is whether the change in policy necessitates the individual's expectation to be overridden. As Allan states "there can be no escape from the need to review the balance between public and private interests"<sup>159</sup> whether this is undertaken either through an explicit balancing test or as an aspect of *Wednesbury* unreasonableness. Arguably, the Court of Appeal engaged in a self-deception in the sense that because it rejected the need for a

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<sup>158</sup> See Craig "Substantive Legitimate Expectations and the Principles of Judicial Review", *op. cit. supra* no. 72, pages 19-28.

<sup>159</sup> Allan, *op. cit. supra* no. 87, page 204. See also Cane, *op. cit. supra* no. 20, page 144.

balancing test in favour of unreasonableness, it was not itself undertaking the "heretical" balancing exercise under a different guise. However, despite protestations to the contrary, the use of *Wednesbury* unreasonableness itself necessarily involves the balancing of competing interests but not on any explicit or rational basis. The invocation of *Wednesbury* does not automatically resolve such issues but in reality obfuscates them. The two interests remain in need of reconciliation whatever the court's rhetoric. However, *Wednesbury* unreasonableness allows the courts to think that they are not undertaking a balancing exercise and therefore hide, or rather not require them to articulate, a rational justification for their decisions. The Court of Appeal's condemnation of a rational and explicit balancing of interests may therefore be more expressive of the court's own conception of administrative legality than of the extent to which expectations are worthy of protection. Rather than openly engage in an examination of the public interest reasons advanced by the public authority to justify the revocation of the individual's expectation, the courts should only ask "was that

unreasonable?" In doing so the Court of Appeal was seeking to secure the legitimacy of substantive review not by a explicit and rational balancing of interests but by the tautologous and casuistic *Wednesbury* formulation indicative of the anti-rationalist methods and "artificial reason" of the common law. Rather than requiring the courts to engage in a more rigorous review as to why the public interest claimed should defeat the individual's expectations, the courts now only identify those decisions which are *Wednesbury* unreasonable.

### *C. Unlawful Expectations*

Finally, it may be mentioned that the English courts have refused to confer legitimacy on unlawful expectations. Primacy must always be given to the *ultra vires* rule, for otherwise public authorities would be able to extend their power at will.<sup>160</sup> Lord Denning M.R.'s attempts to prevent a public authority from going back on an *ultra vires*

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<sup>160</sup> *Ministry of Agriculture and Fisheries v. Hunkin*, 1948 unreported but cited in *Ministry of Agriculture and Fisheries v. Matthews* [1950] 1 K.B. 148, 153-154. See also H.W.R. Wade and C.F. Forsyth *Administrative Law* (Oxford: Clarendon Press, 7th edn., 1994) pages 270, 376.

representation through the principle of estoppel<sup>161</sup> were effectively stopped by the Court of Appeal.<sup>162</sup> While the principle of estoppel is not suited for application to the exercise of statutory powers, the courts have not attempted to resolve the problem of whether it is fair not to allow individuals to rely on the unlawful representations of public authorities. Despite academic encouragement<sup>163</sup> the courts have refused to allow an *ultra vires* representation to bind the action of an authority and to use the principle of legitimate expectations to resolve the problem through balancing the interests of legality with those of legal certainty.<sup>164</sup> This limitation of the principle of legitimate expectations is explained by the fact the court's review is predicated upon the *ultra vires* rule itself and that the courts justify legitimate expectations on the basis of the duty to

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<sup>161</sup> *Robertson v. Minister of Pensions*, *supra* no. 35; *Falmouth Boat Construction Co. v. Howell* [1950] 1 K.B. 16; *Wells v. Minister of Housing and Local Government* [1967] 1 W.L.R. 1000; *Lever Finance Ltd. v. Westminster Borough Council*, *supra* no. 35.

<sup>162</sup> *Western Fish Products v. Penwith District Council* [1981] 2 All E.R. 204. See also *Maritime Electric Co. v. General Dairies Ltd.* [1937] A.C. 610.

<sup>163</sup> P.P. Craig "Representations by Public Bodies" (1977) 93 L.Q.R. 398; *ibid.*, "Substantive Legitimate Expectations in Domestic and Community Law", *op. cit.* *supra* no. 126, 310-312.

act fairly and not through achieving a balance between the competing values of legal certainty and legality. In this respect the principle in English law is similar to that in European Community law.<sup>165</sup>

#### **9. Comparison of English and Community law concerning the Principle of Legitimate Expectations**

Insights can be gained from a comparison of legitimate expectations in English and Community law as the principle developed over the same period in both legal systems. Since the early 1970s the European Court has recognised legitimate expectations as an independent principle of review, whereas the English courts have used the phrase since 1969. Despite the development of a similar principle at the same time the public law heritage of European law, as compared with the lack of a public tradition in English law, will be profoundly important in any comparison. Whereas the European Court has effectively employed the principle to protect substantive expectations by weighing up the competing public and private interests since the

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<sup>164</sup> In *Hamble*, 731g-h Sedley J. appeared to accept this. See also R. Singh "Making legitimate use of legitimate expectation" (1994) 144 N.L.J. 1215.

1970s,<sup>166</sup> the case-law of the English courts shows uncertainty and confusion over the role, scope and very meaning of the principle. While the European Court seems to have grafted the principle into its review with ease, the English courts have experienced persistent difficulties in transplanting the principle.

The development of a principle of legitimate expectations in English law has enabled the courts to articulate such a principle through the "artificial reason" of the common law. When the phrase was first used by Lord Denning, its meaning had nothing in common with the European principle of legitimate expectations but was just used as a catch-phrase which allowed the court to impose the requirements of procedural fairness on a decision-maker which threatened to withdraw a protectable interest from the individual. The meaning of the principle of legitimate expectations became confused with providing merely procedural protection or imposing an estoppel against the exercise of public power. The principle was, in the words of Lord Fraser, "somewhat lacking in

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<sup>165</sup> See chapter 4, section 6.

<sup>166</sup> See Case 74/74 *Comptoir National Technique Agricole (CNTA) S.A. v. Commission* [1975] E.C.R. 533.

precision".<sup>167</sup> Here the English courts can be seen attempting to solve the problem of the extent to which individuals can rely in confidence on administrative conduct not by theoretical reason but by artificial reason and common law precedents. There is also an adherence by some judges to the universal conception of legality by assimilating legitimate expectation with the private law principles of estoppel or misrepresentation. In so far as the courts have recognised that legitimate expectations is a separate public law principle, distinct from the private law principles, it has been through the duty to act fairly rather than through a theoretical analysis of the problem of protecting an individual's trust in public administration. Even the sense in which the duty to act fairly is being used has become confused. In this way the courts have kept the basis of the principle rather ambiguous and obscure.<sup>168</sup>

Legitimate expectation proper was first integrated into English law in relation to procedural expectations. This was perhaps the

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<sup>167</sup> *Ng Yuen Shiu*, *supra* no. 51, 636D per Lord Fraser. See also *Salemi v. Mackellar (No. 2)* (1977) 137 C.L.R. 396, 404 per Barwick C.J.

<sup>168</sup> *Ganz*, *op. cit. supra* no. 12, page 159; Baldwin and Horne, *op. cit. supra* no. 12, 692.

easiest means of integration as English law had revived the principle of the right to be heard in relation to administrative decisions.<sup>169</sup> Legitimate expectations came to be closely connected with the right to be heard.<sup>170</sup> This was achieved through the duty to act fairly: a promise or a past practice may create a reasonable expectation that the administrator will act fairly toward the individual in view of the expectation it created. The protection of procedural expectations is well established in English law, even more so than in Community law. The reason for this is that as the Community generally provides for extensive consultation procedures the protection of procedural expectations is not an issue.<sup>171</sup>

After procedural expectations were recognised in English law, the issue as to whether substantive expectations could be protected then came to the fore. In comparison, Community law does not even distinguish between procedural and substantive legitimate expectations, and it has never been an issue whether the protection of substantive

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<sup>169</sup> See generally Craig *Administrative Law, op. cit. supra* no. 25, chapter 8.

<sup>170</sup> *GCHQ*, *supra* no. 2, 415F per Lord Roskill.

<sup>171</sup> Judge D. Edward "Proportionality and Legitimate Expectations" (A talk given at the Judicial Studies

expectations was within the proper sphere of judicial review. No doubt influenced by German public law, Community law has used the principle as a substantive control on the exercise of power.<sup>172</sup> After two early cases it seemed that English law would protect substantive expectations.<sup>173</sup> However, controversy over the acceptable limits of the principle has led to judicial disagreement and uncertainty. The difficulty for the English courts was that intruding into the substance of a decision was regarded as permissible only on the basis of *Wednesbury* unreasonableness. Disagreements over the acceptable scope of the principle have still not been finally resolved. The main objection against protecting substantive expectations is that it would involve the court in deciding whether the public interest overrode the expectation and therefore questioning the merits of the administrator's proposed policy change.<sup>174</sup>

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Board seminar on UK and EC law, 8th January 1993) page 9.

<sup>172</sup> See G. Nolte "General Principles of German and European Administrative Law - A Comparison in Historical Perspective" (1994) 57 M.L.R. 191, 195, 203.

<sup>173</sup> *R. v. Secretary of State for the Home Department ex parte Khan*, *supra* no. 40; *R. v. Secretary of State for the Home Department ex parte Ruddock*, *supra* no. 69. See Forsyth "The Provenance and Protection of Legitimate Expectations", *op. cit.* *supra* no. 9, 246-250.

<sup>174</sup> *Richmond upon Thames London Borough Council*, *supra* no. 75, 596j *per* Laws J.

Underlying this view can be seen the courts' unwillingness to use law as a means of advancing the administrator's policy objective and of advising on the best means of reconciling the protection of individual's expectations with the attainment of policy objectives. While it is sound in principle that substantive expectations deserve protection, there is a lingering uncertainty over this issue.<sup>175</sup>

The English courts have also disagreed on the appropriate test to determine whether an expectation has a legitimacy worthy of protection. As the *Hamble* case was decided under the scope of Community law, it brings into sharp contrast the difference between English and European conceptions of judicial review. Sedley J. stated that it was for the court to determine whether the public interest justified the disappointment of an expectation by engaging in a balancing of the competing interests.<sup>176</sup> However, the Court of Appeal severely criticised this approach denouncing it as "heresy": only *Wednesbury* unreasonableness provided

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<sup>175</sup> See *Pierson v. Secretary of State for the Home Department*, *supra* no. 125, 608f per Lord Steyn.

<sup>176</sup> *Hamble (Offshore) Fisheries Ltd.*, *supra* no. 47, 731c-e.

the correct test.<sup>177</sup> The different opinions on the acceptability of the balancing test reflect different conceptions of administrative law.<sup>178</sup> The *Hamble* decision clearly reflects European notions of the need to balance the competing interests whereas the Court of Appeal reasserted the traditional model of judicial review. Interpreted from the viewpoint of the Court of Appeal, the emphatic rejection of assimilating English and Community law reflects the superiority of common law values as manifested in the *Wednesbury* test over a more rational and European balancing of interests test. By turning the question of the appropriate test to determine the legitimacy of an expectation into a question over the acceptable limits of judicial review, the Court of Appeal effectively ensured the superiority of the "artificial reason" of the common law as opposed to a rational balancing test. However, this can be seen to depend upon two fallacious lines of

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<sup>177</sup> *Hargreaves*, supra no. 93, 412h per Hirst L.J. See also Pill L.J. at 416b-d.

<sup>178</sup> Cf. T. Hobbes *Leviathan* [1651] (Oxford University Press, 1996) chapter XI, section 19: "...men give different names, to one and the same thing, from the difference of their own passions: as they that approve a private opinion, call it opinion; but they that mislike it, heresy: and yet heresy signifies no more than private opinion; but has only a greater tincture of choler [anger]."

reasoning: first, that the *Wednesbury* test is not merely another form of balancing test but under a different guise and, second, that it provides the only acceptable division between the merits and administrative legality.

As the case-law of the European Court demonstrates, engaging in balancing tests does not entail substitution of opinion nor does it require every expectation to be protected. By undertaking this operation the court is realizing the extent of the individual's expectation in view of the changing demands of public administration; it seeks to optimize the individual's expectation to the extent that achievement of the administrator's objective remains factually possible. Whatever the Court of Appeal's rhetoric may have been, the individual's expectation and the public interest remain in need of reconciliation. However, rather than being an explicit and rational balancing test, the *Wednesbury* test does not require the court to justify why the balance struck between the competing interests was either right or wrong and acts as a cloak for the courts' social and economic preferences.<sup>179</sup>

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<sup>179</sup> Jowell and Lester, *op. cit. supra* no. 86, 381.

While the off the cuff comparative comment of Laws J. that "legitimate expectation...[is]...no more an absolute doctrine in Europe than in England"<sup>180</sup> is correct, this does little to recognise let alone address the critical issue of the different styles and conceptions of administrative law that underpin the different methods of determining whether an expectation is legitimate. Community law requires substantive justification for the disappointment of an expectation and the European Court is prepared to examine alternative means of achieving the public interest goal without necessarily frustrating the individual's expectation. English law allows the court to cover up the basis of its review under the *Wednesbury* test. In another case Simon Brown L.J. stated that the category of legitimate expectation developed in cases against the Inland Revenue Commissioners was "but a head of *Wednesbury* unreasonableness"<sup>181</sup> thereby allowing a developing principle of administrative law to disappear into the "billowing fog" of an all-encompassing

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<sup>180</sup> *R. v. Secretary of State for Health ex parte Macrae Seafoods Ltd.* [1995] C.O.D. 369, 371 per Laws J.

<sup>181</sup> *Supra* no. 73.

principle of unreasonableness.<sup>182</sup> If legitimate expectations are only capable of protection if it would be unreasonable for the public authority to do otherwise, then it would appear that the principle adds little to the legal protection of trust in government as it becomes merely a discretionary feature dependent upon the court's own individual sense of right and wrong rather than a rational and explicit balancing of interests test. Interpreted in this way I think that the response of the Court of Appeal in the *Hargreaves* case demonstrates a failure to understand and apply a developed principle of administrative justice combined with a self-deception as to the balance between private and public interest which the court implicitly struck.

Although the observation of Laws J. that public administration "extends not to a single case but to the management of a continuing regime"<sup>183</sup> is to be welcomed, it is perhaps rather ironic when seen in light of the courts' own highly particular and case specific review of the legitimacy of expectations in public administration. Instead of developing the principle as a means of guiding and

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<sup>182</sup> Gordon and Ward, *op. cit. supra* no. 74.

structuring the exercise of administrative power by elaborating and rationalising how the administration should treat certain types of expectations and how it might balance the competing interests, the courts have preferred the highly particular *Wednesbury* test. In other words, the courts have failed to adequately think through whether their task extends to the single case or to the management of a continuing regime and, if so, how this could be conceived. The consequence of the courts' approach is, on the one hand, to seek to provide legal certainty by recognising the importance of legitimate expectations but, on the other hand, to diminish that legal certainty by failing to provide any general or specific guidance to the administration concerning the legitimacy of expectations across the broad range of administrative programmes.

The difficulties of transplantation have been exacerbated when some judges may have been unaware that the principle was in fact developed elsewhere and therefore have not paid sufficient regard to comparative materials, while other judges have sought to develop the principle as a means of

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<sup>183</sup> *Supra* no. 60.

assimilating English and Community law. The result is further inconsistency of approach and uncertainty. For instance, the judgment of Sedley J. in the *Hamble* case has been praised for its remarkable grasp of European literature and the case-law of the European Court. However, it is unfortunate, though hardly surprising, that higher judges subsequently overruled this judgment in such emphatic language without either addressing such concerns or even seeking a proper understanding of what was being disputed.

Perhaps the biggest problem faced by the English judiciary over the application of legitimate expectations is that it requires a different role from them in realising expectations in the view of the changing demands of public administration. This requires the judiciary to have the necessary institutional confidence and knowledge of governmental processes. For example, in the *Spagl* case<sup>184</sup> the European Court required a reorganisation of all the reference quantities for milk quotas in order to protect the applicants' legitimate expectations. The most that the English courts have done is to require the Home Secretary

to exempt an individual from the operation of new criteria concerning the adoption of a foreign child.<sup>185</sup> The courts have also allowed the Home Secretary an unfettered discretion to change sentencing policy without regard to prisoners' expectations.<sup>186</sup> It would be surprising if an English judge examined the underlying reasons for a measure as undertaken by Advocate General Trabucchi in the *CNTA* case.<sup>187</sup> The second *Mulder* case,<sup>188</sup> where the European Court held the Community liable to compensate milk producers for the permanent exclusion from the market, would be unthinkable in English law where damages can only arise from the existence of a tort. Compared with the European Court, the English courts lack the necessary knowledge of public administration and the institutional confidence to adequately protect legitimate expectations.

Writing in 1978 Mitchell, comparing the decision of the European Court in *Commission v. Council (Staff Salaries)*<sup>189</sup> with the opinion given

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<sup>184</sup> Case C-189/90 *Spagl v. Hauptzollamt Rosenheim* [1990] E.C.R. I-4539.

<sup>185</sup> *Khan*, *supra* no. 40.

<sup>186</sup> *In re Findlay*, *supra* no. 1; *Hargreaves*, *supra* no. 93.

<sup>187</sup> *Supra* no. 159. See chapter 4, section 7A.

<sup>188</sup> Joined Cases C-104/89 and C-37/90 *Mulder v. Council and Commission* [1992] E.C.R. I-3061.

<sup>189</sup> *Supra* no. 44.

by Advocate General Warner citing English authorities,<sup>190</sup> noted the difference of approach:

"There lies within the decision of the [European] Court a sense of administrative morality, whereas, certainly within the English authorities, that was lacking. They could in fact be used as illustrations of the way in which the underlying thought of British administrative law had failed to adjust to the problem of modern government."<sup>191</sup>

Is it possible to state that since 1978 the English courts have developed, through the principle of legitimate expectations, an administrative morality in touch with the realities of modern government? To the extent that the courts have recognised that expectations induced by administrators may deserve some form of protection, the courts are beginning

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<sup>190</sup> *Ayr Harbour Trustees v. Oswald* (1883) App. Cas. 623; *R. v. Port of London Authority* [1919] 1 K.B. 176; *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation* [1926] A.C. 355; *Ellen Street Estates Ltd. v. Minister of Health* [1934] 1 K.B. 590; *Robertson v. Minister of Pensions*, supra no. 35; *William Cory & Son Ltd. v. London Corporation* [1951] 2 K.B. 476; *Schmidt v. Secretary of State for Home Affairs*, supra no. 6; *Re L. (AC) (an infant)* [1971] 3 All E.R. 743.

<sup>191</sup> J.D.B. Mitchell "Law, Democracy and Political Institutions" in M. Cappelletti (ed.), *New Perspectives For a Common Law of Europe* (Florence, 1978) page 361, 373.

to work toward an administrative morality. However, this gradual development has suffered from relapses into the traditional account of judicial review. The result of the case-law is that the administration can defeat any reasonable expectations it may have induced provided that this is not so unreasonable that no reasonable administrator could ever have arrived at it.<sup>192</sup> To state that any judicial control beyond this limit would be an illegitimate interference with the merits and that any further accountability lies within the province of Parliament compares quite unfavourably with the jurisprudence of the European Court. Although the English courts have integrated the principle of legitimate expectations to some extent, they have been prevented from fully assimilating the principle, because of the reluctance to review substantive legality against their preference for the *Wednesbury* test and the dominant conception of law which effectively prevents the courts from engaging in an explicit and rational balancing of interests. The judges have confused the evaluation of whether the public interest could be achieved by other means which do

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<sup>192</sup> *Hargreaves, supra* no. 93.

not necessitate the disappointment of the individual's expectation with the substitution of their opinion of what the public interest demands.

Overall, the painstaking development of the principle of legitimate expectations has been successful in that the English courts now recognise the need to protect individuals' expectations. According to Laws, in recent years European and English law have "in very broad terms marched hand in hand as regards legitimate expectation."<sup>193</sup> To that extent Lord Mackenzie Stuart's assessment that one can "trace a common tendency... [in Community and English law]...to check unfairness on the part of the administration while refraining from interfering with the proper exercise of a discretionary power"<sup>194</sup> is correct. However, this statement needs to be substantially qualified for the following reasons. First, doubts still exist over whether substantive expectations are capable of being protected in English law. Second, the courts have shown themselves to be unwilling, as a matter of English law, to determine whether an

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<sup>193</sup> J. Laws "English & Community Law: Uniformity of Principle" *The European Advocate* (Autumn 1994) page 2 (italics added).

<sup>194</sup> Lord Mackenzie Stuart "Legitimate Expectations and Estoppel in Community Law and English Administrative Law" [1983/1] L.I.E.I. 53, 73.

expectation is legitimate by weighing up the competing public and private interests and examining whether the attainment of a policy objective requires an expectation to be defeated. Finally, as English law lacks a general remedy of compensation for damage arising from administrative action,<sup>195</sup> individuals suffering loss as a result of the infringement of their legitimate expectations cannot be compensated unless they can have an appropriate remedy in tort. The principle of the protection of legitimate expectations is more favourable for individuals in their capacity as Community citizens than it is for them as subjects of the Crown and more suited to the needs of public administration in the Community than in England. Despite the partial successes of the introduction of the principle of legitimate expectations, the judges have been hampered in this regard by the failure to modernise the underlying thought of English administrative law in order to solve the problem of how to ensure effective legal protection of an individual's trust in modern government

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<sup>195</sup> See generally Craig *Administrative Law, op. cit. supra* no. 25, chapter 17; C. Harlow and R. Rawlings *Law and Administration* (London: Butterworths, 2nd edn., 1997) pages 619-628.

without defeating the objectives of the public  
interest.

## **Chapter 6: The Principle of Proportionality in European Community Law**

### **1. Introduction**

The purpose of this chapter is to give an explanation of the principle of proportionality as applied by the European Court. This examination will focus upon two central issues: the nature and purposes of the principle of proportionality and its place in the European Court's framework of review. It is hoped that the principle of proportionality can be explained by the purposes it serves within the different contexts in the Community legal order. This may in turn promote an understanding of the application of the principle by the European Court. Another issue to be addressed will be whether application of proportionality involves the European Court substituting its view of policy decisions for that of the administration.

Some commentators have viewed the principle of proportionality as the most important general

principle of Community law.<sup>1</sup> Whether or not this is a correct assessment is debatable. Others may think that the principle of non-discrimination is, or potentially is, more important.<sup>2</sup> While proportionality is clearly significant in both conceptual and practical terms, there exists a considerable amount of uncertainty over its scope. For example, Schwarze has stated that the principle is "an extremely variable instrument of review. Its administration is problematic since it has been applied in virtually every legal field and hardly appears to be measurable in strict terms"<sup>3</sup> and that no satisfactory explanation has been given of the

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<sup>1</sup> J. Gündisch "Allgemeine Rechtsgrundsätze in der Rechtsprechung des Europäischen Gerichtshof" in *Das Wirtschaftrecht des Gemeinsamen Marktes in der aktuellen Rechtsentwicklung* (Baden-Baden, 1983) page 97, 108 cited in J. Schwarze *European Administrative Law* (London: Sweet & Maxwell, 1992) page 677 who shares this view. See also K.-V. Schiller "Der Verhältnismäßigkeitsgrundsatz im Europäischen Gemeinschaftsrecht nach der Rechtsprechung des EuGH" [1983] R.I.W. 928; M. Lugato "Principio di Proporzionalità e invalidità di atti Comunitari nella Giurisprudenza della Corte di Giustizia delle Comunità Europee" [1991] *Rivista di Diritto Comunitario e Scambi Internazionali* 67.

<sup>2</sup> D. Edward "Foreword" in T. Hervey and D. O'Keefe (eds.), *Sex Equality in the European Union* (Chichester: Wiley, 1996) page xii, states that Ole Due, former President of the European Court, views the concept of discrimination as the most important legal concept in the Community legal order. See also R. Lauwaars *Lawfulness and Legal Force of Community Decisions* (Leiden: A. W. Sijthoff, 1973) page 230.

<sup>3</sup> Schwarze, *op. cit. supra* no. 1, page 864.

precise scope of the principle.<sup>4</sup> It is suggested here that such uncertainty has arisen in part due to a failure to view the principle in terms of its differing purposes and the framework of review in which it is operated by the European Court.

## 2. The Principle of Proportionality

The principle of proportionality is widely recognised to have originally developed in German public law<sup>5</sup> where it developed not on the basis of any implied legislative prohibition against the unreasonable exercise of powers but on a more fundamental and scientific basis of ends and means or cause and effect relationship.<sup>6</sup> The fundamental

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<sup>4</sup> *Ibid.*, page 677.

<sup>5</sup> J. Mertens de Wilmars "The Case-Law of the Court of Justice in Relation to the Review of the Legality of Economic Policy in Mixed-Economy Systems" [1982/1] L.I.E.I. 1, 13; M.P. Singh *German Administrative Law in Common Law Perspective* (Berlin: Springer-Verlag, 1985) page 88; G. Nolte "General Principles of German and European Administrative Law - A Comparison in Historical Perspective" (1994) 57 M.L.R. 191, 192-193, 201-202.

<sup>6</sup> Singh, *ibid.*, page 88 citing L. Hirschberg *Der Grundsatz der Verhältnismäßigkeit* (Göttingen, 1981) pages 43-44. On proportionality in German law see Singh, *ibid.*, pages 88-92; Schwarze, *op. cit. supra* no. 1, pages 685-692; N. Emiliou *The Principle of Proportionality in European Law. A Comparative Study.* (Kluwer, 1996) chapter 2. See also *Re Export of Oat Flakes* [1969] C.M.L.R. 85, 91 decided by the German *Verwaltungsgericht*. On proportionality in French law see Emiliou, *ibid.*, chapter 3; L. Neville Brown and J.S. Bell *French Administrative Law* (Oxford: Clarendon Press, 4th edn., 1993) pages 218-220, 245-250. See also W. van

meaning of proportionality is that the decision-maker must, in the attainment of its objective, adopt measures which accord to that end and avoid excessive or unnecessary measures. The substance of a measure must bear some relation to its objective or, alternatively, the overall burdens of a measure should not exceed the overall benefits to be gained from it. Should the overall costs of the measure exceed its gains then it is disproportionate. Put simply, a measure may be disproportionate if it results in doing more harm than good. Whatever the virtues of acting for the defined objective, the administration must not go about its task in such a way that the measure is either incapable of achieving that end or it causes harm to others in the process such that the measure ceases to be justifiable.

According to Advocate General Jacobs  
"[a]pplication of the principle of proportionality implies a balancing exercise: the burden imposed on the undertakings concerned must be weighed against the benefit accruing to the Community..."<sup>7</sup>

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Gerven "The Effect of Proportionality on the Actions of Member States of the EC: National Viewpoints From Continental Europe" (Institute of European Law, University of Birmingham, 20th March 1998).

<sup>7</sup> Case C-256/90 *Mignini SpA v. Azienda di Stato gli Interventi nel Mercato Agricolo (AIMA)* [1992] E.C.R. I-

Administrative decision-making involves the weighing up of competing interests and the ordering of priorities. The principle of proportionality involves the determination of whether the balance struck by the administrator was excessive or disproportionate. The way in which disproportionality is identified is to compare the burden caused by a measure with its benefit. The promotion of one interest may adversely affect the other. If a restriction placed upon the applicant is severe then one would expect a correspondingly significant benefit to the Community. Conversely, if the measure's impact on the applicant was only slight then it would suffice to show that the measure was not arbitrary and promoted the Community objective even if only to a limited extent. In this way, a decision must bear a proportionate symmetry between its burdens and benefits. The principle of proportionality can be summed up as a requirement that the administrator should not do more harm than good by employing

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2651, paragraph 30 of Advocate General Jacobs's opinion. See also C. Tomuschat "Europe - A Common Constitutional Space" in C. Forder and B. de Witte (eds.), *The Common Law of Europe and Legal Education* (Kluwer, 1992) page 133, 141; Judge David Edward "Proportionality and Legitimate Expectations" (A talk given at the Judicial Studies Board seminar on UK and EC law, 8th January 1993) page 10; van Gerven, *ibid.*, page 30.

means which are out of proportion to the ends pursued.

The generic principle of proportionality covers three tests, or sub-principles, which determine the suitability, necessity and proportionality in the narrow sense of a challenged measure. These tests are cumulative in the sense that a measure must pass all the tests in order that it is not invalidated on the ground of disproportionality. The suitability principle is concerned with the effectiveness or appropriateness of the measure for achieving the purpose pursued. It essentially asks whether the measure is capable of attaining the objective for which it was made. If not, then the measure is unsuitable. The necessity test is concerned with the impugned measure's interference with the applicant's interest or right. This principle requires that the means adopted to attain the objective be the least restrictive possible. If an alternative is open to the decision-maker which does not so affect the applicant's right or interest then the measure is unnecessary. Whereas, if no alternative is available then the restriction will be necessary to achieve the pursued aim. The principle of

proportionality in the narrow sense is concerned with the balance of the competing interests. So while a measure may be both suitable and necessary for attaining its objective it may nonetheless impose an excessively severe and disproportionate burden when compared to the relative benefits of the measure.

### **3. The Principle of Proportionality in Community Law**

As a general principle of Community law, the principle of proportionality must "govern action by public authorities, Community or national, within the Community legal order."<sup>8</sup> The European Court has developed the principle despite the lack of an express statement in the Treaties requiring proportionality in decision-making. Rather the principle is derived from the Community Rule of Law which the European Court serves to protect.<sup>9</sup>

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<sup>8</sup> Case 118/75 *Criminal Proceedings against Watson and Belmann* [1975] E.C.R. 1185, 1208 (col. 2) of Advocate General Trabucchi's opinion.

<sup>9</sup> For statements that Community law is based upon the Rule of Law see Case 294/83 *Parti écologiste 'Les Verts' v. European Parliament* [1986] E.C.R. 1339, paragraph 23;

Proportionality was first mentioned in *Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community*<sup>10</sup> where the European Court stated that "in accordance with a generally accepted rule of law such an indirect reaction by the High Authority to illegal action on the part of the undertakings must be in proportion to the scale of the action."<sup>11</sup> The European Court clearly assumed that the principle was self-evidently part of the Community legal order. However, it was not until the early 1970s that the principle became frequently invoked before the European Court. The principle is now pre-eminent in the European Court's review of both Community and national administrative legality and is applied to decisions made under the E.C.S.C.,<sup>12</sup> Euratom<sup>13</sup> and E.C. Treaties. Under the latter it applies to nearly every area of law and to national decisions made within the scope of Community law.

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Case C-2/88 Imm. J. J. Zwartveld [1990] E.C.R. I-3365, paragraph 17; Opinion 1/91 Draft Agreement relating to the creation of the European Economic Area [1991] E.C.R. I-6079, paragraph 21.

<sup>10</sup> Case 8/55 [1954-56] E.C.R. 292.

<sup>11</sup> *Ibid.*, 299.

<sup>12</sup> Case 8/55 *Fédération Charbonnière de Belgique*, *ibid.*, concerned a decision under the E.C.S.C. Treaty.

<sup>13</sup> Case C-308/90 *Advanced Nuclear Fuels GmbH v. Commission* [1993] E.C.R. I-309.

Proportionality is also a principle of institutional law as well as administrative law. Article 3b(3), inserted by the Treaty of European Union, states that any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty. The principle of subsidiarity requires that "[i]n areas which do not fall within its exclusive competence, the Community shall take action...only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."<sup>14</sup> The principle of subsidiarity determines whether the Community should act at all and, within this area, the principle of proportionality determines what form the action should take.<sup>15</sup> The principle of proportionality must therefore be borne in mind by the Community when it decides how it should act in a particular field of competence.

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<sup>14</sup> Article 3b(2).

<sup>15</sup> See Case C-84/94 *United Kingdom v. Council* [1996] 3 C.M.L.R. 671, paragraphs 125-6 of Advocate General Léger's opinion. See also Emiliou, *op. cit. supra* no. 6, pages 139-142.

The Advocates General and the European Court have given different definitions of the requirements of the principle of proportionality. In a couple of early cases the European Court assimilated proportionality as part of the "principle of justice".<sup>16</sup> In subsequent cases the requirements of proportionality have been more fully elaborated. In 1970 Advocate General Dutheillet de Lamothe stated that under the principle of proportionality "citizens may only have imposed on them, for the purposes of the public interest, obligations which are strictly necessary for those purposes to be attained."<sup>17</sup> Advocate General Capotorti has stated that proportionality means that "...any burden placed on those affected by Community rules must lie within the limits necessary for obtaining the objective sought and require the least possible sacrifice on the part of those concerned."<sup>18</sup> The European Court has adopted the following definition:

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<sup>16</sup> See, e.g., Joined Cases 17 and 20/61 *Klöckner-Werke AG and Hoesch AG v. High Authority of the European Coal and Steel Community* [1962] E.C.R. 325, 340; Case 19/61 *Mannesman AG v. High Authority of the European Coal and Steel Community* [1962] E.C.R. 357, 371.

<sup>17</sup> Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle* [1970] E.C.R. 1125, 1146 (col. 1) of the Advocate General's opinion.

<sup>18</sup> Case 122/78 *S.A. Buitoni v. Fonds d'Orientation et de Régularisation des Marchés Agricoles (FORMA)* [1979]

"In order to establish whether a provision of Community law is consonant with the principle of proportionality it is necessary to establish, in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement."<sup>19</sup>

In its recent jurisprudence the European Court has accepted that the principle of proportionality is best explained in terms of the three constituent principles of suitability, necessity and proportionality in the narrow sense:

"By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages

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E.C.R. 677, 691 (col. 1) of the Advocate General's opinion.

<sup>19</sup> Case 66/82 *Fromançais SA v. Fonds d'Orientation et de Régularisation des Marchés Agricoles (FORMA)* [1983] E.C.R. 395, paragraph 8.

caused must not be disproportionate to the aims pursued."<sup>20</sup>

While different definitions or interpretations have been preferred by various Advocate Generals and differently constituted chambers of the European Court it is clear that such differences are not intended to signify a qualitative change in the conceptual basis of proportionality.

#### **4. The Application of the Framework of Proportionality**

Uncertainty over the scope of the principle of proportionality has arisen because of the different applications of the principle. In applying the principle in one case the European Court may state that the impugned measure will only be disproportionate if it is manifestly inappropriate for its purposes whereas in other cases the European Court will closely scrutinise the measure. It is apparent that the principle operates on a sliding scale of review. The nature of the test for

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<sup>20</sup> Case C-331/88 *R. v. Ministry of Agriculture, Fisheries and Food ex parte Fedesa* [1990] E.C.R. I-4023, paragraph 13. This three pronged definition of proportionality

legality imposed on the decision-maker by the European Court will vary. More than one commentator has described the principle as "a question of degree".<sup>21</sup> This is in part due to the evaluative findings necessary in its application.<sup>22</sup> The answers to whether a measure is excessive or beyond what is necessary are to be found by looking at the circumstances in which it was made and at the competing interests involved. The principle is therefore not self-executing; the nature of the proportionality test used by the European Court is heavily dependant upon the context of the particular case before it. According to Advocate General Capotorti "...an infringement of the principle of proportionality may...[not]...be held to have occurred, without careful reflection on the scope of that principle and on the importance which the facts given assume in its light."<sup>23</sup>

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corresponds to its elaboration in German law. See Emiliou, *op. cit. supra* no. 6, pages 26-37.

<sup>21</sup> Lord Mackenzie Stuart "Control of Power Within the European Communities" (1986) 11 *Holdsworth Law Review* 1, 14; C. Vajda "Judicial Review Within the Common Agricultural Policy-Part II" (1979) 4 *E.L.Rev.* 341, 347.

<sup>22</sup> G. Slynn *Introducing a European Legal Order* (London, The Hamlyn Lectures, 1992) page 36 recognises that the principle requires value judgments to be made.

<sup>23</sup> Joined Cases 154, 205, 205, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *S.p.A. Ferriera Valsabbia v. Commission* [1980] *E.C.R.* 907, 1055 (col. 2) of the Advocate General's opinion.

The argument advanced here is that the principle of proportionality forms an evaluative framework in which the European Court can assess administrative legality. What this means is that the European Court constructs a suitable frame of reference to express the requirements of proportionality through which it can determine whether the ends justify the means. The evaluative framework of proportionality can be set at varying levels of intensity or degrees of control. The European Court examines the legality of a measure with differing degrees of rigour placing various constraints on the exercise of power. The degree of control exercised by the European Court ranges from an exacting control to a more relaxed control deferential to the exercise of discretionary powers. The nature and form of the proportionality framework does not depend upon the mere whim of the European Court, though it often does not explicitly draw out why it chose one particular framework over another. The construction of the proportionality framework is influenced by various factors such as: the relative importance of the competing interests; the specific function served by the principle demanded by the context of its application; the

subject-matter under review; the nature of the challenged measure; the political accountability of the body subject to review and the overall competency of the European Court. From these, and other factors, the European Court decides how the principle of proportionality is to be expressed in regard to the specific case before it. The application of the principle of proportionality forms a variable framework for assessing the legality of means against ends. Deciding which framework best expresses the requirement of proportionality is an essential feature of the application of that principle.

In order to apply the principle of proportionality it is incumbent on the European Court to ascertain certain matters.<sup>24</sup> As the principle concerns the legality of the means chosen to attain an end it is first necessary to discern the end purpose pursued by the measure. This end forms the decision-maker's objective which it is seeking to achieve in the public interest. Second, the applicant's interest will need to be identified. Which interest of the applicant does

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<sup>24</sup> See P.P. Craig *Administrative Law* (London: Sweet & Maxwell, 3rd edn., 1994) pages 414-415 where the author

the measure bear upon? How does the impugned measure affect the applicant? Having ascertained this the European Court knows which interests the decision-maker has balanced and how. Next, the framework of review needs to be articulated. Again, this is conducted by assessing various factors present in the specific case. What weight is to be accorded to the relevant interests? Is the public interest an important one while the applicant's interest is comparatively slight, e.g., the protection of public health or state security as against a small financial disadvantage? Or is the applicant's interest important, e.g., a fundamental right or a significant financial disadvantage? What is the context of the application of proportionality? Did the decision-making process concern fundamental rights, the imposition of a penalty or an economic policy measure? Is the measure of an individual and self-contained nature or is it a general, normative measure? Was a hastily made decision required by pressing circumstances? Is the decision-maker open to other forms of accountability? Having arrived at a suitable framework of review the European Court

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lists five steps involved in any application of

will apply the principle of proportionality to the facts before it. Was the measure a suitable, appropriate and effective way of achieving its objective? Was the measure the least restrictive alternative open to the decision-maker? Did the measure place a disproportionate and excessive burden upon the applicant when compared with the benefit advanced to the public interest?

Across the different substantive areas of Community law three broad types of case have been discerned where the principle of proportionality is applied.<sup>25</sup> These concern measures affecting Treaty and fundamental rights, those imposing a penalty and those entailing economic and policy choices. The principle of proportionality has a different purpose depending upon which of these three types of decision-making it is applied to. This in turn affects the articulation of a framework of review by the European Court. These different purposes of the principle give specific expressions to the principle's generic meaning that the decision-maker must not end up doing more harm than good in the attainment of its objective.

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proportionality.

## A. Measures Affecting Treaty and Fundamental Human Rights

The common market is based upon four fundamental freedoms (goods,<sup>26</sup> workers,<sup>27</sup> establishment<sup>28</sup> and services<sup>29</sup>) which give positive economic rights to Community citizens. These Treaty rights have been accorded great importance by the European Court in terms of how the Community can affect the ordinary lives of its citizens. These economic rights are central to the whole Community enterprise of economic integration. They are not, however, absolute. The Treaty allows the Member States to derogate from these rights in a limited range of circumstances.<sup>30</sup> The principle of proportionality is applied to ensure that any measures derogating from these rights are objectively justified. When examining the legality of such a derogation the European Court will already have part of its evaluative framework in place as the importance accorded to the individual's interest, the Treaty right, is

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<sup>25</sup> Craig, *ibid.*, pages 418-421.

<sup>26</sup> Articles 9-11, 30-37.

<sup>27</sup> Articles 48-51.

<sup>28</sup> Articles 52-58.

<sup>29</sup> Articles 59-66.

acknowledged. The application of the principle of proportionality to review infringements of these rights will therefore be comparatively straightforward as the reasons for derogation are limited and the classification of such rights as fundamental requires any restriction to be to the minimum extent possible. The purpose of proportionality is then to ensure the primacy of the Treaty right; it can only be restricted with good reason and not beyond the precise limits required by the derogation. Proportionality is a necessary corollary of the existence of these rights. As such rights are seen as intrinsic to the Community Member States are only allowed to restrict them within a limited range of cases and then the exception must be necessary and justified. Treaty rights are complemented by the protection of fundamental human rights. Due to pressures to provide protection for human rights the European Court developed fundamental rights as general principles of law.<sup>31</sup> Infringement of fundamental

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<sup>30</sup> See, respectively, Articles 36, 48(3) and (4), 55, 56(1), 66.

<sup>31</sup> Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle*, supra no. 17. See generally P.P. Craig and G. de Búrca *EC Law. Text, Cases, and Materials*. (Oxford: Clarendon Press, 1995) chapter 7.

human rights is also reviewed against the principle of proportionality.

### *B. Measures Imposing a Penalty*

The second area in which the principle of proportionality is applied is against the imposition of an administrative penalty. Administrative decisions may impose penalties upon individuals or traders in various contexts to ensure compliance with Community law. For example, in the agricultural sphere penalties are imposed by the forfeiture of deposits and Member States may impose penalties on individuals if they breach Community law. The principle of proportionality has been applied to ensure that the penalty imposed is not excessive. The interests to be balanced in such cases are usually specific. The individual's interest is in the degree of the penalty while the Community interest is in ensuring that Community law is followed. The purpose of proportionality in reviewing the imposition of a penalty is two-fold. First, the principle can promote the effectiveness of the penalty for achieving its purpose. Second, it provides protection for the individual concerned

by making sure that she/he does not suffer an excessive or disproportionate burden.

*C. Measures Entailing Economic and Policy Choices*

Policy decisions are made by the Community institutions in order to promote European integration. The European Community is based upon the idea of the mixed-economy which stimulates competition through which economic integration is to be achieved.<sup>32</sup> To ensure that the market functions correctly the Community institutions may decide to intervene. Such intervention is bound to affect individual freedom in some way. It has been stated that in the field of economic law the greatest risk of administrative arbitrariness occurs.<sup>33</sup> In order that the process of economic integration does not undermine the individual freedom necessary for its success, the principle of proportionality is applied to ensure that such intervention is suitable for achieving its aims, no more than is necessary and not disproportionate.

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<sup>32</sup> See Mertens de Wilmars, *op. cit. supra* no. 5. See also D.J. Gerber "Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe" (1994) 42 A.J.C.L. 25.

According to Mertens de Wilmars, a former judge at the European Court:

"From the economic point of view the principle of proportionality embodies two concepts fundamental to mixed-economy systems which are democratic in their inspiration: the principle that the intervention of the authorities must be subsidiary in nature and that there must be a connection between an intervention threshold and the safeguard of individual liberties."<sup>34</sup>

The level and extent of any intervention must be checked in order that the Community economy does not become a planned economy, in which case the Community would fail to achieve its purpose of economic integration through the establishment of a single market and individual freedom would be unnecessarily overridden. The principle ensures that state intervention serves the purpose of social development, which is in the interests of

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<sup>33</sup> Lord Mackenzie Stuart *The European Communities and the Rule of Law* (London, The Hamlyn Lectures, 1977) page 110.

<sup>34</sup> Mertens de Wilmars, *op. cit. supra* no. 5, 13. Article 5 E.C.S.C., which provides that the Community is to carry out its task "with a limited measure of intervention", and Article 57 E.C.S.C., which provides that in the sphere of production preference is to be

the Community, effectively and appropriately and does not go beyond what is necessary in order to attain this purpose.

The making of economic policy decisions involves the weighing up of competing interests and prioritising of some interests over others. Difficult decisions have to be made as to how the conflicting interests should be resolved in determining policy. For example, the Common Agricultural Policy (CAP) has several objectives which may at times conflict with each other.<sup>35</sup> The European Court has recognised that these objectives "may not all be simultaneously and fully attained."<sup>36</sup> It is inevitable that if the decision-maker is to make a decision some interest will be adversely affected in some way. Policy decisions require a trade-off between competing goals and interests; to secure an advantage often a corresponding disadvantage has to be endured. Consequently, it is correct to state that in this field of decision-making "there is nearly always something to be said against any administrative

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given to indirect means of action, reflect these concepts.

<sup>35</sup> See Article 39. See generally F. Snyder *Law of the Common Agricultural Policy* (London: Sweet & Maxwell, 1985).

decision".<sup>37</sup> The Community institutions may have to make decisions which adversely affect either a particular individual, a group or everyone in general. Application of the principle of proportionality must take account of this in order that the European Court avoids becoming a covert form of administration. Early in its jurisprudence the European Court recognised that the Community institutions were not under an obligation to avoid decisions which adversely affected any interests.<sup>38</sup> However, this did not mean that the Community could ignore the special interests of those concerned and act so harshly that those interests are compromised more than could reasonably be expected. The European Court stated that when making a decision the Community "is bound to act with all the circumspection and care required to balance and assess the various, often conflicting, interests involved and to avoid harmful consequences in so far as, within reason, the nature of the decision to be taken permits."<sup>39</sup> As the interests involved in

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<sup>36</sup> Case 5/67 *W. Beus GmbH & Co. v. Hauptzollamt München* [1968] E.C.R. 83, 98.

<sup>37</sup> *R. v. Secretary of State for the Home Department ex parte Brind* [1991] 1 A.C. 696, 767B per Lord Lowry.

<sup>38</sup> Case 15/57 *Compagnie des Hauts Fourneaux de Chasse v. High Authority of the European Coal and Steel Community* [1957-58] E.C.R. 211, 228.

<sup>39</sup> *Ibid.*

the making of such decisions are likely to be more generalised, multifarious and interrelated, the European Court is faced with a different task than with decisions affecting fundamental rights and penalties. This is reflected in the construction of the proportionality framework to review economic policy measures.

## **5. The Case-Law of the European Court**

In this section the case-law of the European Court will be examined. This analysis will inevitably be selective in order to discern some of the more important cases. As a general principle of Community law proportionality is used in various ways. It is employed to determine the validity of a measure adopted either by the Community institutions or by a Member State, to provide guidance in the interpretation of a measure, to guide the exercise of powers conferred by the Treaty and secondary legislation and to fill in any gaps in Community law. A division will be made between the application of proportionality to

measures adopted by the Community institutions and those adopted by the Member State.

*A. The Principle of Proportionality Applied to Community Measures*

Challenges to Community measures based upon the principle of proportionality have occurred most often in the field of the CAP.<sup>40</sup> This forms an ideal zone for the application of the principle for in the implementation of the CAP the Community necessarily has to regulate economic activity in depth and therefore invade the sphere of action of individuals.<sup>41</sup> Many of the cases examined arise from the context of the CAP.<sup>42</sup> The type of decision-making conducted in this sphere includes both economic policy decisions and measures imposing penalties. Therefore, the sphere of the CAP

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<sup>40</sup> See generally Snyder, *op. cit. supra* no. 35; J.A. Usher *Legal Aspects of Agriculture in the European Communities* (Oxford: Clarendon Press, 1988). For analyses of the principle of proportionality in the sphere of the CAP see S. Neri "Le principe de proportionnalité dans la jurisprudence de la Cour relative au droit communautaire agricole" (1981) 17 R.T.D.E. 652; Schwarze, *op. cit. supra* no. 1, pages 727-773; Emiliou, *op. cit. supra* no. 6, chapter 6.

<sup>41</sup> Neri, *ibid*, 678.

<sup>42</sup> For an analysis of the principle of proportionality in another area of Community activity see A. Egger "The principle of proportionality in Community anti-dumping law" (1993) 17 E.L.Rev. 367.

provides cases in which the European Court has constructed different frameworks in order to apply the principle of proportionality.

*Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof*<sup>43</sup> concerned one of the earliest applications of the principle of proportionality to an economic measure made by the Community institutions. A challenge was made to the level of Monetary Compensatory Amounts (MCAs) charged on goods. Due to currency fluctuations, the Council had decided to devise a system of MCAs<sup>44</sup> in order to compensate for different prices levels of agricultural produce due to the difference in exchange rates for national currencies. Pursuant to Council Regulation No 974/71<sup>45</sup> the level of the MCAs were to be based solely on the relationship between the official parity of the Deutsche Mark (DM) compared with the dollar and its true parity rather than on any profit made by the importer on the exchange rate. In the preamble of the Regulation it was stated that the MCAs adopted should not exceed

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<sup>43</sup> Case 5/73 [1973] E.C.R. 1091. See also Case 9/73 *Carl Schlüter v. Hauptzollamt Lörrach* [1973] E.C.R. 1135.

<sup>44</sup> See generally J.A. Usher "Agricultural Markets: Their Price-Systems and Financial Mechanisms" (1979) 4 E.L.Rev. 147; P. Gilsdorf "The System of Monetary Compensation from a Legal Standpoint Part I-The System and its Effects, Part II-Legal Basis of and Limits to the System" (1980) 5 E.L.Rev. 341, 433.

what was strictly necessary to compensate the difference between the exchange rates. This requirement encapsulated the principle of proportionality. As the currencies of other countries fluctuated in relation to the DM to an extent different from that of the dollar compensatory amounts charged would not always correspond to the effects in the monetary field of the revaluation of the DM so that a trader could be charged a greater amount than it had actually benefited from. The applicant had imported cheese milk from Bulgaria into Germany and had been charged compensatory amounts of 45.50 DM per 100 kg. The applicant claimed that the method of calculation of MCAs was disproportionate.

The European Court reasoned that the Council had been required to quickly draw up measures having immediate effect that were to be applicable to all imports and exports concerned in order to deal with the constantly developing and more or less unpredictable situation of currency fluctuations. The Council had sought to make an overall assessment of the advantages and disadvantages of introducing the system of MCAs.

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<sup>45</sup> OJ 1971 L 106, p. 1.

The applicant had argued that the Council should have adopted a system based upon any profit made by the importer due to the exchange rate. However, the European Court found, in agreement with the Commission, that an alternative method of calculation based upon the exchange rate of the exporting state would have resulted in overburdening the administration and would have rendered trade more difficult. Furthermore, such a system could have been rendered nugatory if the parties contractually agreed to trade in a certain currency.<sup>46</sup> The European Court stated that the requirement that the MCAs charged were to be no more than were strictly necessary could not be judged in relation to the individual situation of any one particular group of operators:

"Given the multiplicity and complexity of economic circumstances, such an evaluation would not only be impossible to achieve, but would also create perpetual uncertainty in the law.

An overall assessment of the advantages and disadvantages of the measures contemplated was

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<sup>46</sup> *Ibid.*, 1126 (col. 2) to 1127 (col. 1) of Advocate General Roemer's opinion.

justified, in this case, by the exceptionally pressing need for practicability in economic measures which are designed to exert an immediate corrective influence; and this had to be taken into account in balancing the opposing interests."<sup>47</sup>

The European Court concluded that the applicant had not shown that the way the Council had weighed up the advantages and disadvantages of calculating the level of MCAs was "manifestly out of proportion to the object in view".<sup>48</sup>

In this case the European Court began to develop the framework of manifest disproportionality or 'marginal review'.<sup>49</sup> The applicant must show that the challenged measure was not merely disproportionate but manifestly disproportionate. This framework therefore allows the decision-maker a wide degree of discretion or a margin of appreciation in the exercise of its discretionary powers. This framework of review is

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<sup>47</sup> *Ibid.*, paragraph 22.

<sup>48</sup> *Ibid.*, paragraph 23.

<sup>49</sup> H.G. Schermers and M. Waelbroeck *Judicial Protection in the European Communities* (Kluwer, 1992) paragraphs 310 and 313. Article 33 of the E.C.S.C. Treaty provides: "The Court of Justice may not, however, examine the evaluation of the situation...save where the Commission is alleged to have...manifestly failed to observe the

constrained to the identification of only arbitrary or patent disproportionality. The European Court adopted this framework of review for the following way. First, it noted that the Council was faced with an unpredictable and quickly changing situation which demanded a response. The measures taken were adopted quickly against an unpredictable background. The European Court appreciates that the Community institutions must have some lee-way in moments of economic stress when contingency measures have to be made.<sup>50</sup> Secondly, an overall assessment had been made of the situation and of the system to be introduced. This system would have its advantages which would be offset by corresponding disadvantages. The alternatives proposed by the applicants certainly had disadvantages also. By making an overall assessment the Council had to trade certain interests off against each other. The applicant's interest was that of being charged MCAs which did not correspond to the profit made due to the fluctuating exchange rate, while the Community interest was to ensure a fair standard of living for the agricultural

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provisions of this Treaty or any rule of law relating to its application."

<sup>50</sup> Lord Mackenzie Stuart, *op. cit. supra* no. 33, page 96.

community<sup>51</sup> and to stabilise agricultural markets.<sup>52</sup> To achieve these aims the Council must be given a wide discretionary power. The requirement in the preamble of the regulation that the amounts of MCAs be limited to those which were strictly necessary was therefore relevant in the overall assessment of the system, not in terms of individual amounts charged to a certain group of operators.<sup>53</sup> The situation caused by the currency fluctuations was the very opposite of a market lead by supply and demand. Speculative traders could make profits just by converting the currency they obtained for their products. The public interest justification for the introduction of MCAs was therefore the stabilisation of markets. The Council had made an economic decision which had traded certain interests off against one another. This was inevitable for otherwise there would not have been any progress towards achieving the objectives at all. As the measure aimed to secure an important interest it was in the traders' interest that it

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<sup>51</sup> Article 39(1)(b).

<sup>52</sup> Article 39(1)(c).

<sup>53</sup> In Case 15/83 *Denkavit Nederland BV v. Hoofdproduktschap voor Akkerbouwprodukten* [1984] E.C.R. 2171, paragraph 5 Advocate General Mancini stated that the principle of proportionality "does not exclude - in fact it presupposes - consideration and co-ordination of all the requirements of the System."

worked, otherwise it could potentially destroy their businesses. The burden placed on the applicant was not so severe when compared to the importance of the measure's objective. Furthermore, the European Court did not have the requisite expertise to examine alternative remedies. Advocate General Roemer stated that he, and presumably the European Court also, was bound to agree with the Commission that an alternative system would have been impracticable and caused considerable difficulties.<sup>54</sup> For these reasons the European Court set the framework of review for proportionality at the manifest level.

*Bela-Mühle Josef Bergmann KG v. Grows-Farm GmbH & Co. KG*,<sup>55</sup> commonly referred to the 'skimmed-milk' case, concerned the application of a different framework of review in which to test the proportionality of an economic policy measure, a Council Regulation. The Community had been faced with an increasing surplus of skimmed-milk powder. To deal with the problem the Council adopted a

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<sup>54</sup> *Ibid.*, 1126 (col. 2) of the Advocate General's opinion.

<sup>55</sup> Case 114/76 [1977] E.C.R. 1211. See also Case 116/76 *Granari BV v. Hoofdproduktschap voor Akkerbouwprodukten* [1977] E.C.R. 1247 and Joined Cases 119 and 120/76 *Ölmühle Hamburg AG v. Hauptzollamt Hamburg Waltersdorf* [1977] E.C.R. 1269. See C.M. Schmittoff "The Doctrines

regulation in order to reduce stocks of milk powder by increasing its use in animal-feed.<sup>56</sup> Grants of aid for certain vegetable products and the free circulation of certain imported animal feed products for cattle-traders were made subject to an obligation to purchase quantities of skimmed-milk powder at a price that was equal to three times its value as animal feed. In order to counter the milk powder surplus a burden had to fall somewhere. The Council had decided that not only milk producers but also producers in other agricultural sectors should shoulder the burden through the compulsory purchase of milk-powder for use in animal feed at a price three times higher than the products it replaced. It was argued that this contravened the requirements of proportionality.

In the opinion of Advocate General Capotorti the amount that producers were obliged to pay for the animal feed was a "kind of tax levied...to meet the need to dispose of surplus milk-powder stocks".<sup>57</sup> The Advocate General then considered whether the measure was necessary; were the burdens

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of Proportionality and Non-Discrimination" (1977) 2 E.L.Rev. 329.

<sup>56</sup> Regulation 563/76, OJ 1976 L 67, p. 18.

<sup>57</sup> *Ibid.*, 1234 (col. 1) of the Advocate General's opinion.

placed upon the producers excessive as other less onerous alternative means were available to the Council? Advocate General Capotorti stated that two possible alternatives had been open to the Council. First, the burden could have been more evenly distributed if it was indirectly spread throughout the Community via the Community budget. Second, the costs of processing liquid skimmed-milk into milk powder and of denaturing were higher than the market price of the milk used in animal feed. Had the processing of liquid milk into powder been discouraged and instead devoted to other purposes, it would have served to have reduced the surplus of milk powder. The Advocate General stated that "compared with the advantage sought for the Community, that system made demands which were too heavy on certain categories of producers and consumers".<sup>58</sup> The European Court followed the opinion of the Advocate General as regards the principle of proportionality in all but one way. The European Court conflated the principle of proportionality with that of non-discrimination. It stated that the "obligation to purchase at such a disproportionate price constituted a discriminatory

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<sup>58</sup> *Ibid.*, 1234 (col. 2) of the Advocate General's

distribution of the burden of costs between the various agricultural sectors."<sup>59</sup> The need to keep these two concepts distinct has been convincingly made.<sup>60</sup> It is clear that the European Court did not consider the Regulation to be lawful and perhaps wished to emphasise its disapproval by stating that it was not only disproportionate but discriminatory also.

At first glance it might appear that the European Court would have applied the manifest proportionality test as in the *Balkan-Import-Export* case. However, the European Court did not expressly state that the applicant had to show the measure to be manifestly disproportionate but seemed to be less deferential in its review. The European Court seemed to have attached weight to the fact that such a considerable financial burden fell "not only on producers of milk and milk products but also, and more especially, on producers in other agricultural sectors".<sup>61</sup> Such producers were not responsible for the milk surplus and therefore formed an 'innocent' class. It is possible that the

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opinion.

<sup>59</sup> *Ibid.*, paragraph 7.

<sup>60</sup> See M. Herdegen "The Relation Between the Principles of Equality and Proportionality" (1985) 22 C.M.L.Rev. 683; Emiliou, *op. cit. supra* no. 6, pages 148-161.

<sup>61</sup> *Ibid.*, paragraph 7.

European Court, like Advocate General Capotorti, saw the obligation as a kind of tax or economic penalty which affected producers unconcerned with the milk sector.<sup>62</sup> The European Court is keen to ensure that in the regulation of the market economic penalties are not imposed on traders<sup>63</sup> and the suspicion that a measure amounts to a *de facto* economic penalty may justify a closer scrutiny. The purpose of applying proportionality shifted from being whether an economic policy choice was subsidiary to whether the imposition of a severe economic burden was necessary. The weight of the conflicting interests and the nature of the charge therefore led the European Court to a framework of review with a more intensive degree of control than the marginal review of the manifest disproportionality requirement. Applying the principle of proportionality it was clear that while the Community interest of seeking to decrease the milk surplus was a legitimate and important aim, less burdensome alternatives means were available to the Council. The producers had

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<sup>62</sup> Craig, *op. cit.* supra no. 24, pages 419-420 views the measure not as a penalty *stricto sensu* but as a disproportionate economic charge.

<sup>63</sup> See, e.g., Case 77/86 *R. v. H.M. Commissioners of Customs and Excise ex parte The National Dried Fruit Trade Association* [1988] E.C.R. 757, paragraph 32.

suffered an excessive burden and the intervention went beyond what could be viewed as necessary.

In reaching the decision as to whether the measure was excessive the European Court engages in an evaluative process.<sup>64</sup> This is a function of the framework of proportionality. The European Court has to decide how to articulate the principle of proportionality in the case before it. In the 'skimmed-milk' case the European Court decided to be less deferential in its review for the reasons given. From this decision it can be seen that the principle of proportionality is concerned with specific burdens and sacrifices imposed upon individuals rather than a general review of all the competing interests. Should the challenged measure impose a particularly harsh burden on a certain sector then the European Court may invalidate on grounds of proportionality. Alternatively, if it is merely complained that the measure does not attain the correct balance of the competing interests, without imposing a heavy burden upon a particular sector, then the European Court is likely to apply the manifest test for proportionality as the case demonstrates.

In *Germany v. Council (Bananas)*<sup>65</sup> the European Court explained why its review must be limited to manifestly incorrect assessments. A challenge had been made against Council Regulation No 404/93<sup>66</sup> which introduced a new common organisation of the market in Bananas. The German Government challenged the Regulation. According to Advocate General Gulmann, bananas are amongst the most important agricultural products in international trade.<sup>67</sup> Prior to the Regulation there had been no common organisation of the Community banana market. The Community had been supplied by bananas produced in the Community, those in countries which signed the Lomé Convention with the Community (ACP States) and bananas from third countries. The consumption of bananas in various Member States differed. The Council decided to act in order to bring about free movement within the Community and a common system of trade with third countries. As the prices of the different bananas varied the Council was faced with a difficult task of balancing the relevant

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<sup>64</sup> G. de Búrca "The Principle of Proportionality and its Application in EC Law" (1993) 13 Y.E.L. 105, 122.

<sup>65</sup> Case C-280/93 [1994] E.C.R. I-4973. On the subsequent banana litigation see N. Reich "Judge-made 'Europe à la carte': Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation" (1996) 7 E.J.I.L. 103.

<sup>66</sup> OJ 1993 L 47, p. 1.

interests and of ensuring the marketing of products at reasonable prices.<sup>68</sup> The banana market was unusual compared to other sectors and therefore the Council's experience was limited. Furthermore, the Council had a difficult task in determining the system's future effects which depended upon a series of factors which were hard to foresee, such as consumer reaction.

The Regulation consisted of common quality and marketing controls for all bananas and the creation of producers' organisations. Community producers were to be compensated up to a maximum quantity of bananas and traditional imports of bananas from ACP States could continue. Third-country imports were to be subject to a tariff-quota and, within that, to a levy of ECU 100 per ton of bananas. Imports outside the quota were set at ECU 750 per ton for non-traditional ACP State bananas and ECU 850 per ton for third-country bananas. The German Government argued that the tariff quota was contrary to the principle of proportionality as it placed excessive burdens on certain traders and was not necessary. It was argued that the Council had manifestly exceeded the limits of its discretionary

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<sup>67</sup> *Ibid.*, paragraph 10 of the Advocate General's opinion.

power. Both Advocate General Gulmann and the European Court rejected this argument. The European Court stated that it must constrain its review of the measure to only manifestly incorrect assessments for "in establishing a common organisation of the market, the Council has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility."<sup>69</sup> It was acknowledged by the Advocate General that there were circumstances which could provide a basis for the European Court to declare the system introduced invalid. To succeed an applicant would have to show that the Council had manifestly and seriously overstepped those limits by making manifestly incorrect assessments of the assumptions and effects involved in those policy choices. In the present case the Council had not exceeded its powers regarding the establishment of the factual basis of the action or the precise demarcation of its objectives and its choice of the appropriate means.<sup>70</sup> Advocate General Gulmann commented that the Council had made "no such manifest error in the

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<sup>68</sup> Article 39(1)(e).

<sup>69</sup> *Ibid.*, paragraph 91.

<sup>70</sup> *Ibid.*, paragraph 99 of the Advocate General's opinion.

fundamental choice of means for achieving its purposes for the Court to overrule that choice within the framework of its review of legality.”<sup>71</sup>

Again the framework of review was limited but not altogether excluded. Conflicting interests had to be resolved in a new common organisation of the market and burdens had to be shouldered somewhere. Indeed Advocate General Gulmann stated that it was doubtful whether the Council could not have chosen other less burdensome means for consumers and traders for attaining its objectives.<sup>72</sup> However, the applicants had not shown that the threshold of manifest disproportionality had been reached. This restraint shows the difference in the role of the administrator or legislator and that of the European Court. The wide discretion given to the Council corresponds with its political responsibilities. The European Court certainly does not see itself as the appropriate forum for continuing political disagreements when Member States, outvoted in the Council of Ministers, seek to have a measure invalidated by the European Court when it is not manifestly disproportionate.

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<sup>71</sup> *Ibid.*, paragraph 87 of the Advocate General's opinion.

<sup>72</sup> *Ibid.*

The European Court will also adopt a deferential framework of review when it reviews the retrospective legality of a measure. *Crispoltoni v. Fattoria Autonoma Tabacchi and Donatab Srl*<sup>73</sup> involved a challenge to two regulations which concerned the common organisation of the tobacco market. The common organisation of this sector had been established by a system based upon norm and intervention prices.<sup>74</sup> The Council would fix a norm price and an intervention price for the following year which was to be 90% of the norm price. The products could be sold either on the market or to the intervention agencies and a premium was granted to encourage purchasers to buy at the norm price. Due to an increase in production the Council decided to introduce a system of maximum guarantee quantities which limited production.<sup>75</sup> For every 1% that the maximum guarantee quantity was exceeded then the intervention prices and premiums were to be reduced by 1%. Despite this measure production continued to increase. In 1992 the Council sought to deal with the problem by means of a completely

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<sup>73</sup> Joined Cases C-133/93, C-300/93 and C-362/93 [1994] E.C.R. I-4863.

<sup>74</sup> Council Regulation No 727/70, OJ 1970 (I), p. 206.

<sup>75</sup> Council Regulation No 1114/88, OJ 1988 L 110, p. 35.

new common organisation of the market.<sup>76</sup> The applicant had received a premium for its 1991 tobacco production. However, the Commission found that the applicant had exceeded the maximum guaranteed quantity by 15% and the Italian intervention agency sought the reimbursement of this 15%. Before the European Court it was argued that the maximum guarantee system was disproportionate and the introduction of a system in 1992 was evidence of the inappropriateness of the maximum guarantee quantity system.

The European Court stated that the applicant had to show that the measure was manifestly inappropriate having regard to the objective the Council sought to achieve. Furthermore, the European Court stated:

"The legality of a Community act cannot depend on retrospective considerations of its efficacy. Where the Community legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information

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<sup>76</sup> Council Regulation No 2075/92, OJ 1992 L 215, p. 70.

available to it at the time of the adoption of the rules in question."<sup>77</sup>

The framework of review was then to be adjusted in view of the fact that the European Court was reviewing the legality of the system retrospectively. When the system was introduced it could not have been reasonably foreseen that it would prove to be inadequate for combating the over-production. The European Court was stating that the fact that the measures adopted were not necessarily the best is insufficient to annul them.<sup>78</sup> Had the European Court been willing to examine the measure ex post facto then it would have imposed on the Council an impossibly high standard to foresee the inadequacies of the system which could not reasonably have been foreseen. Even if the Council had been given enough time to consider the likely consequences of introducing the system it could not reasonably have foreseen the exact levels of effectiveness and suitability of the scheme. The European Court therefore modified

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<sup>77</sup> *Ibid.*, paragraph 43. The European Court referred to the previous cases of Case 40/72 *I. Schroeder KG v. the Federal Republic of Germany* [1973] E.C.R. 125, paragraph 14 and Cases C-267 to 285/88 *Wuidart v. Laitrie Coopérative Eupenoise, a cooperative society* [1990] E.C.R. I-435, paragraph 14.

its framework of review to test whether the measure was disproportionate in view of the information available when it was made. The European Court found that while the system may not have been the most effective and appropriate means available neither had it proved to be manifestly inappropriate. Advocate General Jacobs remarked that had the maximum guaranteed system not been introduced then production could have increased even more.<sup>79</sup> The argument that the system penalised those producers regardless of their conduct was rejected by the European Court. The alternative to the maximum guarantee system was to adopt a system of individual quotas which would have been more restrictive than the maximum guarantee system.<sup>80</sup> That the maximum guarantee quantity system was insufficiently effective was not enough to justify the conclusion that it was disproportionate.

In *Mignini SpA v. Azienda di Stato per gli Interventi nel Mercato Agricolo (AIMA)*<sup>81</sup> the European Court found a measure adopted in the exercise of a broad discretionary power to be

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<sup>78</sup> Lord Mackenzie Stuart, *op. cit. supra* no. 33, page 96.

<sup>79</sup> *Ibid.*, paragraph 48 of the Advocate General's opinion.

<sup>80</sup> *Ibid.*, paragraph 58 of the Advocate General's opinion and paragraph 46 of the European Court's judgment.

<sup>81</sup> Case C-256/90 [1992] E.C.R. I-2651.

disproportionate. The applicant produced animal foods from soya beans. To promote the development of soya bean production aid had been payable to those undertakings concluding contracts at a minimum price set by the Community. However, the applicant was refused the aid because it had not satisfied the condition that the produce be identified on the premises of the production establishment. This condition aimed at ensuring that the system of aid was not abused by fraudulent multiple claims. The applicant argued that the requirement that the produce be identified on the premises of production<sup>82</sup> and therefore requiring manufacturers to have storage facilities on their premises where production takes place, was contrary to the requirements of proportionality; it was unnecessary for the purposes of control and disproportionate in that it was very expensive. Also as the same condition was not imposed upon producers which used soya beans to produce oil it was argued that it was unequal.

The European Court stated that for the purpose of examining the provision the principles of

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<sup>82</sup> Article 2(1) of Commission Regulation No 2537/89, OJ 1989 L 245, p. 8, as amended by Commission Regulation No 150/90, OJ 1990 L 18, p. 10.

proportionality and non-discrimination could not be separated. Significantly it continued by stating that if a measure was patently unsuitable for achieving its objective then this would affect its legality but the Community institutions still retained a broad discretionary power in regard to the CAP reflecting the Treaty responsibilities imposed on them. In assessing the necessity of the obligation that storage facilities be on the premises for animal food producers the European Court found that various means of control had been open to the responsible agencies. Information could be cross-checked in order to verify that it corresponded. The Commission argued that physical controls were needed to ensure the reliability of checks carried out elsewhere. Such controls were possible where the manufacture of oil was concerned but not for the manufacture of animal feeding-stuffs. However, the European Court found that any system would be open to some fraud whatever the controls and, furthermore, the composition of animal food allowed the quantity of beans processed to be determined from microscopic analyses of the final product. The Commission also argued that as incorporators of soya beans were more numerous than

manufacturers of oil, which were not subject to the obligation, control of the movements of goods could be more difficult for incorporaters. Again the European Court preferred the applicant's argument; movement of products could be controlled by other less restrictive means, such as the approval of storage facilities. The European Court further pointed out that the burden on animal food manufacturers to build new storage facilities on their premises could prove to be a sufficient deterrent to make some producers not apply for the aid and therefore frustrate the whole purpose of the aid system. The obligation was invalidated as contrary to the principles of proportionality and non-discrimination.

When the European Court uses the framework of patent or manifest unsuitability it requires overwhelming grounds for a measure to be invalidated. In the present case the obligation for storage facilities on the premises had to be weighed against the need to control fraud which is rife in some areas of Community policy. It might be thought that the prevention of fraud, like the

protection of public health,<sup>83</sup> is an important public interest and that a severe and excessive burden on the applicant's behalf would be required to justify a finding of manifest disproportionality. The reason for the generous nature of the European Court's review is that the condition could actually prevent some businesses from taking advantage of the aid policy altogether. To apply for aid the producer had to store the produce on its premises. The European Court recognised that the construction of new storage premises and additional storage charges would come at a high cost.<sup>84</sup> The condition, which was self-contained and amenable to review without questioning the whole policy underlying it, could deter producers from applying for the aid and therefore defeat the whole purpose of the policy. Rather than questioning the aid policy, the European Court's review had the effect of strengthening its effectiveness by invalidating a

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<sup>83</sup> See, e.g., Case C-331/88 *R. v. Ministry of Agriculture, Fisheries and Food ex parte Fedesa* [1990] E.C.R. I-4023.

<sup>84</sup> *Ibid.*, paragraph 30. Compare with the view of Advocate General Jacobs, *ibid.*, paragraph 30 of the opinion of the Advocate General, that the obligation was "in reality simply a reduction in the extent to which...[processors of soya beans]...may benefit from a generous arrangement...".

condition which had a dissuasive effect on undertakings taking advantage of it.

The next two cases involved the forfeiture of deposits.<sup>85</sup> Agricultural traders may sometimes have to lodge deposits with intervention agencies which will act as a guarantee that the trader will fulfil its commercial obligations. If the conditions laid down are not complied with then the trader may lose its deposit. The purpose of this forfeiture is to enable the Community to gain a good idea of what trade movements are being conducted by reflecting real trade through the issue of licences subject to deposits. The forfeiture of such deposits occurs when goods are not imported or exported according to licence. This forfeiture has both punitive and deterrent effects in order to ensure the smooth functioning of the CAP. In *S.A. Buitoni v. Fonds d'Orientation et de Régularisation des Marchés Agricoles*<sup>86</sup> the applicant had secured certificates for imports of tomatoes from outside the Community which had been subject to the provision of a security. Having imported the produce the French

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<sup>85</sup> See R. Barents "The System of Deposits in Community Agricultural Law: Efficiency v. Proportionality" (1985) 10 E.L.Rev. 239; Schwarze, *op. cit. supra* no. 1, pages 732-747; Emiliou, *op. cit. supra* no. 6, pages 212-223.

intervention agency refused to return the security because the applicant had failed to submit proof of importation within six months.<sup>87</sup> The provision had been introduced for administrative reasons. The applicant argued that it was disproportionate to apply the same penalty for a total failure to import and for delay in the submission of the proof of importation. The forfeiture of the deposit was intended to guarantee the importation of the produce. The European Court stated that to have the same penalty for the failure to submit proof of importation within the time limit as for the failure to import was "excessively severe in relation to the objectives of administrative efficiency in the context of import and export levies."<sup>88</sup> The charge to penalise the late submission of proofs should have been considerably less onerous than the loss of the entire security and more closely connected to its practical effects. In *R. v. Intervention Board for Agricultural Produce (IBAP) ex parte E.D. & F. Man*

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<sup>86</sup> Case 122/78 [1979] E.C.R. 677. See also Case 240/78 *Atalanta Amsterdam B.V. v. Produktschap voor Vee en Vlees* [1979] E.C.R. 2137.

<sup>87</sup> As required by Article 3 of Regulation No. 499/76, OJ 1975 L 59, p. 18.

<sup>88</sup> *Ibid.*, paragraph 20.

*(Sugar) Ltd.*<sup>89</sup> the applicant traded in sugar and had submitted tenders to export sugar subject to a deposit of £1,670,370. The applicant had to apply for an export licence by midday on a given date. However, the intervention agency did not receive the relevant telex communication until nearly four hours after the deadline. Consequently the intervention agency declared the security to be forfeited, which was challenged as disproportionate by the applicant. The European Court stated that while the Commission could impose a time-limit for the submission of applications for export licences, the penalty should have been less severe. The loss of the entire deposit for the late communication was disproportionate.

In cases concerning the application of proportionality to the forfeiture of deposits the European Court does not use the manifest proportionality test but draws a tighter framework of review around the boundaries of decision-making by the Community institutions.<sup>90</sup> The European Court is prepared to use proportionality for a more

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<sup>89</sup> Case 181/84 [1985] E.C.R. 2885.

<sup>90</sup> See also Case C-155/89 *Belgian State v. Philipp Brothers SA* [1990] E.C.R. I-3265; Case C-326/94 *A. Maas & Co. NV v. Belgische Dienst voor Bedrijfsleven Landbouw, now the Belgisch Interventie- en Restitutiebureau* [1996] E.C.R. I-2643.

intensive degree of control because of the nature of the decision-making under review and hence the different purpose served by the principle. In such cases the decision is of a different kind to an economic or policy choice. It is typically a decision imposing a penalty upon the individual trader and not a general, normative measure. The Community institutions do not need to make an overall assessment to decide whether the trader's deposit should be forfeited. The decision is more individualised and less polycentric. The Community interest is in the smooth-running and efficiency of the deposit system, while the trader's interest is in not being subject to an excessive penalty. These interests are more amenable to close judicial scrutiny than those involved in the making of an economic policy measure and the European Court sees itself as the legitimate forum for an intense scrutiny of the proportionality of a penalty or sanction.

The forfeiture cases can be compared with *Advanced Nuclear Fuels GmbH v. Commission*<sup>91</sup> which arose under the Euratom Treaty. The applicant company had inadvertently exported nuclear

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<sup>91</sup> Case C-308/90 [1993] E.C.R. I-309.

materials from Germany to the United States. The Commission decided to place the company under the administration of an appointed board for the maximum period of four months<sup>92</sup> to ensure that any similar mistakes did not recur. The applicant argued that this penalty was disproportionate as the Commission had exaggerated the seriousness of the incident and that the penalty was unnecessary to ensure that it was not repeated. Both arguments were rejected by the European Court. According to Advocate General Jacobs the accidental exportation of nuclear material could not be treated as a "trifling matter, undeserving of the efforts required to prevent a recurrence of such an event with the highest degree of assurance available."<sup>93</sup> The sanction was necessary as the board of administrators could force the company to change its internal regulation. Had a lesser penalty been imposed, such as a warning,<sup>94</sup> then the Commission could not be sure that the incident would not re-occur. Advocate General Jacobs recognised that there was some merit in the argument that the Commission's response exaggerated the seriousness

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<sup>92</sup> Under Article 83(1)(c) of the Euratom Treaty.

<sup>93</sup> *Ibid.*, paragraph 43 of the Advocate General's opinion.

of the incident in that a single failure had given rise to secondary failures which had also breached the rules. However, this could not affect the legality of the sanction as that single failure was serious enough to justify the most demanding penalty.<sup>95</sup> The European Court found that because of the nature of the breach it was appropriate to impose the severest sanction available.<sup>96</sup>

The forfeiture cases and the *Advanced Nuclear Fuels* case show what latitude the European Court exercises within the application of proportionality even though all the cases involve the review of measures imposing a penalty. In the forfeiture cases the applicants' interests were seriously affected while the Community interest was comparatively weak as in the *E.D. & F. Man (Sugar)* case. This was reflected in the attention the European Court showed in its review. Whereas in the *Advanced Nuclear Fuels* case the European Court recognised the considerable importance of the Community interest in ensuring that nuclear materials were not accidentally exported with no-one having any knowledge of their whereabouts.

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<sup>94</sup> Such an alternative penalty was available under Article 83(1)(a) of the Euratom Treaty.

<sup>95</sup> *Ibid.*, paragraph 45 of the Advocate General's opinion.

Advocate General Jacobs saw some strength in the applicant's complaint but refused to allow this to affect the legality of the penalty: the seriousness of the subject-matter required the Community to ensure that it never happened again. Within the more individualised decision-making concerning penalties, the European Court can adopt a more intensive framework of review in which to apply proportionality and will be able to modify its framework in view of the strengths of the competing interests involved.

*B. The Principle of Proportionality Applied to National Measures*

Application of the principle of proportionality in relation to Member State action tends to arise when the individual seeks to rely upon a Treaty right or a fundamental human right which has been restricted by the Member State in order to achieve a policy objective. In this context Advocate General Trabucchi has stated that "special importance attaches to the principle that the obligation imposed should be proportionate to

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<sup>96</sup> *Ibid.*, paragraph 27.

the legal objective sought by public authorities."<sup>97</sup>

The European Court has to determine whether the restriction was justified and proportionate. The task of the European Court is made easier in that it already has part of its framework of review in place: the importance of the applicant's interest. The European Court then has to determine the relative importance to be accorded to the Member State's interest. The proportionality framework for reviewing Member State action therefore tends to be more intensive than that of Community action: "[i]t would be a *fortiori* illegal if the action were found to be in breach of a fundamental personal right."<sup>98</sup> However, the framework of review can differ from case to case. The analysis here will draw from the jurisprudence concerning the free movement of goods, other fundamental freedoms and the protection of fundamental human rights.

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<sup>97</sup> Case 118/75 *Criminal Proceedings against Watson and Belmann*, *supra* no. 16, 1208 (col. 2) of the Advocate General's opinion. For the situations where Member States must follow the principle of proportionality see generally J. Temple Lang "The Sphere in Which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles" [1990/1] L.I.E.I. 23.

<sup>98</sup> Case 118/75 *Criminal Proceedings against Watson and Belmann*, *supra* no. 16, 1209 (col. 1) of Advocate General Trabucchi's opinion.

The law of the free movement of goods<sup>99</sup> provides many applications of the principle of proportionality.<sup>100</sup> Article 30 provides that any quantitative restriction on the free movement of goods or any measure having equivalent effect to a quantitative restriction is prohibited between the Member States. Exceptions to this are provided for under Article 36 on grounds of *inter alia* public morality, public policy, public security and the protection of health and life of humans, animals or plants. According to the second sentence of Article 36 such restrictions should not constitute a means of arbitrary discrimination or a disguised restriction on trade between member States. As Article 36 constitutes a derogation from the fundamental principle of the free movement of goods the European Court has stated that it "must therefore be interpreted in such a way as not to extend its effects further than is necessary for the protection of the interests which it seeks to

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<sup>99</sup> See generally S. Weatherill and P. Beaumont *EC Law. The Essential Guide to the Legal Workings of the European Community*. (London, 2nd edn., 1995) chapters 15-16.

<sup>100</sup> For more comprehensive analyses of the principle of proportionality in relation to the free movement of goods see Schwarze, *op. cit. supra* no. 1, pages 773-806; Emiliou, *op. cit. supra* no. 6, chapter 7.

protect."<sup>101</sup> In other words, the European Court will not allow the free movement of goods to be undermined by allowing measures to be justified under the Article 36 derogations when such measures are not strictly necessary to achieve the limited purposes set out. The European Court examines the derogation to ascertain whether it is disproportionate and its objective could be achieved by less restrictive means. Were it otherwise then a Member State could easily evade the principle of the free movement of goods for reasons of self-interest such as protectionism by providing a justification based upon Article 36. The principle of proportionality is utilised to ensure that this does not happen. The examination here will concentrate upon some of the derogations available under Article 36, such as the protection of human and animal health, public security, consumer protection.

The protection of public health is an important objective of the public interest.<sup>102</sup> When public health is used to justify a derogation from a Treaty right the purpose of proportionality is to

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<sup>101</sup> Case 124/81 *Commission v. United Kingdom* [1983] E.C.R. 203, paragraph 13.

<sup>102</sup> See, e.g., Case C- 331/88 *Fedesa*, *supra* no. 83.

examine whether the restriction is justified and necessary. While the European Court is aware that Member States need adequate discretion to protect public health, it will require clear grounds on which to justify the restriction as the following case demonstrates. In *Commission v. United Kingdom*<sup>103</sup> (the 'UHT milk case') it was argued that the requirement that imports of Ultra-Heat Treated (UHT) milk had to be authorised by an import licence was justified by the need to protect public health under Article 36. It was argued that such licences allowed conditions to be imposed on milk imports to prevent milk from disease infected cattle from entering the UK before the administrative authorities could act. However, the European Court stated that the issuing of licences depended upon administrative discretion and therefore gave rise to an element of uncertainty for traders. This impediment to intra-Community trade could have been eliminated without prejudice to the protection of animal health if the UK authorities obtained relevant information by means of declarations signed by the importers and, if necessary, accompanied by the appropriate

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<sup>103</sup> *Ibid.*

certificates. The requirement for an import licence was not necessary for the protection of health and therefore a measure having equivalent effect to a quantitative restriction. It may be suspected that the European Court did not see the protection of health of animals as the real reason for the licence requirement. However, it did not allow the measure to be justified without the Member State showing that it corresponded to a legitimate derogation of public health and that the measure could actually promote that purpose and that no other less restrictive means were available to it.

*R. v. Royal Pharmaceutical Society of Great Britain ex parte Association of Pharmaceutical Importers*<sup>104</sup> concerned the public health justification to a restriction on the free movement of pharmaceutical medicines. On the prescription of a medicine from a doctor to the patient some pharmacists chose to supply a functionally equivalent imported parallel product which was cheaper than the real products thereby allowing the pharmacist to increase her/his profit. However, the Royal Pharmaceutical Society declared that this practice was contrary to its Code of Ethics even

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<sup>104</sup> Joined Cases 266/87 and 267/88 [1989] E.C.R. 1295.

though the effect of the imported product was exactly the same as the prescribed one. The purpose of the prohibition was the protection of public health by making the doctor solely responsible for the patient's treatment. The Commission argued that less restrictive means were available to achieve the same end: first, the patient could be asked to agree to the substitution and, secondly, prescription forms could be introduced enabling the doctor concerned to decide whether to prescribe parallel medicines or ensure that the patient received the actual drug prescribed. Advocate General Darmon rejected both of these alternatives as incapable of advancing the interests of public health as effectively as the prohibition. The first alternative was inadequate as the patient, unaware of the difference between the products, would be urged to take the substitute by the pharmacist whose main motive was to increase her/his profit margins.<sup>105</sup> With regard to the second alternative, a presumption would be created in favour of the substituted product. The Advocate General stated that it was not for the European Court to establish a questionable hierarchy of values over those of

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<sup>105</sup> *Ibid.*, paragraph 34 of the Advocate General's

national medical ethics.<sup>106</sup> The European Court may have been more cautious in its review as acceptance of the Commission's second alternative would have required substantial administrative change.<sup>107</sup> If so, then this may have militated against the effectiveness of this alternative for achieving the objective for it could have been seen as causing more difficulties than the level of harm to the free movement of goods.

The European Court did not examine any alternative measures but limited its review. It stated that there was no evidence that the prohibition against substitution was unnecessary to protect public health. The European Court accepted that for reasons of psychosomatic phenomena a specific medicine might be prescribed rather than a generic substitute having the same therapeutic effect. Finally, the restriction did not form a disguised restriction on intra-Community trade under the second sentence of Article 36. The European Court did not apply a rigorous framework

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opinion.

<sup>106</sup> *Ibid.*, paragraph 38 of the Advocate General's opinion. S. Weatherill "Article 30 EEC: Caution in the European Court" (1990) 53 M.L.R. 699, 703 argues that the second alternative was an attractive compromise solution meeting the needs of public health whilst promoting integration.

<sup>107</sup> Weatherill, *ibid.*

of review but hinted that it was prepared to examine the measure more deeply if evidence that the prohibition was unnecessary had been provided. The framework of review was limited because of the importance of the Member State making its own arrangements for the demands of public health in the absence of harmonization.

*Aragonesa de Publicidad Exterior SA and Publivia SAE v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*<sup>108</sup> concerned the possible public health justification of a Catalan law prohibiting the advertising of alcohol of a certain strength in the media and in public, e.g., in the cinema and on public transport. The purpose of the law was to protect public health by reducing the level of alcohol dependency of young people. Having found that the purpose of public health was served by the measure the European Court found that it had complied with the principle of proportionality. First, the measure was of a limited nature as it only covered beverages of a certain alcoholic strength.<sup>109</sup> The European Court

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<sup>108</sup> Joined Cases C-1/90 and C-176/90 [1991] E.C.R. I-4151.

<sup>109</sup> Thus the prohibition would prohibit the advertising of alcohol products such as whiskey or vodka but not beer or wine.

stated that this was not a "manifestly unreasonable" condition.<sup>110</sup> Also the measure was not a blanket prohibition on advertising but only prevented it in specific places used by motorists and young people against which the campaign was targeted.<sup>111</sup> The European Court therefore could not find the measure to be disproportionate to the aim of protecting public health. It adopted a deferential framework of proportionality to review the measure because it served an important public interest and was limited in its application. Had the restriction on advertising been wider then the European Court could have examined alternative measures but here the measure had the effect of achieving the aim without imposing an unnecessary restriction.

The framework of review to apply proportionality to review derogations based on public health will differ according to the case before the European Court. In the UHT milk case the European Court was sceptical of whether public

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<sup>110</sup> *Ibid.*, paragraph 17.

<sup>111</sup> See paragraph 7 of the opinion of Advocate General Van Gerven where the Advocate General stated that he could not think of any equally effective alternative that was less restrictive of trade; a warning with the advertisement stating that "alcohol can damage your health" was not considered to be as equally effective as

health was the real reason for the restriction and therefore required the Member State to prove that the measure were necessary. In the *Royal Pharmaceutical Society* case a limited framework of review was adopted. The European Court did not suspect that the measure amounted to a disguised restriction on intra-Community trade but resulted from a genuine desire on the part of the Member State to protect public health. It was for the applicant to show that the restriction was unnecessary. For similar reasons the European Court adopted a deferential framework of review in *Aragonesa*. In other cases the European Court has constructed different frameworks to express the requirement of proportionality in the context of public health.<sup>112</sup>

The European Court's review of restrictions adopted for reasons of animal health is influenced

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the partial prohibition as the consumer's attention was still drawn by the advertisement.

<sup>112</sup> Compare Case 174/82 *Officier van Justitie v. Sandoz BV* [1983] E.C.R. 2245 and Case 97/83 *Criminal Proceedings against Melkunie BV* [1984] E.C.R. 2367 with Case 178/84 *Commission v. Germany* [1987] E.C.R. 1227. On these cases see the different views of Schwarze, *op. cit. supra* no. 1, pages 790-797 and G. Slynn "The concept of the free movement of goods and the reservation for national action under Article 36 EEC Treaty" in J. Schwarze (ed.), *Discretionary Powers of the Member States in the Field of Economic Policies and their Limits under the EEC Treaty* (Baden-Baden: Nomos Verlagsgesellschaft, 1988) page 17.

by similar factors. In *Commission v. United Kingdom*<sup>113</sup> a challenge was made to an import ban against poultry products from other Member States into the UK while import licences were granted for imports from Ireland and Denmark. The reason for the ban was ostensibly to control the spread of Newcastle disease in poultry. Imports of turkeys from France had increased to the concern of British producers and put the UK government under pressure to act. It did so by imposing a ban before Christmas 1981. The UK tried to support its action as a means of preventing outbreaks of the disease. However, the European Court considered that the real aim of the ban was for protective, economic reasons rather than a serious attempt to protect animal health.<sup>114</sup> The ban was therefore to be considered as a disguised restriction on the free movement of goods unless the UK could prove that its actions were no more than was necessary for the protection of animal health. The European Court also found that the UK could have adopted other measures less restrictive than a ban such as those

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<sup>113</sup> Case 40/82 [1982] E.C.R. 2793. This case led to the subsequent action for damages before the Court of Appeal in *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716.

<sup>114</sup> *Ibid.*, paragraph 37.

adopted in Denmark. As the chance of infection was slight and would be due to sheer hazard then it could not justify the extent of the prohibition against imports from other Member States. The ban was therefore disproportionate.

The European Court was clearly suspicious that the ban formed a disguised restriction on trade. If so, then the protection of animal health was not its real aim but economic protection of British producers against competition. Having satisfied itself that the timing and preparation of the ban suggested a disguised restriction, the European Court placed the burden on the UK to prove that the ban was necessary and proportionate. While the European Court may query the real purpose of the measure, it will give the Member State a fair opportunity to justify the measure subject to a rigorous framework of proportionality.

*Criminal Proceedings against Gourmetterie Van den Burg*<sup>115</sup> concerned the validity of a Dutch law prohibiting the importation and keeping of red grouse with the free movement of goods and its possible justification due to the protection of health and life of animals. The defendant had been

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<sup>115</sup> Case C-169/89 [1990] E.C.R. I-2143.

prosecuted after trading in dead red grouse originating from the UK. In seeking to justify the restriction Advocate General Van Gerven stated that it was quite clear "that the requirements of necessity and proportionality...must in such a case be assessed with customary rigour."<sup>116</sup> A causal connection existed between the measure and the objective of protecting animals. A Dutch prohibition on imports of red grouse would reduce demand from the UK and therefore help protect the birds in that country. Was the prohibition the least restrictive alternative open? Under Directive 79/409<sup>117</sup> on the conservation of wild birds the Council had considered that the red grouse occurred in such large numbers that it was not endangered by hunting as regulated by the Member State of origin. Advocate General Van Gerven stated:

"In the context of harmonization, another Member State must be able to adduce powerful reasons before it can be assumed that a prohibition on imports, that is to say a breach of the

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<sup>116</sup> *Ibid.*, paragraph 7 of the Advocate General's opinion. See Advocate General Van Gerven's definition of proportionality at paragraph 8 and also Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan* [1991] E.C.R. I-4685, paragraph 27 of the opinion of Advocate General Van Gerven.

fundamental principle of the free movement of goods, constitutes the only, or at any rate the least restrictive measure for the conservation of a bird species occurring in the first Member State."<sup>118</sup>

The Dutch government did have an alternative open: it could have, acting under the Directive, collected information on the bird and then submitted proposals to set up a Committee to examine whether the bird should be considered as an endangered species. The prohibition was inconsistent with the principle of mutual confidence between Member States by banning the Dutch trade in a bird originating in the UK. Further, the Advocate General considered that the absolute nature of the prohibition made it contrary to the requirement of proportionality in the narrow sense when compared to the very small contribution it would make to the protection of an animal which was neither endangered nor whose protection was a priority under Community law. The European Court also found that the prohibition could not be justified by concentrating more upon the

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<sup>117</sup> OJ 1979 L 103, p. 1.

<sup>118</sup> *Ibid.*, paragraph 9 of the Advocate General's opinion.

harmonising effects of the Directive rather than the application of proportionality to review the derogation under Article 36 though it seemed to agree with the opinion of Advocate General Van Gerven. It is clear that an attempt to derogate from a fundamental economic right of the Treaty by a Member State will be reviewed in an intensive manner using the principle of proportionality. One important element in determining the legality of a measure will be whether the sector concerned has been subjected to Community harmonization and what measures other Member States have adopted. It has been commented that this case "suggests that the proportionality test must be applied in the Community context. That is, what is to be deemed proportional must also be evaluated in light of other Member States' standards."<sup>119</sup>

The following cases demonstrate how the European Court reviews a derogation based on public security. In *Campus Oil Limited v. Minister for Industry and Energy*<sup>120</sup> the Irish government had adopted a measure which obliged importers of oil to

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<sup>119</sup> G.M. Kelly "Public policy and general interest exceptions in the jurisprudence of the European Court of Justice: Towards a 'European' conception of values and fundamental rights?" (1996) 4 *European Review of Private Law* 17, 30.

<sup>120</sup> Case 72/83 [1984] E.C.R. 2727.

purchase a certain quantity of their requirements from a publicly owned company operating the only Irish oil refinery. The purpose of this company was to improve the security of the supply of oil into Ireland and not allow Ireland to become dependant on oil supplies from elsewhere. The applicants argued that the Order was a restriction on intra-Community trade and the maintenance of a public security defence was, in reality a cover for the protection of economic interests. The Irish government claimed that this restriction was justified by virtue of the public security derogation which it was for the Member State to determine. It is clear that the European Court was impressed by the public security argument. It had been argued that as oil consumption was extremely important for the life of the country and that Ireland depended on imports of oil, it was necessary to maintain a national oil refinery thereby allowing the national authorities to enter into long-term contracts with countries producing crude oil. The European Court accepted that interference with the supply of oil was permissible under the public policy ground as it was extremely important as an energy source for the modern

economy and fundamental to the country's existence as its institutions, essential public services and even the survival of its inhabitants depended on it. As a result the supply of oil could seriously affect the public security of the state.<sup>121</sup> Having identified the strength of the relative interests, it was not surprising that the European Court did not adopt an intensive framework of proportionality. The applicant doubted whether the existence of a refinery could guarantee oil supplies in a crisis. While the European Court admitted that such a crisis would interrupt or severely reduce the deliveries of crude oil, the Member State was placed in a better position than it had been before with its own refinery in the case of a crisis. The European Court stated that the requirement that oil importers purchase certain quantities from the refinery in order to pay for its costs was necessary was a question for the national court to assess. It stated that such a requirement could be necessary if the quantities of petroleum covered by the measure did not exceed the minimum requirements of the state. While the European Court was deferential in its review it

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<sup>121</sup> *Ibid.*, paragraph 34.

found the issue to be justiciable. As the requirements of public security are intrinsic to the existence of the Member State it is not surprising that the European Court adopted a deferential framework of review. The subject-matter was very sensitive and the decision as to what public security demands is essentially a policy assessment requiring specialist knowledge. However, the European Court did lay down conditions to be satisfied if the restriction on intra-Community trade was to be considered necessary. In a subsequent decision the European Court has shown that it will be deferential to the Member State's assessment of public security.

In *Criminal Proceedings against Richardt and Les Accessoires Scientifiques SNC*<sup>122</sup> the defendant, being the director of the defendant company faced criminal charges for the unlawful transit of military goods without a licence. He had agreed with a Soviet central purchasing agency to export a unit for producing bubble memory circuits, which included a ten-inch Veeco Microtech, from France to

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<sup>122</sup> Case C-367/89 [1991] E.C.R. I-4621. See also Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v. Federal Republic of Germany* [1995] E.C.R. I-3189 and Case C-83/94 *Criminal Proceedings against Peter Leifer* [1995] E.C.R. I-3231.

the former Soviet Union. This equipment had a strategic importance and was regulated by Luxembourg law on the grounds of public security. The defendant was to export the goods straight from France to Moscow by air. However, the scheduled flight was cancelled and without notifying the defendant Air France sent the goods to Luxembourg where the authorities seized them. The European Court examined whether Article 36 precluded the requirement for special authorisation and, in the event of failure to comply with this, the confiscation of the goods. The European Court stated that the public security exception covered both internal and external security. As the movement of goods used for strategic purposes could affect its public security, a Member State could require the transit of such goods to be subject to the grant of a special authorisation. With regard to confiscation of the goods the European Court stated that this could be considered disproportionate where the return of goods to the Member State of origin could suffice. The proportionality of the penalty was however to be determined by the national court "taking account of all the elements of each case, such as the nature

of the goods capable of endangering the security of the State, the circumstances in which the breach was committed and whether or not the trader seeking to effect the transit and holding documents for that purpose issued by another Member State was acting in good faith."<sup>123</sup>

From this case it can clearly be seen that the European Court constructed two different frameworks to express the principle of proportionality. For the public security derogation the European Court emphasised that this was subject to the requirements of proportionality<sup>124</sup> but it refrained from undertaking a close analysis of whether the rules in question were absolutely necessary. The European Court seemed to accept that the Member State had a discretion to decide what the requirements of public security were and would not lightly interfere with this assessment. As regards the penalty of confiscation of the goods the European Court constructed a different framework for the principle of proportionality. While leaving the determination of the issue to the national court, the European Court hinted that confiscation would be considered to be disproportionate if the

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<sup>123</sup> *Ibid.*, paragraph 25.

goods could be returned to the Member State from where they came and then listed the matters to be taken into account by the national court. As de Búrca comments: "where the measure is concerned not so much with setting out the policy or the kind of restriction needed, but with penalizing breaches of that policy or rule, then the Court seems prepared to intervene more readily and to declare the penalty to be excessive."<sup>125</sup>

In *Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC and Estée Lauder Cosmetics GmbH*<sup>126</sup> Germany tried to justify a restriction on intra-Community trade by reason of the protection of consumers and human health. Two companies, Clinique and Estée Lauder, had marketed cosmetics since 1972 under the name "Linique" in Germany and "Clinique" elsewhere. In order to reduce costs the companies decided to standardise their product labelling and market the products everywhere under the "Clinique" name. However, Germany prohibited the use of this name on the grounds that it could confuse consumers into thinking that the product had medicinal

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<sup>124</sup> *Ibid.*, paragraphs 20-21.

<sup>125</sup> de Búrca, *op. cit. supra* no. 64, 136.

<sup>126</sup> Case C-315/92 [1994] E.C.R. I-317.

purposes.<sup>127</sup> With regard to the justification of the rule the European Court was unimpressed by the argument that consumer protection or the health of humans required the restriction. The cosmetics products concerned were sold in perfumeries and the cosmetic departments of large stores and therefore none of them were available in pharmacies. The products were presented as cosmetics products and not as medicinal products. Furthermore, as the same products were marketed in other Member States under the "Clinique" name the use of that name would not seem to mislead consumers. The European Court adopted an intensive framework of review to examine whether the restriction was justified and concluded that the possible danger to consumer protection or the health of humans arising from medical connotations from the "Clinique" name were not sufficient to justify the prohibition of the use of that name on the products.

The principle of proportionality is also applicable in the review of penalties imposed on individuals by the Member States to ensure compliance with Community law. For example,

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<sup>127</sup> It was argued that in the German language there was a similarity between the words "Clinique" and the German

*Criminal Proceedings against Messner*<sup>128</sup> which arose in the context of the free movement of persons,<sup>129</sup> concerned a German national who had entered Italy and failed to notify the authorities within three days as prescribed by Italian law, the penalty for which was imprisonment of up to three months and a fine. While the European Court recognised that a Member State could require other nationals to report their presence to the authorities, such a requirement could not be allowed to infringe the right involved. The three day period in question was excessively restrictive in view of the need of those concerned to have enough time to travel from the Member State's border to their destination and then to find out which authority to report to. Also the time-limit was not absolutely necessary in order that the Member State have exact knowledge of population movements. The European Court stated that this view was confirmed by the fact that the majority of Member States which imposed an obligation to report to the national authorities allowed those concerned appreciably longer periods.

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words "Klinik" which means a hospital. See paragraph 5 of the opinion of Advocate General Gulmann.

<sup>128</sup> Case C-265/88 [1989] E.C.R. 4209.

<sup>129</sup> See Weatherill and Beaumont, *op. cit. supra* no. 99, chapter 18.

Neither was the penalty justified. The European Court has found that a penalty may be imposed in order to ensure compliance with formalities but the level of the penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the right being exercised.<sup>130</sup> The possibility of imprisonment for breach of such a formality would be a drastic restriction of the freedom of movement and so was disproportionate. A rigorous degree of control was employed to ensure that the Treaty right was not restricted by administrative formalities. The principle of proportionality was applied in an intense way due to the importance of the individual's interest: the interest of the Member State was an important one but failure to follow it could not be punished by such severe punishment which would have the effect of diminishing the freedom of movement.

Sometimes application of the principle of proportionality may need to be reversed: instead of the Member State going too far in its pursuit of policy, it has not gone far enough. For example, in

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<sup>130</sup> Case 157/79 *R. v. Pieck* [1980] E.C.R. 2171, paragraph 19.

*Von Colson and Kamann v. Land Nordrhein-Westfalen*<sup>131</sup>  
the European Court found that the relevant  
directive<sup>132</sup> left the Member State free to choose  
the means available to achieve its objective of  
prohibiting sex discrimination in access to  
employment. However, the European Court stated that  
should the Member State decide to penalise breaches  
of the directive then it must be effective and have  
a deterrent effect, the compensation must be  
adequate in relation to the damage sustained and  
therefore be more than purely nominal compensation.  
In the actual case, the applicant had been  
discriminated against when applying for a job and  
had been awarded her travelling expenses. The  
European Court held that this derisory sum was  
insufficient to amount to adequate compensation. In  
cases such as this the European Court is applying a  
'reverse' principle of proportionality.<sup>133</sup>

The European Court has developed a  
jurisprudence to protect the fundamental human  
rights of individuals through the general  
principles of law. In doing so it has drawn

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<sup>131</sup> Case 14/83 [1984] E.C.R. 1891.

<sup>132</sup> Directive No 75/207, OJ 1976 L 39, p. 40.

<sup>133</sup> See also Case 79/83 *Harz v. Deutsche Tradax GmbH* [1984] E.C.R. 1921 where the European Court stated that it was for the national court to decide whether the sum

inspiration from the standards of national constitutions and the European Convention of Human Rights.<sup>134</sup> Breaches of fundamental rights are tested against the principle of proportionality. In *Wachauf v. Bundesmat Für Ernährung und Forstwirtschaft*<sup>135</sup> the European Court was invited to protect the right to property in regard to milk quotas.<sup>136</sup> The applicant was a tenant farmer who upon the expiry of his tenancy asked for compensation for the definitive discontinuance of milk production pursuant to a German law which implemented Regulation No 857/84.<sup>137</sup> That Regulation provided that an application by a tenant farmer must be supported by the lessor's written consent. As the applicant did not have this consent he was refused the requested compensation. The referring court asked the European Court whether the applicant had to surrender the reference quantity to the producer who takes over the holding.<sup>138</sup> A reference quantity allows a producer to produce a

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of DM 2.31 was adequate compensation for sex discrimination.

<sup>134</sup> See Craig and de Búrca *op. cit. supra* no. 31, chapter 7.

<sup>135</sup> Case 5/88 [1989] E.C.R. 2609.

<sup>136</sup> See generally M. Cardwell *Milk Quotas. European Community and United Kingdom Law*. (Oxford: Clarendon Press, 1996).

<sup>137</sup> OJ 1984 L 90, p. 13.

limited amount of milk in a given year. The applicant argued that should he be prevented from keeping the reference quantity then he could not benefit from the compensation system as the lessor opposed it and so would be deprived the fruits of his labour. The European Court had to determine whether the rules breached the applicant's right to property. Following its previous case-law<sup>139</sup> the European Court recognised that fundamental human rights formed an integral part of the general principles of law. However, such rights are not absolute but must be considered in relation to their social function. The European Court continued:

"Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interests by the Community and do not constitute, with regard to the aim pursued, a disproportionate and

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<sup>138</sup> Under Article 5(3) of Commission Regulation No 1371/84, OJ 1984 L 132, p. 11.

<sup>139</sup> Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] E.C.R. 3727.

intolerable interference, impairing the very substance of those rights."<sup>140</sup>

The European Court held that the Community Regulations allowed the Member State enough discretion to implement those rules without breaching fundamental human rights either by allowing the tenant to keep all or part of the reference quantity if he intended to continue milk production or by compensating him if he intended to definitively abandon milk production. The national rules went beyond what was necessary for the fulfilment of the system's purpose. The European Court seemed to adopt an intensive framework of review to ensure that the Member State did not infringe the applicant's fundamental human rights. The European Court has been criticised for devaluing the notion of fundamental human rights by allowing them to be restricted in the name of economic integration.<sup>141</sup> However, such rights may need to be overridden in the interests of policy objectives. It is for the European Court by applying the principle of proportionality to

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<sup>140</sup> *Ibid.*, paragraph 18.

<sup>141</sup> J. Coppel and A. O'Neill "The European Court of Justice: Taking Rights Seriously?" (1992) 29 C.M.L.Rev. 669, 691-2.

determine whether the restriction of a fundamental human right was necessary.

In regard to judicial review of national measures the European Court tends to apply the principle of proportionality in a more intensive framework of review. This is due to the interests of the individual which can be restricted by the Member States. These interests largely cover Treaty rights and fundamental human rights. However, it can be seen that the European Court varies its framework of review depending on the particular case before it. It has been stated that the European Court has tended to adopt a more intensive framework of review with regard to similar cases over time.<sup>142</sup> This is perhaps because over time the European Court has gained experience and confidence in applying the principle of proportionality to national measures. Finally, mention should be made of the practice of the European Court in some cases to refer the application of the proportionality

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<sup>142</sup> Craig and de Búrca, *op. cit. supra* no. 31, page 348 encouraging comparisons of Case 41/74 *Van Duyn v. Home Office* [1974] E.C.R. 1337 with Cases 115 and 116/81 *Adoui and Cornuaille v. Belgian State* [1982] E.C.R. 1665 and Cases 34/79 *R. v. Henn and Darby* [1979] E.C.R. 3975 with Case 121/85 *Conegate v. Customs and Excise Commissioners* [1986] E.C.R. 1007. To this list could also be added Case 118/75 *Criminal Proceedings against Watson and Belmann*, *supra* no. 8 and Case C-265/88 *Criminal Proceedings against Messner* [1989] E.C.R. 4209.

test back to the national court. In certain cases it will be quite clear from the European Court's judgment whether the impugned measure is disproportionate or not, whereas in other cases it will explicitly state that it is for the national court to apply the principle. This practice should not be seen as the European Court refusing to decide how to apply the principle. Rather it views the national court as the more competent forum to apply the proportionality test. Even in such cases the European Court will maintain some control over the framework of review as it may impose certain conditions to be followed if the national measure is to be lawful.<sup>143</sup>

## **6. The Construction of the Framework of Proportionality**

Proportionality is the strongest form of substantive review. It enables the European Court to balance the competing interests by examining whether a measure was suitable, necessary and not in any event excessive for the achievement of its

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<sup>143</sup> See, e.g., Case 72/83 *Campus Oil Limited v. Minister for Industry and Energy*, *supra* no. 120; Case C-367/89

objective. The precise requirements of proportionality are articulated within different frameworks of review. These expressions of the principle range from being quite deferential to the exercise of public power to be applying a strict and rigorous standard. At the one end there are a number of cases where the manifest framework of review is applied. Going down the scale, there are then cases where the European Court seems prepared to examine the disproportionality of the measure if the applicant can provide some evidence to this effect and, following this, cases where the European Court places the burden on the decision-maker to justify its decision. Even within these broad descriptions of the various frameworks there are subtle differences of approach.

Proportionality requires the decision-maker's action not to be out of proportion to the end sought after. Application of that principle will accordingly differ in proportion to the competing interests. For example, when the decision-maker is considering how to achieve a public health or public security interest the European Court may apply a less rigorous framework of review for it

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*Criminal Proceedings against Richardt and Les*

appreciates the importance of those public interests. For a measure to be out of proportion to the demands of public health or security may require patently inappropriate means or an acute interference with the applicant's interests. Whereas if the decision-maker infringes an important interest of the applicant's, such as a Treaty right, then the European Court will be more intensive in its approach to the matter. The range of options as to what can be proportionate may be more circumscribed because the importance of the applicant's interest when compared with the public interest. The European Court will not automatically find that an important interest on the applicant's behalf cannot be overridden but will place a burden on the Member State to prove that the public interest is sufficiently weighty to justify the restriction. Identification of the competing interests and their comparative weight will be the first factors the European Court ascertains in order to construct a framework of review. As the competing interests involved vary from case to case then so will their appraisal by the European Court. For example, in *Aragonesa* the European Court

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*Accessoires Scientifiques SNC, supra* no. 122.

accepted the public health interest in the reduction of alcoholism, while in the 'UHT Milk' case the European Court seemed to suspect that the public health interest was a cover for economic protectionism.

Another central factor to the framework adopted is the type of decision-making under review. This is to some extent interrelated with the nature of the competing interests. The purpose of the principle of proportionality will vary with the type of decision under review. Whether the measure affects Treaty rights or fundamental human rights, imposes a penalty or is an economic policy measure will define the specific purpose of the court's review.<sup>144</sup> In relation to Treaty rights, the European Court recognises that these rights are fundamental to the common market and the application of proportionality suggests that such rights must be upheld unless a restriction is necessary and justified. The purpose of proportionality when applied to economic policy measures is to ensure that any economic intervention in the market is subsidiary and that there is a connection between the extent of the

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<sup>144</sup> *Supra* section 4.

intervention and any restriction on individual freedom.

There are other reasons for applying certain frameworks of review. The European Court tends to stress that an applicant must show that the measure was manifestly inappropriate or disproportionate when it rejects a challenge to an economic policy measure. When articulating the framework of review in this context the European Court is influenced by the following factors. The decision-maker must be allowed a reasonable measure of discretion for the performance of its task. If the European Court were prepared to intensively apply proportionality where the competing interests and the type of decision-making seem to compel a more deferential review, then the decision-maker could be prevented from making any measure last the course of time to make a difference, whether the measure was defective in some way or not. There would also be difficulties for the European Court to apply an intense review and it would solve little. The nature of the decision-making process demands that a decision be made and it is inevitable that some interest is going to be restricted in some way. The power to balance such polycentric interests was given to the

decision-maker because of its specialist knowledge. An intense review by the European Court would be difficult, costly, time-consuming and lead to many other applicants trying their luck. If the impugned measure is of a general, normative nature, such as a Regulation, then the European Court will set the framework of review to take account of the "global situation"<sup>145</sup> of all those concerned. If the decision-maker has made an overall assessment then it can only be invalidated if that overall assessment is patently wrong and not on the basis that one individual decision is disproportionate. Such decisions are more suited to political accountability where the merits can also be challenged and the decision-maker can be brought to account. The European Court is fully aware of the need for decisions to be made quickly in trying circumstances. Such measures may in hindsight appear to be capable of improvement in some way but this will not lead the European Court to criticise a measure on the basis of how it operates in practice after it was adopted. This is a recognition of the need for certainty in decision-making. Finally, it may be argued that the adoption

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<sup>145</sup> Neri, *op. cit. supra* no. 39, 658.

of the manifest framework of review serves the function of limiting the case-load of the European Court. Were the European Court to apply an intense review framework where the manifest framework was appropriate then it would move from examining the disproportionality of the measure and come close to telling the decision-maker how the competing interests should have been balanced. By applying the manifest framework the European Court avoids undertaking such a cost-benefit assessment for itself but allows for a review, albeit limited, to cover those measures which clearly and patently go beyond what is required in the circumstances.

There are also reasons for the European Court adopting a more exacting framework of review. If the applicant's interest is of an individual nature, such a Treaty right or a penalty, then the European Court can review the measure without potentially upsetting the whole system in which the interest exists. If the European Court is reviewing the imposition of a sanction which was imposed for good reason, as in the *Advanced Nuclear Fuels* case, then this will be reflected in the amount of discretion it allows the decision-maker. What the Member State thinks is necessitated by the public

interest may be out of line with other Member States. If so, then the European Court will require sufficient reason to justify this. Whereas if only one other Member State adopts less restrictive measures then the European Court will acknowledge the discretion of the Member State to choose what it deems fit within certain limits. If the Member State's measure seems to the European Court to be a disguised restriction, as in the Turkey case, or an obstacle to the exercise of the Treaty right, as in *Messner*, then it will place a corresponding burden on the Member State to justify the measure.

#### **7. The Principle of Proportionality and the Merits of Public Decisions**

The responsibility of the European Court when applying the principle of proportionality is dual: first, to ensure that the decision-maker achieved a fair and proportionate balance between the competing interests and, secondly, it must refrain from assessing for itself the merits of administrative action and then substituting its own opinion for that of the decision-maker. The European Court can only examine the legality of a

measure and not substitute its discretionary and subjective appreciation for that of the administration.<sup>146</sup> However, the concern over proportionality is that the European Court has engaged in replacing its view for that of the administration and testing "the 'intrinsic value of the law', a test of expediency to which the judge is not empowered."<sup>147</sup> What conclusions can be drawn following an examination of the case-law? Does the European Court use the principle of proportionality to substitute its view of the merits of public decisions for that of the administration? These question might be answered in the following manner.

First, the issue regarding the subject matter of the legal disputes should be clarified. The context in which a legal challenge is mounted should not prevent the European Court from determining administrative legality. That the European Court is largely dealing with economic interests and policy enacted into law is no reason for it to refuse to apply the principle of proportionality. As economic intervention can impinge upon individual freedom like any other form

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<sup>146</sup> See G. Slynn "Judicial Review of Community Acts" (The Exeter Lecture in European Community Law, University of Exeter, 1985) page 5.

of state intervention and it must be justified in law in the same way as any other form of state intervention. As Advocate General Capotorti has stated, the European Court "...has no power to evaluate the wisdom of choices of economic policy made by the Council or the Commission...This does not, however, mean that it is altogether out of the question for the Court to appraise economic considerations to the extent to which their appraisal is necessary in determining the legality or otherwise of the measure....this will be the case in particular when inquiry is made into the observance of the principle of proportionality."<sup>148</sup>

The respective functions of the European Court and the administrator or legislator differ. The decision-maker makes and implements policy while the European Court decides legal challenges to the basis of that policy and its implementation. An obvious difference is that the European Court cannot initiate public decisions. The only way it can decide that a measure is impermissible is if an action is brought before it by an applicant. The

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<sup>147</sup> Lauwaars, *op. cit. supra* no. 2, page 232.

<sup>148</sup> Case 114/76 *Bela-Mühle Josef Bergmann KG v. Grows-Farm GmbH & Co. KG* *supra* no. 55, 1226 (col. 1) of the Advocate General's opinion. See also Lord Mackenzie Stuart, *op. cit. supra* no. 33, pages 67, 102.

European Court can only declare decisions invalid and not make new decisions of its own accord.<sup>149</sup> Also the European Court can only state what measures it cannot accept and not what measures it would like to see adopted instead. It is impossible for the European Court to set itself up as an alternative and covert form of government by the application of proportionality to decide issues such as the allocation of resources or what the demands of the public interest are. However, it is open for the European Court to declare a measure to be unlawful and this, it might be thought, could allow it to covertly veto measures if their merits did not find approval in the Court.

While the European Court has its own discrete role so does the decision-maker. The administration has the legal power and expertise to weigh up the competing interests and prioritise them. The decision-maker may then decide that a certain policy objective ought to be attained, with the possible attainment of sub-goals along the way.<sup>150</sup> To do so it will have to decide how to achieve that policy objective. The question facing the decision-

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<sup>149</sup> See Article 174.

maker is this: by what means should the policy objective be attempted? The decision-maker may choose a means of achieving the policy objective which interferes with individual freedom in some way. Under the principle of proportionality the measure can be challenged before the European Court on the basis that it is unnecessary for the fulfilment of the policy objective to interfere with individual freedom to such an extent as less restrictive alternatives exist. Accordingly, it is for the European Court to determine whether any alternative measures exist. It is clear that should no alternatives at all exist, then the measure will be necessary and objectively justified. However, if alternatives do exist then the European Court must determine whether they are equally capable of achieving the policy objective. This involves examining the substantive merit of each alternative course of action for attaining the end sought. The European Court cannot state that the decision-maker ought to follow one particular alternative course of action but that alternatives are open to her/him which have the equivalent function of achieving the

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<sup>150</sup> See generally D. Galligan *Discretionary Powers. A Study of Official Discretion*. (Oxford: Clarendon Press, 1986) chapter 3.

policy objective and do not involve such an interference with individual freedom. The European Court will not question the necessity or proportionality of the policy objective sought after but of the form of implementation needed for that policy objective. Does this examination of the merit of less restrictive alternatives for achieving the objective involve a questioning of the merits of the measure and lead the European Court into restricted waters?

Some commentators take the view that as the principle of proportionality operates on a sliding scale of review it does not necessarily involve a substitution of the court's view of the merits for that of the decision-maker.<sup>151</sup> The framework of review is certainly relevant. Were the European Court to apply an intensive framework of review where the manifest framework was more suitable then it might soon find itself closely shadowing the decision-making process. However, this does not provide a watertight explanation. The framework of review determines whether the European Court should examine whether alternative measures exist which

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<sup>151</sup> de Búrca, *op. cit. supra* no. 63, 107-113; J. Jowell "Is Proportionality an Alien Concept?" (1996) 2 E.P.L. 401, 405.

can achieve the same end. What then of the cases where the European Court has applied an intensive framework of review and looked at alternative measures?

Application of the proportionality principle involves determining whether the alternatives, if any, open to the decision-maker are equally capable of achieving the policy objective as the challenged measure. The European Court will have to examine the merits, *in one sense*, of the various alternatives against the fulfilment of the policy objective to determine whether any less restrictive options exist which are equally useful to attain the policy objective. However, the European Court will not examine the merits, *in another sense*, of acting for the defined policy objective. According to Asso:

"Les cas sont nombreux où une décision ne peut être légalement prise que dans la mesure où elle est nécessaire. Aussi le juge, lorsqu'il contrôle la légalité peut être obligé de contrôler l'opportunité. Celle-ci ne serait alors appréciée, par le juge, qu'en tant qu'élément de la légalité d'une décision. Il faut donc opérer une distinction entre

l'opportunité-condition, élément de la légalité et l'opportunité pure où le juge substituera sa propre appréciation des faits à celle retenue par l'administration."<sup>152</sup>

The examination of the merits when, in Asso's phrase, they are an element constituting the legality of the decision concerns nothing more than deciding whether alternative measures exist which are equally capable of achieving the policy objective sought after. It means the merit of those means for achieving the policy objective. Either alternative measures exist which are capable of attaining the policy end or not. If so, then the European Court proceeds to examine whether such alternatives are less restrictive of individual freedom. Examining the merit of those alternatives does not involve the European Court in questioning the merits, in the sense of the intrinsic rights

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<sup>152</sup> B. Asso "Le contrôle de l'opportunité de la décision économique devant la Cour européenne de justice." (1976) 12 R.T.D.E. 21, 27: "There are many cases where a decision cannot legally be taken unless such a measure is necessary. Thus the judge who is called upon to examine its legality may be obliged to examine its merits. However, this is only considered by the judge as an element pertaining to the legality of the decision. It is accordingly necessary to make a decision between the merits of a decision as an element of its legality and the proper merits of a decision where the judge substitutes his assessment of the facts for that put forward by the administrator."

and wrongs, of the policy objective. Rather the European Court is ensuring that the defined policy objective can be achieved by other measures less restrictive of individual freedom. Temple Lang states that "[t]he Court does not, under the principle of proportionality, question the desirability of the policy result chosen, but may have to consider whether it could have been satisfactorily obtained by a better-designed and less onerous measure."<sup>153</sup> Alternatively, according to Shapiro, in effect the court is saying to the administrator: "[w]e invalidate the law you have made because we can think of a better law - one that achieves your goals at less cost to the competing interests."<sup>154</sup> Review for proportionality is a way of developing judicial opinions about policy implementation and the achievement of policy objectives when private interests are affected. The European Court undertakes a goal-oriented balancing process to determine whether it was factually permissible for alternative measures to have been adopted.

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<sup>153</sup> J. Temple Lang "The Constitutional Principles Governing Community Legislation" (1989) 40 N.I.L.Q. 227, 242. See also Lord Mackenzie Stuart, *op. cit. supra* no. 33, pages 54-55; G. Slynn *Introducing a European Legal Order*, *op. cit. supra* no. 22, page 36.

Many examples from the case-law support this view. In the 'skimmed-milk' case Advocate General Capotorti examined the feasibility of two alternatives open to the Council to achieve its policy objective of reducing the milk surplus.<sup>155</sup> As the Advocate General concluded that the two alternatives were equally useful and imposed less of a burden upon those affected, the challenged measure was therefore disproportionate. The European Court did not criticise the Council's policy objective but the means chosen to implement it. In the *Mignini* case<sup>156</sup> the effect of the application of proportionality by the European Court was to actually strengthen the effectiveness of the aid policy by removing the obligation that producers store the produce on their premises rather than to substitute its own view for that of the decision-maker. Equally effective measures intended to reduce fraud could have been adopted which did not impose such a high burden on the producer. Similarly, in the forfeiture of deposit cases<sup>157</sup> the European Court reviewed the penalties

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<sup>154</sup> M. Shapiro "The Giving Reasons Requirement" [1992] *University of Chicago Legal Forum* 179, 217.

<sup>155</sup> *Supra* no. 55, at 1234 of the Advocate General's opinion.

<sup>156</sup> *Supra* no. 81.

<sup>157</sup> *Supra* text at no. 85.

imposed as they went beyond what was necessary for the achievement of promoting the smooth functioning of the CAP. Less severe sanctions could have been chosen which achieved the same end. By being critical of the sanction, the European Court was not examining the purpose they served.

The tendency of the European Court to impose more onerous requirements on the Member States to justify the infringement of Treaty rights does not mean it replaces the assessments of the Member States with its own views. For example, in the *Royal Pharmaceutical Society* case Advocate General Darmon examined the merit of the Commission's suggested alternatives to the prohibition on substituting medicinal products. This examination of whether those alternatives had sufficient merit to be equally capable of achieving the same end as the impugned measure did not involve either the Advocate General or the European Court in substituting their views of the demands of public health for that of the decision-maker. In the *Campus Oil* and *Richardt* cases the European Court showed deference to the Member State's assessment of the demands of public security but this did not prevent it from placing conditions to the legality

of the penalty imposed in the latter case. The imposition of such conditions did not allow it to question the merits of the policy. In the *Clinique* case the European Court did not question the worthiness of the aim of protecting consumers but concluded that the danger to consumer protection was insufficient to justify the impugned measures as less restrictive alternatives existed. In *Messner* the European Court ensured that the Member State did not impose a penalty for the failure to follow a formality which could form an obstacle to the free movement of persons itself. In doing it did not question the need for Member States to know of exact population movements on their national territory.

The task of assessing the effectiveness of hypothetical alternative measures requires knowledge of administrative process and can be a difficult task for a court to perform.<sup>158</sup> For example, in *Commission v. Denmark*<sup>159</sup> Advocate General Slynn and the European Court disagreed over the usefulness of alternative measures for achieving the policy objective. According to Nolte,

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<sup>158</sup> Lord Mackenzie Stuart, *op. cit. supra* no. 33, page 43; Slynn *Introducing a European Legal Order, op. cit. supra* no. 22, page 36.

as the necessity test forms the hard core of the proportionality enquiry, the Court is less susceptible to criticism that it is replacing the administration's policy choices with its own.<sup>160</sup> The case-law shows that the European Court will not undertake a re-examination of what the public interest requires but it will examine whether the measures adopted for that end are suitable, necessary and not excessive in view of affected private interests. According to Sir Gordon Slynn:

"The European Court has always been unwilling to interfere where an economic or political assessment is needed; second-guessing the Commission...[or the Member States]...is not its function, though if provisions which can be objectively shown to be excessive are adopted then the Court of Justice would interfere."<sup>161</sup>

## 8. Conclusion

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<sup>159</sup> Case 302/86 [1988] E.C.R. 4607.

<sup>160</sup> Nolte, *op. cit. supra* no. 5, 193.

<sup>161</sup> G. Slynn "European Law and the National Judge" in *Butterworths Lectures 1991-92* (London: Butterworths, 1993) page 28.

Rather than summarise the preceding analysis, some general comments on the nature of the principle of proportionality are warranted. Proportionality concerns the relationship between administrative action and individual freedom. However, exactly what this means is rather unclear. Proportionality is sometimes characterised as being inspired by the ideas underpinning liberal democracy<sup>162</sup> and therefore it is interpreted as a principle serving the protection of the freedom of the individual against the State. In other words, proportionality is viewed as an essential principle within a liberal framework of law.<sup>163</sup> This conception of proportionality, I suggest, has

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<sup>162</sup> T. Tridimas "Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny" (Institute of European Law, University of Birmingham, 20th March 1998) page 1. See also Schwarze, *op. cit. supra* no. 1, pages 678-679; I. Ward "Fairness, Effectiveness and Fundamental Rights: The Case For a Unified Administrative Law Within the European Community" (1994) 5 *Touro International Law Review* 279. Even when the view is not expressly articulated the adoption of a rights-based liberal framework appears to be implied, see de Búrca, *op. cit. supra* no. 64. This view is linked to the idea of the European Court elaborating democratic principles in order to compensate for the "democratic deficit" in the European Union, see A.M. Burley "Democracy and Judicial Review in the European Community" [1992] *University of Chicago Legal Forum* 81; C. Harlow "Towards a Theory of Access for the ECJ" (1992) 12 *Y.E.L.* 213. Furthermore, this view of proportionality is in particular adopted by common lawyers dissatisfied with the lack of protection for fundamental rights in the UK see chapter 7, section 2.

developed for the following reasons. First, the principle is closely associated with the protection of fundamental human rights in the jurisprudence of both the German Federal Constitutional Court<sup>164</sup> and the European Court of Human Rights,<sup>165</sup> and there is a wide-ranging debate over the protection of human rights within the European Union.<sup>166</sup> Secondly, rights-based liberal constitutionalism has recently emerged as the new form of normal legal-constitutional discourse in which such issues tend to be analysed and "is conducted within an agreed-upon set of conventions about what counts as a relevant contribution, [and] what counts as answering a question".<sup>167</sup> These factors tend to

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<sup>163</sup> Cf. the "liberal normativist" style of public law thought identified in M. Loughlin *Public Law and Political Theory* (Oxford: Clarendon Press, 1992).

<sup>164</sup> See Emiliou, *op. cit. supra* no. 6, chapter 2. Cf. Nolte, *op. cit. supra* no. 5, page 205 stating that German administrative law was the product of "a specific crisis of legitimacy in the national legal system", in particular concerning the protection of fundamental human rights against the State.

<sup>165</sup> See M. Eissen "The Principle of Proportionality in the Case-Law of the European Court of Human Rights" in R. St. J. MacDonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993) page 125.

<sup>166</sup> See generally Craig and de Búrca, *op. cit. supra* no. 31, chapter 7.

<sup>167</sup> R. Rorty *Philosophy and the Mirror of Nature* (Oxford: Blackwell, 1980) page 320. This trend is mirrored by developments in political theory by the transformation of liberalism into the dominant political tradition see A. MacIntyre *Whose Justice? Which Rationality?* (London: Duckworth, 1988) chapter 17. For critiques of liberalism see generally R. Beiner *What's the Matter With*

contribute to a distinct view of proportionality as a tool to be employed solely for the protection of the individual and the control of the administration. However, I think that this view overlooks the equally important role proportionality has in structuring and guiding administrative action. Continental administrative law adopts a purposive approach whereby the review of administrative action is adapted to the achievement of the administrative function for which the power was exercised; law is concerned not just with controlling but also structuring administrative activity.<sup>168</sup> If this is so, then the conception of proportionality as a means of protecting individual freedom may be an incomplete and therefore inadequate way of understanding the principle.

I would suggest that the nature of the exercise undertaken by the European Court as a goal-oriented balancing of interests test and the examination of the usefulness of alternative courses of action for the achievement of the

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*Liberalism?* (London, 1992); M. Ramsay *What's Wrong With Liberalism? A Radical Critique of Liberal Political Philosophy* (London, 1997).

<sup>168</sup> E. Schmidt-Aßmann "Basic Principles of German Administrative Law" (1993) 35 *Journal of the Indian Law Institute* 65, 66, 77.

administration's objectives serves the purposes of the administration as well as the protection of the individual. This is because the European Court is concerned to ensure that the administration is able to achieve its end objectives. In other words, by applying proportionality the European Court serves not just to control the administration but also to structure and guide the administration in the achievement of its objectives. Therefore, by interpreting proportionality as within a specific liberal framework of individual exercising their rights against the State would appear to distort the meaning of the principle within a Continental tradition of administrative law. Furthermore, as these control and purposive functions are closely linked, to suggest, following van Gerven,<sup>169</sup> that a distinction in the formulation of the principle can be made between an intensive control of disproportionality and a more purposive form of review on the basis of what is regarded to be

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<sup>169</sup> van Gerven, *op. cit. supra* no. 6, page 32. It is significant that van Gerven, at pages 37-38, characterises proportionality as part of the "proceduralisation of the law", a view which corresponds with a liberal conception of law as a means of enabling individuals to secure their own goals but ignores the importance of law in achieving wider social objectives. See, e.g., J. Rawls *A Theory of Justice* (Oxford: Clarendon Press, 1972) page 88 who develops a model of "pure procedural justice".

proportionate would appear to be an attempt to divide up proportionality review into static dualistic categories. State action and individual freedom cannot be exclusively separated from each other and therefore neither can the control of the administration be separated from the task of guiding and structuring the administration in the achievement of its purposes.

Proportionality is a necessary and basic idea of the democratic State which guarantees individual freedom to its citizens which elect government to make and implement policy initiatives. In the course of achieving these objectives individual freedom may need to be restricted. Accordingly, "[t]he requirements of life in a community and the fulfilment of tasks incumbent on the State may call for adjustments in the degree of freedom which the subjective right of the individual represents."<sup>170</sup> The role of proportionality is to ensure that such administrative action interferes as little as possible with the individual's capacity and simultaneously it guides the administration in the achievement of its objectives.

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<sup>170</sup> Case 118/75 *Criminal Proceedings against Watson and Belmann*, *supra* no. 8, 1209 (col. 1) of Advocate General Trabucchi's opinion.



## Chapter 7: The Possible Adoption of the Principle of Proportionality in English Law

### 1. Introduction

The possible adoption of the principle of proportionality into English law has been a contentious issue from 1984 when it was raised by Lord Diplock.<sup>1</sup> Since then judicial and academic debate have identified the main issues concerning the possibility of transplanting this principle. The purpose of this chapter is to examine this debate and analyse the response of the English judiciary to the principle of proportionality as domestic courts and in their role as Community courts. Proportionality is not an established ground of judicial review in English law. By suggesting its possible adoption Lord Diplock had in mind utilising proportionality as a separate head of judicial review in addition to his tripartite classification.<sup>2</sup> The debate therefore initiated as a possible addition to the established

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<sup>1</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410E (hereinafter the GCHQ case). See also Hansard 397 H.L. Deb. col. 994 (3rd February 1977).

<sup>2</sup> *R. v. Secretary of State for the Home Department ex parte Brind* [1991] 1 A.C. 696, 750D per Lord Roskill.

common law rules to be applied by the ordinary courts as opposed to the development of a distinct body of public law to be applied by a specialist administrative jurisdiction.

While proportionality is not a formally recognised principle of English law, there is conflicting authority for and against its adoption. What is clear is that this area of law is in a state of flux. Different judges hold different views on the possible role of proportionality. According to Lord Browne-Wilkinson, it can only be a matter of time before the principle is finally accepted as part of English law,<sup>3</sup> while Sir Thomas Bingham has stated that "it would be worth a modest investment in proportionality as a growth stock."<sup>4</sup> Millett J. has described it as a "novel and

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<sup>3</sup> Lord Browne-Wilkinson "Some Comparative Reflections: The Impact of European Law on English Human Rights and Public Law" in B.S. Markesinis (ed.), *The Gradual Convergence. Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century*. (Oxford: Clarendon Press, 1994) page 202. See also Lord Browne-Wilkinson "The Infiltration of a Bill of Rights" [1992] P.L. 397.

<sup>4</sup> T.H. Bingham "'There is a World Elsewhere': The Changing Perspectives of English Law" (1992) 41 I.C.L.Q. 513, 524. See also Lord Scarman "The Development of Administrative Law: Obstacles and Opportunities" [1990] P.L. 490-491; Lord Justice Glidewell "English Administrative Law: Past, Present and Future" (1993) 15 Liverpool L.R. 3, 18; D. Oulton "How Widely Accepted as a General Principle is Proportionality?" (1997) 12 *Commonwealth Judicial Journal* 17.

dangerous"<sup>5</sup> principle whereas Sir John Laws has intimated that proportionality should now be considered as part of English law.<sup>6</sup> Beneath such views underlie tensions inherent in the application of proportionality and the role of the judiciary in reviewing the substance of administrative decisions.

## 2. The Proportionality Debate

In order to understand the underlying tensions involved in the proportionality debate it is necessary to identify the different conceptions of administrative law held by the contributors. Those seeking to uphold the traditional model of judicial review have generally rejected calls for the adoption of proportionality. Under this model the courts are viewed as the guardians of liberty against executive power by using the artificial reason of the common law. The courts will review the exercise of public power if it is *ultra vires* or *Wednesbury* unreasonable in order to prevent the

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<sup>5</sup> *Allied Dunbar (Frank Weisinger) Ltd. v. Frank Weisinger* (1988) 17 I.R.L.R. 60, 65.

<sup>6</sup> J. Laws "Law and Democracy" [1995] P.L. 72, 77, 79.

abuse of power.<sup>7</sup> Legality is a universal concept which demands that all public bodies and individuals are subject to the ordinary law of the land. The judiciary is viewed as holding a customary wisdom which is expressed through the common law. Underpinning this view is the acceptance of an anti-rationalist approach to the place of law in government. Due to changes in the role of government and dissatisfaction with the limits placed on judicial review by the traditional model, some writers have sought to develop a more rationalist model of judicial review in order to protect fundamental rights.<sup>8</sup> Under what might be termed a "rights" model, law is seen to be founded not upon rules but principles.<sup>9</sup> Judges can articulate points of principle but not policy. In

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<sup>7</sup> In *R. v. Lord President of the Privy Council ex parte Page* [1993] A.C. 682, 701D Lord Browne-Wilkinson stated that "[i]f the decision-maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting *ultra vires* his powers and therefore unlawfully." See generally H.W.R. Wade and C.F. Forsyth *Administrative Law* (Oxford: Clarendon Press, 7th edn., 1994).

<sup>8</sup> See T.R.S. Allan *Law, Liberty, and Justice. The Foundations of British Constitutionalism*. (Oxford: Clarendon Press, 1993). Cf. the "liberal normativist" style of public law thought identified by M. Loughlin *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) pages 206-210. See also C. Harlow and R. Rawlings *Law and Administration* (London: Butterworths, 2nd edn., 1997) chapter 4.

<sup>9</sup> R. Dworkin *Taking Rights Seriously* (London: Duckworth, 1977); R. Dworkin *Law's Empire* (London: Fontana, 1986).

judicial review proceedings, the law is to be expressed through rational principles such as proportionality. In developing this model some writers have sought to make explicit the fundamental rights they view as embedded in the common law<sup>10</sup> and to give the Rule of Law a substantive, rather than a merely formal, meaning.<sup>11</sup> Recently, some judges have expressed their views on administrative law by adopting a rights model of judicial review.<sup>12</sup> The issue of whether English law should recognise a principle of proportionality has formed a focal issue between the traditional and rights based approaches to administrative law and can be seen as part of the wider debate of which model of judicial review should be adopted.

The foremost advocates of proportionality have been Jowell and Lester who have sought to extend the approach of Lord Diplock in the rationalisation

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<sup>10</sup> Allan, *op. cit. supra* no. 8, chapter 6.

<sup>11</sup> See P.P. Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] P.L. 467.

<sup>12</sup> See in particular J. Laws "Is the High Court the Guardian of Fundamental Constitutional Rights?" [1993] P.L. 59; J. Laws "Law and Democracy", *op. cit. supra* no. 6; J. Laws "The Constitution: Morals and Rights" [1996] P.L. 622. See also S. Sedley "The Sound of Silence: Constitutional Law Without a Constitution" (1994) 110 L.Q.R. 270; S. Sedley "Human Rights: A Twenty-First Century Agenda" [1995] P.L. 386; Lord Steyn "The Weakest and Least Dangerous Department of Government" [1997] P.L. 84.

of the heads of judicial review.<sup>13</sup> Their argument is that *Wednesbury* unreasonableness is an inadequate articulation of substantive review and that principles such as proportionality are required in order to provide a more principled justification for judicial review and in order to protect individual rights. For Jowell and Lester the requirement that the means bear a proportionate relationship with the desired end seems so "characteristically English"<sup>14</sup> that there should be little difficulty in absorbing this principle into English law. In support of this they argue that implicit applications of the principle can be found "lurking within the underbrush of *Wednesbury*" unreasonableness.<sup>15</sup> Judges have applied notions of proportionality without knowing it or more likely admitting it. Jowell and Lester argue that in the interests of a principled and coherent approach to

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<sup>13</sup> J. Jowell and A. Lester "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] P.L. 368; J. Jowell and A. Lester "Proportionality: Neither Novel Nor Dangerous" in J. Jowell and D. Oliver (eds.), *New Directions in Judicial Review* (London: Stevens, 1988) page 51; J. Jowell "Courts and the Administration in Britain: Standards, Principles and Rights" (1988) 22 *Israel L.R.* 409; A. Lester "The Influence of European Law on English Administrative Law" [1991] *Rivista Italiana di Diritto Pubblico Comunitario* 921; J. Jowell "Is Proportionality an Alien Concept?" (1996) 2 *E.P.L.* 401.

<sup>14</sup> "Beyond *Wednesbury*: Substantive Principles of Administrative Law" *ibid.*, 375.

judicial review proportionality should now be openly acknowledged as a principle of English law. In one sense their argument could be viewed as an invitation for the judiciary to just change its language of review. Indeed Jowell has stated that "it does not matter whether or not...[proportionality]...is sheltered under the *Wednesbury* umbrella, or allowed to stand alone" so long as it is openly accepted in English law.<sup>16</sup> However, adoption of proportionality would require a different focus of review away from the concentration on remedies and towards principles.<sup>17</sup> The model of judicial review Jowell and Lester adopt is the rights based model and judicial acceptance of proportionality is viewed as a means of achieving this.

This argument has been significantly boosted by the extra-judicial publications of Sir John Laws who has argued that despite the lack of any explicit protection of fundamental rights in the British Constitution, the common law can and should be developed in order to remedy this deficiency.

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<sup>15</sup> *Ibid.*, 374.

<sup>16</sup> J. Jowell "Is Proportionality an Alien Concept?", *op. cit. supra* no. 13, 410.

<sup>17</sup> Cf. *Davy v. Spelthorne Borough Council* [1984] A.C. 262, 276 *per* Lord Wilberforce: "...typically, English law fastens, not upon principles but upon remedies."

Laws' argument is that a differential standard of judicial protection needs to be developed depending on the impact of public power upon the individual: "the greater the intrusion proposed by a body possessing public power over the citizen into an area where his fundamental rights are at stake, the greater must be the justification which the public authority must demonstrate."<sup>18</sup> Accordingly, the "monolithic" standard of irrationality is seen by Laws as "an imperfect and inappropriate mechanism for the development of differential standards in judicial review."<sup>19</sup> When a public authority makes a discretionary decision affecting an individual's fundamental rights it should accord the first priority to the affected right unless it can provide substantial justification for overriding it. In applying the principle of proportionality the courts would be applying a tool suited to a differential standard of review by requiring greater justification in proportion to the interference with fundamental rights. Proportionality is then viewed as enabling the court to give a more finely tuned approach as

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<sup>18</sup> J. Laws "Is the High Court the Guardian of Fundamental Constitutional Rights?", *op. cit supra* no. 12, 69.

<sup>19</sup> *Ibid.*

opposed to an expression of judicial indignation implied within the language of administrative irrationality, in its review of the exercise of discretionary powers. A strong tendency has therefore appeared in which the adoption of proportionality is seen as inextricably linked with the issue of giving protection to fundamental rights. The views of Laws have found support in other members of the higher judiciary. For example, Lord Steyn has stated that "[t]he real question is whether the principle of *Wednesbury* unreasonableness is adequate protection of human rights, or whether only a recognition of the principle of proportionality can adequately protect human rights."<sup>20</sup>

Arguments against the adoption of proportionality have come from those seeking to uphold the traditional model of judicial review. Lord Irvine has called for the "constitutional imperative of judicial self-restraint" as exemplified in the *Wednesbury* principles to be honoured by refusing to recognise proportionality

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<sup>20</sup> Lord Steyn, *op. cit. supra* no. 12, 94.

as part of English law.<sup>21</sup> Lord Irvine states that "[t]he fundamental objection to proportionality is that it invites review of the merits of public decisions on the basis of a standard which is considerably lower than that of *Wednesbury* unreasonableness and would involve the court in a process of policy evaluation which goes far beyond its allotted constitutional role."<sup>22</sup>

Lord Hoffman shares the view that proportionality should have no place as a separate principle from unreasonableness but employs a different line of argument.<sup>23</sup> Like Lord Irvine, Lord Hoffman states that unreasonableness is the key concept for controlling the exercise of public power. However, irrationality or unreasonableness is viewed as a higher level concept which includes lack of proportionality as one of its forms. According to Lord Hoffman, the fact that English law adopts a general principle of unreasonableness saves English judges from the task of assigning particular cases to the sub-categories of

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<sup>21</sup> Lord Irvine of Lairg Q.C. "Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review" [1996] P.L. 59, 60.

<sup>22</sup> *Ibid.*, 74.

<sup>23</sup> Lord Hoffman "The Influence of the European Principle of Proportionality upon English Law" (Institute of European Law, University of Birmingham, 20th March 1998).

suitability, necessity and proportionality in the narrow sense, "which seems to afflict" other systems of administrative law.<sup>24</sup> Lord Hoffman sees the real problem as not which principle should be observed but who should decide whether it has been observed or not. Comparing the importance of the object of a measure with the burdens it imposes is a matter upon which reasonable people may differ and is normally left to democratic institutions to resolve. However, the courts retain their power of review for unreasonableness. Lord Hoffman states that "the whole art of judicial review...requires a political sensitivity to the proper boundaries between the powers of the legislative, executive and judicial branches of government."<sup>25</sup>

Proportionality is viewed as a distraction from the real task the court has to undertake which is to determine the margin of appreciation to be given to the decision-maker and the grounds upon which it is allowed. Compared with this, the exercise of assigning particular cases to various sub-categories seems to Lord Hoffman to be "no better

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<sup>24</sup> *Ibid.*, page 5.

<sup>25</sup> *Ibid.*, page 7.

than trainspotting".<sup>26</sup> As there are no hard and fast rules as to how judges should reconcile democratic government with the protection of fundamental rights, the courts have to "tread a delicate line which avoids the extremes of populism on the one hand and judicial over-activism on the other."<sup>27</sup> In other words, the customary wisdom of the courts, articulated through the language of unreasonableness cannot, except in a very crude manner, be better expressed through the technical rules of proportionality. Instead the art of judicial review for unreasonableness requires practical experience in the traditions of the common law and any attempt to rationalise this art by drawing upon the technical distinctions of proportionality only serves to devalue the courts' accumulated wisdom.

From the traditionalists' point of view proportionality is seen as a European threat to the common law which would force the judges to subvert the role and function of both Parliament and the

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<sup>26</sup> *Ibid.*, page 14. At page 6 Lord Hoffman states: "[t]o go down the road of classification can lead only to metaphysical problems of distinguishing different forms of irrationality which would truly be worthy of medieval schoolmen and, if such distinctions are to have any practical meaning, differences in the treatment of different kinds of irrationality which could fairly be characterised as irrational."

courts. The principle is seen as encouraging judicial supremacy and threatening democratic government through political institutions. Traditionalists are therefore highly sceptical of proportionality.

Adopting a comparative perspective Boyron has argued that proportionality would not fit within the theoretical framework of English constitutional and administrative law.<sup>28</sup> The domination of the English legal system by the sovereignty of Parliament means that the English courts lack the same status as the French Conseil d'État which operates a proportionality review. The distinction between appeal and review is one of the main organising principles of English administrative law and this would be threatened if proportionality were to be adopted. Furthermore, the difference between French inquisitorial procedures and English adversarial procedures and the different attitudes towards the administration would make the adoption of proportionality problematic.<sup>29</sup> In response to Jowell and Lester, Boyron has argued that

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<sup>27</sup> *Ibid.*, page 9.

<sup>28</sup> S. Boyron "Proportionality in English Administrative Law: A Faulty Translation?" (1992) 12 O.J.L.S. 237.

<sup>29</sup> *Ibid.*, 262-263. See also J.W.F. Allison *A Continental Distinction in the Common Law. A Historical and*

proportionality would result in a similarly inadequate and tautologous justification for judicial intervention as *Wednesbury* unreasonableness does. The courts could justify intervention on the basis of proportionality because the challenged decision was disproportionate and thereby engage in a similar question-begging circularity.<sup>30</sup>

From a functionalist perspective Harlow has also cautioned against the adoption of proportionality.<sup>31</sup> Harlow states that claims about the precision and rationality of civil law are exaggerated and arguments in favour of proportionality show little awareness of the real nature of the principle as a "'balancing test' replete with judicial discretion".<sup>32</sup> Under green light theory, the matters involved in a proportionality inquiry are considered to be too

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*Comparative Perspective on English Public Law*. (Oxford: Clarendon Press, 1996) chapter 10.

<sup>30</sup> *Ibid.*, 255.

<sup>31</sup> See Harlow and Rawlings, *op. cit. supra* no. 8. Cf. the empiricist strain in the functionalist style exemplified by J.A.G. Griffith, see Loughlin, *op. cit. supra* no. 8, pages 197-201.

<sup>32</sup> C. Harlow "Changing the Mindset: The Place of Theory in English Administrative Law" (1994) 14 O.J.L.S. 419, 428-429.

important to be left solely to judges.<sup>33</sup> From this viewpoint proportionality would simply enable the judiciary to replace administrative discretion with judicial discretion and so is to be resisted as a potential restriction of democratic government; "law is not and cannot be a substitute for politics."<sup>34</sup>

Other contributions to the debate have sought to deal constructively with what role proportionality could possibly play in English law. Craig has recognised that while the development of substantive principles of review may be the best option, proportionality should not be viewed as a panacea.<sup>35</sup> Proportionality is a not a self-executing doctrine providing a ready-made answer but a repository for the conclusion reached by a normative background theory. Application of proportionality will require some decision to be

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<sup>33</sup> C. Harlow "Back to Basics: Reinventing Administrative Law" [1997] P.L. 245, 261. On green light theory see Harlow and Rawlings, *op. cit. supra* no. 8, chapter 3.

<sup>34</sup> J.A.G. Griffith "The Political Constitution" (1979) 42 M.L.R. 1, 16. See also J.A.G. Griffith "Constitutional and Administrative Law" in P. Archer and A. Martin (eds.), *More Law Reform Now. A Collection of Essays on Law Reform*. (Chichester: Barry Rose, 1983) pages 49, 54-59.

<sup>35</sup> P.P. Craig *Administrative Law* (London: Sweet & Maxwell, 3rd edn., 1994) page 421. See also P.P. Craig "Unreasonableness and Proportionality in UK Law" (Institute of European Law, University of Birmingham, 20th March 1998).

made, either explicitly or implicitly, over which particular background theory is being adopted and what particular conception of proportionality is being advanced.<sup>36</sup> Intellectual honesty requires a reasoned argument as to why a decision was disproportionate, making it clear which particular conception of proportionality is being applied and at what level of intensity. For Craig this does not mean that proportionality should be rejected but that we should be aware of what its successful application requires.

The debate over proportionality has mainly been led by the liberals who want to reform judicial review to a more rights based model. In response traditionalists have argued that the established model of judicial review should be maintained. One consequence of leading the debate has been that the liberalists have also been able to set the agenda for the debate. For example, the issue of proportionality has become bound up with the protection of fundamental rights within the constitution. While this important issue has been recognised and discussed, the focus of debate has marginalised other issues such as whether

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<sup>36</sup> *Ibid.*, page 444.

proportionality should be applied across the whole range of administrative decision-making. However, before specific issues in the proportionality debate are addressed, the judicial debate will be analysed.

### 3. Proportionality in English Law

In this section the case-law concerning proportionality will be examined. Although proportionality is "unknown" to English public law<sup>37</sup> and the judiciary are unaccustomed to the principle, it has been argued that several cases can be interpreted as implicit applications of the principle. However, there is another reason for examining the case-law which is to present the tradition of substantive review which has become known as "Wednesbury review".<sup>38</sup> The important decision of the House of Lords in *Brind* requires separate examination and the subsequent case-law will also be examined. The application of the

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<sup>37</sup> J.F. Garner "The Principle of Proportionality" in *U.K. National Reports Submitted to the Xth International Congress on Comparative Law* (Budapest, 1978) section IVD2/1.

<sup>38</sup> Cf. Lord Irvine, *op. cit. supra* no. 21.

principle by the English courts in their role as Community courts provides an opportunity to assess the suitability of the principle as a full-scale transplant into English law.

A. *The Pre-Wednesbury Case-Law.*

As proportionality is not a developed ground of judicial intervention discerning whether there are impressions of proportionality can be difficult. Applications of the notion of proportion may be found under the principle of reasonableness before it came to be defined in the *Wednesbury* sense. For example, in *Kruse v. Johnson*<sup>39</sup> Lord Russell C.J. stated that by-laws could be held to be unreasonable and void by the court if they were partial and unequal in their application as between different classes, manifestly unjust or if they "involved such oppressive and gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men."<sup>40</sup> Lord Russell continued by stating that a by-law will not be unreasonable merely

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<sup>39</sup> [1898] 2 Q.B. 91. See generally A.N. Schofield *Byelaws of Local Authorities* (London: Butterworth, 1939) pages 48-70.

because the court thinks that it goes further than is prudent or necessary. In examining by-laws the courts used to adopt a more interventionist attitude in guarding property rights against state intervention. In *Repton School Governors v. Repton Rural District Council*<sup>41</sup> a by-law requiring that anyone who constructed a building had to provide at the rear an open area was challenged as unreasonable. Bailhache J. referred to Lord Russell's statement and added:

"...if the effect in a given case, which might be of frequent occurrence, of construing a by-law in a particular way would lead to a result quite unnecessary for the protection of public health, and would impose a serious restriction upon the ordinary rights of a property owner with no good object, I think one would be entitled to say that the by-law was void because it was unreasonable."<sup>42</sup>

The by-law was found to be unreasonable. In protecting property rights the judge was willing to determine whether the extent of interference was

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<sup>40</sup> *Ibid.*, 99-100.

<sup>41</sup> [1918] 1 K.B. 26. Decision affirmed by the Court of Appeal [1918] 2 K.B. 133.

necessary in view of the purpose of public health. *Scott v. Pilliner*<sup>43</sup> concerned the validity of a by-law which prohibited anyone from using any street or public place for the purpose of selling newspapers devoted to the probable result of "races, steeplechases, or other competitions." The court found that the width of the by-law could not be supported. The definition was so wide that it could cover the probable result of any athletic contest not at all concerned with betting. Kennedy J. stated that "[o]ne may have a strong view as to the mischief of betting, but one's objection to betting ought not to govern the decision of this case. The question for us is whether it is reasonable for the county authority to penalise the sale or distribution of such newspapers or other documents as may be held to come within the very wide description given in the by-law."<sup>44</sup> The width of the by-law went beyond what was necessary to achieve its purpose of deterring betting and was therefore unreasonable.

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<sup>42</sup> *Ibid.*, 30 (emphasis added).

<sup>43</sup> [1904] 2 K.B. 855.

<sup>44</sup> *Ibid.*, 857.

In *Attorney-General v. Hodgson*<sup>45</sup> a by-law which prohibited the use of cars in a park for public safety reasons was upheld. It had been argued that the same purpose could be secured by imposing speed limits. However, in rejecting this Peterson J. held that the council might well have thought that a speed limit would not necessarily be observed and the interests of public safety could be threatened. In *Arlidge v. Mayor, Aldermen, and Councillors of the Metropolitan Borough of Islington*<sup>46</sup> a by-law imposed a duty on the landlords of lodging houses to clean every part of the house once a year. The definition of landlord was wide enough to include people receiving the rent as an agent or trustee. The problem with this was that in the event of non-performance a penalty would be imposed on the landlord when he might be quite unable to carry out the work without breaking a contract or committing a trespass. The King's Bench Division held that to impose an obligation on a landlord to carry out certain work for which he could render himself liable as trespasser or be subject to a penalty for non-performance was unreasonable. Lord Alvertstone

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<sup>45</sup> [1922] 2 Ch. 429.

<sup>46</sup> [1909] 2 K.B. 127. See also *Stiles v. Galanski* [1904] 1 K.B. 615.

C.J. stated that the by-law "seems to me to go beyond anything which the necessity of the case demands."<sup>47</sup> The notion of proportionality here is that suitable means should be adopted in order to achieve the desired end. To impose an obligation to either commit a trespass or pay a penalty was clearly unsuitable in order to achieve the objective.

These old cases show that the ideas of suitability, necessity and proportionality are not altogether alien to the common law, though it would be going too far to state that the principle of proportionality is part of English law but just needs to be more clearly articulated. These common law notions of not going beyond what is necessary were applied by the judges in the early part of the century to protect property rights against collectivist State intervention. With the increase in public power over the individual in the modern State, such doctrines could be in the process of being rediscovered by today's judiciary.<sup>48</sup> However, so far the courts have been unable to reapply such

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<sup>47</sup> *Ibid.*, 134.

<sup>48</sup> See S. Sedley "The Sound of Silence: Constitutional Law Without a Constitution", *op. cit. supra* no. 12, 278; S. Sedley "The Moral Economy of Judicial Review" in G.P. Wilson (ed.), *Frontiers of Legal Scholarship* (Chichester: Wiley, 1995) page 156, 158.

doctrines due to their attachment to *Wednesbury* unreasonableness. What these old cases show is that the *Wednesbury* doctrine was not the product of ineluctable design but a new and novel doctrine quickly thought up in an *ex tempore* judgment delivered late on a Friday afternoon in 1947.<sup>49</sup> Before then the courts had on occasion assimilated notions of proportionality within the doctrine of unreasonableness in order to protect the rights and interests of individuals.

*B. Wednesbury.*

In the case of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*<sup>50</sup> the Court of Appeal set out the basis on which the courts may legitimately interfere with administrative decision-making. At a time when the courts were still in the throes of the wartime tendency of leaning "over backwards to the point of falling off the bench, in favour of the executive",<sup>51</sup> the basis of judicial intervention came to be articulated by

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<sup>49</sup> J. Laws "Judicial Review I. The Ghost in the Machine" [1989] P.L. 27, 30.

<sup>50</sup> [1948] 1 K.B. 223.

<sup>51</sup> J.A.G. Griffith "Administrative Law and the Judges" (London: The Pritt Memorial Lecture, 1978) page 13.

Lord Greene M.R., a judge with a highly formalist approach to the judicial role.<sup>52</sup> This judgment and the epithet of "Wednesbury unreasonableness" have subsequently become deeply embedded in judicial discourse.<sup>53</sup> The case itself concerned a challenge to the lawfulness of a condition placed on the grant of licences to cinemas operating on Sundays to the effect that children under the age of fifteen were not to be admitted.<sup>54</sup> The power of the local authority was to issue licences subject to such conditions as it thought fit to impose.<sup>55</sup> The condition was challenged as unlawful. Lord Greene began by asking what power did the court have in examining decisions taken by public authorities. The court could strike down a decision if the authority was found to have contravened the law but it could not substitute itself for the authority. The grant of power by Parliament to the authority ensured that the courts could only review the

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<sup>52</sup> See Lord Greene *The Judicial Office* (Birmingham: The Holdsworth Society, 1938); Lord Greene "Law and Progress" (1944) 94 *The Law Journal* 349, 357, 365. See also J.A.G. Griffith *Judicial Politics since 1920: A Chronicle* (Oxford: Blackwell, 1993) pages 55-57.

<sup>53</sup> The *Wednesbury* case is one of the most cited cases of all time. See G. Slapper "Half a century of being unreasonable" *The Times*, 25th November 1997.

<sup>54</sup> For a more detailed background see R. Carnwath "The Reasonable Limits of Local Authority Powers" [1996] P.L. 244, 246-248.

<sup>55</sup> Section 1(1) Sunday Entertainment Act 1932.

exercise of such power in a strictly limited class of case for it was a court of review and not of appeal. After setting out the doctrine of considerations and the other overlapping heads of review - bad faith, dishonesty, unreasonableness, and disregard of public policy - Lord Greene asked what did it mean for discretionary power to be exercised unreasonably? Using the example of the teacher dismissed because of her red hair<sup>56</sup> Lord Greene stated that such a decision could be unreasonable in the sense of taking into account irrelevant matters or in the sense that it was made in bad faith "and, in fact, all these things run into one another."<sup>57</sup> The challenged condition was found to be within the authority's wide discretionary power. The argument that it was unreasonable was rejected:

"[Counsel] is bound to say that the decision of the authority was wrong because it is unreasonable, and in saying that he is really saying that the ultimate arbiter of what is and is not reasonable is the court and not the

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<sup>56</sup> See *Short v. Poole Corporation* [1926] Ch. 66, 91 per Warrington L.J.

<sup>57</sup> *Supra* no. 44, 229.

local authority. It is just there, it seems to me, that the argument breaks down."<sup>58</sup>

However, Lord Greene did allow for a decision to be challenged as unlawful if it was unreasonable but in a different sense. Here it would have to be shown that the decision was so unreasonable that no reasonable authority could ever have arrived at it. This is what is commonly known as *Wednesbury* unreasonableness. Lord Greene stated that "something overwhelming" would be required for a challenge to succeed on this ground as it was not what the court thought to be unreasonable but what no reasonable authority could ever have arrived at. This sense of unreasonableness was defined as an aspect of determining whether a decision was *ultra vires*, in the sense that it was beyond the four corners of the authority's jurisdiction. It was only in 1984 that Lord Diplock could suggest that this ground of review, which he re-defined as "irrationality", could stand on its own feet and need no longer be justified as an inferred though unidentifiable mistake of law.<sup>59</sup>

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<sup>58</sup> *Ibid.*, 230.

<sup>59</sup> *GCHQ case*, *supra* no. 1, 410H-411A. Cf. *Edwards (Inspector of Taxes) v. Bairstow* [1956] A.C. 14, 36 per Viscount Radcliffe.

*Wednesbury* unreasonableness has been identified by some commentators as indicative of the myth-making of English administrative law. Jowell states that one myth is that judicial review is only concerned with the decision-making procedure and not substance and that it takes no account of the merits,<sup>60</sup> whereas Sedley identifies another myth to be that judicial review is a modern invention.<sup>61</sup> Analytically *Wednesbury* unreasonableness has been viewed as an unnecessary safety net as the controls of relevancy and propriety of purpose adequately cover the cases which would fall into unreasonableness.<sup>62</sup> However, if "...*Wednesbury* invented nothing and clarified little..."<sup>63</sup> then why has it proved to be of such importance in modern judicial review? The answer is that is it the very imprecision of this ground of review that has made it so prominent. According to Carnwath: "...the fusion of different legal strands

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<sup>60</sup> Jowell "Courts and the Administration in Britain: Standards, Principles and Rights", *op. cit. supra* no. 13, 415.

<sup>61</sup> Sedley, *op. cit. supra* no. 12, 277.

<sup>62</sup> Craig, *op. cit. supra* no. 30, page 410. P. Atiyah *Pragmatism and Theory in English Law* (London, The Hamlyn Lectures, 1987) pages 123-124 identifies a general trend of English judges to pile new doctrines on old doctrines as a consequence of their pragmatism.

<sup>63</sup> S. Sedley "Governments, Constitutions, and Judges" in G. Richardson and H. Genn (eds.), *Administrative Law &*

made *Wednesbury* unreasonableness a highly convenient shorthand for judges looking for a quick way to dispose of complex arguments. This, combined with its quasi-alliterative resonance, assured its durability."<sup>64</sup> The use of the test formed the judiciary's pragmatic response to the question of whether a given decision is lawful or not. It is a formal test that the judges have developed through the artificial reason of the common law to signify their (dis-)approval of an administrative decision. *Wednesbury* unreasonableness has come to mean judicial restraint and non-intervention but has at the same time allowed judicial intervention and even usurpation but not on any principled or rational basis. It is this apparent contradiction and "inherent vagueness"<sup>65</sup> which has appealed to judges minded to deal pragmatically with the case before them. Today *Wednesbury* describes a species of review under the traditional model of judicial

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*Government Action. The Courts and Alternative Mechanisms of Review.* (Oxford: Clarendon Press, 1994) page 35, 38.

<sup>64</sup> Carnwath, *op. cit. supra* no. 54, 248. According to Sedley, *op. cit. supra* no. 12, page 278 footnote 30: "...far from demonstrating any originality in the decision [*Wednesbury*] may demonstrate only the unoriginality of much advocacy and some lawmaking in this field: in the mouths of many advocates '*Wednesbury*' has become an adjective meaning inchoately objectionable..."

<sup>65</sup> P. Cane *An Introduction to Administrative Law* (Oxford: Clarendon Press, 3rd edn., 1996) page 208.

review used by some to argue against any extension or development of judicial review. According to Lord Irvine, only by applying the *Wednesbury* test can the courts give due weight to the "constitutional imperative of respect for the merits of public decisions."<sup>66</sup> *Wednesbury* is then a rule of artificial reason which the courts will apply in order to enforce the will of Parliament and to avoid questions of policy but which simultaneously allows the judges sufficient discretion to test how reasonable an administrative decision is.

The development of *Wednesbury* unreasonableness is testament to its ambiguity.<sup>67</sup> The formulation was born at a time when the courts were positively opposed to questioning administrative decision-making. Cases such as *Local Government Board v. Arlidge*<sup>68</sup> set the tone for judicial review of administrative action from the early part of the century to the 1960s.<sup>69</sup> The courts refused to intervene for fear of questioning Parliamentary

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<sup>66</sup> Lord Irvine, *op. cit. supra* no. 21, 72.

<sup>67</sup> See G.L. Peiris "Wednesbury Unreasonableness: The Expanding Canvas" (1987) 46 C.L.J. 53.

<sup>68</sup> [1915] A.C. 120. See A.V. Dicey "The Development of Administrative Law in England" (1915) 31 L.Q.R. 148.

<sup>69</sup> For a detailed overview see Griffith *Judicial Politics since 1920: A Chronicle*, *op. cit. supra* no. 47, chapters 1-4.

sovereignty or ministerial accountability. It was, however, in a different climate that *Wednesbury* was more generously applied when the House of Lords held that a Minister did not have an unlimited statutory discretion.<sup>70</sup> According to Sedley: "far from being the point at which public law woke up, the *Wednesbury* case is a long snore in its sleep."<sup>71</sup> In 1984 Lord Diplock redefined unreasonableness to irrationality which covers those decisions which outrageously defy logic or accepted moral standards so that no sensible person who applied his or her mind to the question could have arrived at it.<sup>72</sup> This re-classification and re-definition was motivated by a rationalisation of the common law doctrine of reasonableness. However, not all judges have accepted this. Lord Donaldson M.R. has questioned the definition of irrationality as "casting doubt on the mental capacity of the decision-maker"<sup>73</sup> and preferred the *Wednesbury* test or rather to ask whether the decision could elicit

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<sup>70</sup> *Padfield v. Ministry of Agriculture, Fisheries and Food* [1968] A.C. 997.

<sup>71</sup> Sedley, *op. cit. supra* no. 12, 278.

<sup>72</sup> *GCHQ case*, *supra* no. 1, 410G. See P. Walker "What's Wrong With Irrationality" [1995] P.L. 556.

<sup>73</sup> *R. v. Devon County Council ex parte G* [1989] A.C. 573, 577G.

the response "my goodness, that is certainly wrong".<sup>74</sup>

The central issue concerning *Wednesbury* unreasonableness is that the courts cannot interfere with the merits of public decisions. There is widespread agreement against the courts substituting their judgement on the merits. Traditionalists, liberalists and empirical functionalists, such as Griffith, would all agree that the courts have no jurisdiction to engage in an appeal on the merits or to remake the original administrative decision. The rule against merits review may then be described as a "narrow-gauge discovery" because it is, when taken alone, compatible with a wide number of competing frameworks and can therefore "bathe in an atmosphere of value neutrality."<sup>75</sup> However, beneath such ostensible agreement lies intractable disagreement over what exactly constitutes "the merits" and therefore what constitutes "legality" also. Only by identifying the different conceptions of administrative law and in acknowledging that the

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<sup>74</sup> *Ibid.*, 583H.

<sup>75</sup> C. Taylor "Neutrality in Political Science" in *Philosophy and the Human Sciences: Philosophical Papers Volume 2* (Cambridge: University Press, 1985) page 58, 90.

rule against merits review does not exist within a matrix of value neutrality can the real issues be examined.

Rhetorically judicial review is only concerned with the decision-making process.<sup>76</sup> However, the *Wednesbury* test has certainly been applied to the substance of administrative decisions.<sup>77</sup> The tautologous definition given to unreasonableness is an outcome of Lord Greene's approach as to what constitutes the merits of administrative decisions. Lord Greene's reasoning proceeded on the following lines. First, it was recognised that the court cannot substitute its view for that of the public authority. Secondly, the notion of reasonableness, having a well-established lineage,<sup>78</sup> is recognised as an aspect on which the court can review the decision of the authority. However, in order that the second proposition does not undermine the first, review for unreasonableness must be a certain type. Therefore, Lord Greene formulated the *Wednesbury* definition; the court must decide not

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<sup>76</sup> See, e.g., *Chief Constable of the North Wales Police v. Evans* [1982] 3 All E.R. 141, 155c per Lord Brightman.

<sup>77</sup> See, e.g., *Wheeler v. Leicester City Council* [1985] A.C. 1054.

<sup>78</sup> See *Rooke's Case* (1598) 5 Co. Rep. 99b; *R. v. Askew* (1768) 4 Burr. 2186, 2189; *Kruse v. Johnson*, *supra* no. 34; *Theatre de Luxe (Halifax) Ltd. v. Gledhill* [1915] 2 K.B. 48, 58-60.

whether the decision was unreasonable but whether the authority has been unreasonable by arriving at a decision which no reasonable authority ever could have come to. In this rough and ready way Lord Greene purported to distinguish between the merits of a decision and its legality. This formulation is seen by some as the inexorably logical standard of review whereby the courts cannot substitute their view for that of the public authority. The importance attributed to *Wednesbury* is shown by the fourth proposition which is implicit in the reasoning of Lord Greene and has been subsequently expressed.<sup>79</sup> It is inferred that any extension of judicial review beyond the limits set down by *Wednesbury* unreasonableness would necessarily and inevitably result in the judiciary substituting their opinion of the substantive merits for that of the public authority. However, the validity of this statement rests upon the questioning-begging premise that *Wednesbury* is the only way of preventing the courts from usurping the public authority's power. *Wednesbury* defines the merits of administrative decisions as anything which is

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<sup>79</sup> See *Brind*, *supra* no. 2, per Lord Ackner and Lord Lowry; Lord Irvine, *op. cit. supra* no. 21.

outside the scope of the unreasonableness test which is to be applied by reference to itself.

The importance of this for the traditionalists is that they are wedded to the *Wednesbury* definition of what constitutes the merits of public decision-making. The merits form anything which is outside the limits set down by *Wednesbury* and it is for the judiciary to decide what falls within the *Wednesbury* formulation. The *Wednesbury* test enables the judiciary to give the appearance that they are far removed from questions of policy and administration but is flexible enough to enable them to intervene when a sufficiently serious case arises. For those who adopt a rights model of judicial review the *Wednesbury* test is out of date and inadequate. Jowell and Lester criticise the test as inadequate in that it does not provide sufficient justification and encourages suspicion of judicial prejudice, unrealistic in that it sets a high threshold for applicants and tautologous.<sup>80</sup> Allan states that as the distinction between legality and the merits though fundamental, is in practice one of degree, it is neither

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<sup>80</sup> Jowell and Lester "Beyond *Wednesbury*: Substantive Principles of Administrative Law", *op. cit. supra* no. 13, 371-372.

straightforward nor self-evident and "cannot be captured by any simple formulas, mechanically applied."<sup>81</sup> This distinction cannot be elaborated as a legal principle but depends on cautious evaluation constituting essentially a plea for judicial self-restraint.<sup>82</sup>

### *C. The Post-Wednesbury Case-Law.*

*Wednesbury* did not become established as the *locus classicus* of English administrative law until the 1960s. While the judges were extending the scope for error of law<sup>83</sup> and procedural fairness,<sup>84</sup> substantive review remained relatively static. Following the procedural reforms of Order 53<sup>85</sup> and the drawing of a procedural distinction between public and private law, the way was opened for the judiciary to develop a substantive public law. Lord Diplock's suggestion that English law might adopt proportionality can be read in this light. However, such a development would run against the traditional common law approach and the universal

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<sup>81</sup> Allan, *op. cit. supra* no. 8, page 187.

<sup>82</sup> *Ibid.*, pages 187-188.

<sup>83</sup> *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.

<sup>84</sup> *Ridge v. Baldwin* [1964] A.C. 40.

conception of legality. Jowell and Lester argue that during this period judges used other principles, such as proportionality, "without knowing or, more likely, admitting it."<sup>85</sup> Unsurprisingly, Jowell and Lester would like to classify as many cases as possible as hidden applications of proportionality. The liberals therefore argue that the common law can develop a public law jurisprudence by reinterpreting common law precedents within a rights model of judicial review. Jowell and Lester argue that proportionality is not all that different from what the judges are well-accustomed to doing in order to allay concerns over its application. Alternatively, it may be thought that if proportionality is not all that different to *Wednesbury* review there is no need to transplant it into English law. Whatever conclusions may be drawn, this debate over the interpretation of the previous case-law is arguably tendentious in that it is concerned to vindicate a particular conception of judicial review rather than determine how proportionality can be best developed in the future. Furthermore, the focus

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<sup>85</sup> Order 53 R.S.C., S.I. 1977 No. 1955; section 31 Supreme Court Act 1981.

over which cases can be viewed as containing hidden notions of proportionality has overshadowed other issues.<sup>87</sup> Other commentators have noted the limits of this form of debate. For example, Jowell and Lester state that the House of Lords decision in *Bromley London Borough Council v. GLC*,<sup>88</sup> which concerned the use of the fiduciary trust concept against spending for transport policy, could be seen as displaying a hidden notion of proportionality.<sup>89</sup> As Craig states, this re-categorisation does not solve the difficult issues there raised.<sup>90</sup> Reclassifying the reasoning employed as better expressed through the language of proportionality cannot be a substitute for an analysis of the purpose of the legislation and a

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<sup>86</sup> "Beyond *Wednesbury*: Substantive Principles of Administrative Law", *op. cit. supra* no. 13, 374.

<sup>87</sup> *Ibid.*, 375-376, 381-382; "Proportionality: Neither Novel Nor Dangerous" and Jowell "Is Proportionality an Alien Concept?" are concerned with the reinterpretation of case-law under a proportionality friendly framework. Boyron "Proportionality in English Administrative Law: A Faulty Translation?", *op. cit. supra* no. 23, 249-254 argues against Jowell and Lester's views. Craig *Administrative Law*, *op. cit. supra* no. 30, pages 411-418 is less concerned with the case-law than with the place, meaning and application of proportionality.

<sup>88</sup> [1983] 1 A.C. 768. See generally M. Loughlin *Legality and Locality. The Role of Law in Central-Local Government Relations*. (Oxford: Clarendon Press, 1996) chapter 4.

<sup>89</sup> "Proportionality: Neither Novel Nor Dangerous", *op. cit. supra* no. 13, page 62; "Beyond *Wednesbury*: Substantive Principles of Administrative Law", *op. cit. supra* no. 13, 381-382.

<sup>90</sup> Craig, *op. cit. supra* no. 30, pages 442-443.

normative judgment on the competing interests involved. Indeed such re-categorisation may have the danger that proportionality is seen as a self-executing conclusionary principle just the same as *Wednesbury* unreasonableness.

Without considering every case Jowell and Lester discuss, the following analysis will examine some of the leading cases. *R. v. Barnsley Metropolitan Borough Council ex parte Hook*<sup>91</sup> concerned the revocation of a market trader's licence and a life ban from trading because he had been caught urinating into a side street. The Court of Appeal quashed the decision because *inter alia* the punishment was "altogether excessive and out of proportion to the occasion."<sup>92</sup> Lord Denning M.R. referred to the ability of the Court of King's Bench to quash unreasonable punishments which stemmed from the 17th century when the court struck down an excessive fine imposed by the Commissioners of Sewers.<sup>93</sup> The case can be seen as a simple application of the maxim that the punishment should fit the crime. Similarly in *R. v. London Borough of*

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<sup>91</sup> [1976] 1 W.L.R. 1052.

<sup>92</sup> *Ibid.*, 1057H per Lord Denning M.R.

<sup>93</sup> *Commings v. Masam* (1643) March 196, 202. See L.L. Jaffe and E.G. Henderson "Judicial Review and the Rule of Law: Historical Origins" (1956) 72 L.Q.R. 345, 348-350, 355-357.

*Brent ex parte Assegai*<sup>94</sup> a school governor was banned from visiting any Council premises and dismissed. Woolf L.J. (as he then was) regarded the ban as wholly out of proportion to the applicant's conduct: "[w]here the response is out of proportion with the cause to this extent, this provides a very clear indication of unreasonableness in the *Wednesbury* sense." Proportionality has therefore been assimilated with unreasonableness in cases concerning the imposition of penalties on an individual. In such situations the decision-making is more individualised and application of proportionality seems more suitable in assessing whether the penalty imposed was lawful.

Two of the main cases relied upon by Jowell and Lester are *Congreve v. Home Office*<sup>95</sup> and *Wheeler v. Leicester City Council*.<sup>96</sup> Jowell and Lester state that at the heart of both cases was the refusal of the court to countenance the achievement of a legitimate end by disproportionate means.<sup>97</sup> The explicit use of proportionality could have therefore strengthened the intellectual cogency of

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<sup>94</sup> Queen's Bench Division, (CO/20/87, CO/21/87), 11th June 1987, LEXIS transcript. See J. Beatson "Proportionality" (1988) 104 L.Q.R. 180.

<sup>95</sup> [1976] Q.B. 629.

<sup>96</sup> [1985] A.C. 1054.

these decisions. The *Congreve* case concerned the withdrawal of television licences from those people who had bought a licence at the price of £12 when the cost was being raised to £18. Lord Denning held that the demands for payment of the difference or revocation was contrary to the 1689 Bill of Rights for raising taxation without statutory authority and an unlawful punishment. If so, then the purpose of the administrative decision cannot have been a legitimate or proper purpose and it was an illegal decision in that the Home Secretary never had the power in the first place rather than a disproportionate exercise of that power. Classifying this case as an example of proportionality therefore assumes that the Home Secretary actually had the power and so overlooks the primary control of legality and purposes.<sup>98</sup>

The *Wheeler* case arose from the actions of a city council which was under a statutory duty to promote good race relations. Three members of the Leicester Rugby Football club were members of the English side touring South Africa, which then operated a policy of apartheid. The city council

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<sup>97</sup> "Proportionality: Neither Novel Nor Dangerous", *op. cit. supra* no. 13, page 61.

<sup>98</sup> Craig, *op. cit. supra* no. 30, page 414.

asked the club to condemn the tour but the club refused. Following this the council suspended the club from using the council's recreation field for one year as it considered the refusal to constitute an affront to the city's ethnic minority population. In the House of Lords, Lord Roskill held that the council's decision was unlawful as it was *Wednesbury* unreasonable and procedurally improper. This justification can be criticised because the procedural propriety of the decision was never an issue and Lord Roskill gave no reason why the decision was unreasonable. Lord Templeman considered the ban to be a form of punishment which the council placed on the club for not adopting its views: "[t]he council could not properly seek to use its statutory powers of management or any other statutory powers for the purposes of punishing the club when it had done no wrong."<sup>99</sup> This decision has been viewed as the House of Lords acting as a court of appeal from the council.<sup>100</sup> Jowell and Lester prefer the reasoning of Browne-Wilkinson L.J. (as he then was) in the Court of Appeal which Lord

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<sup>99</sup> *Ibid.*, 1081C.

<sup>100</sup> T.R.S. Allan "Racial Harmony, Public Policy and Freedom of Speech" (1986) 49 M.L.R. 121, 123.

Roskill explicitly declined to endorse.<sup>101</sup> In his speech Browne-Wilkinson L.J. represented a change in the focus of review toward the rights model of judicial review by analysing the case in terms of basic constitutional rights.<sup>102</sup> According to this view, the ban was an unacceptable constraint on the freedoms of speech and conscience. While couched in the language of constitutional rights, this opinion held the ban to be unlawful for the same reasons employed by the House of Lords; that its purpose was to punish the club.<sup>103</sup> If the purpose of the exercise of the power was to punish, then Browne-Wilkinson L.J. did not consider this to be a proper purpose. Interpreting this reasoning as an application of proportionality may only serve to confuse what is exactly required by that principle. For example, it was not considered that the court could examine alternative courses of action open to the council in order to achieve its objective. Was

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<sup>101</sup> *Ibid.*, 1079D.

<sup>102</sup> The dissent of Browne-Wilkinson L.J. has been a rallying point for the liberalists. See Jowell and Lester "Beyond *Wednesbury*: Substantive Principles of Administrative Law", *op. cit. supra* no. 13, 373-374; Allan, *op. cit. supra* no. 8, pages 137-138, 168-169.

<sup>103</sup> *Ibid.*, 1063A-B: "[t]he question, therefore, is whether general powers conferred on elected public bodies for the administration of public property or money can lawfully be used to punish those who lawfully and reasonably decline to support the view held by the public body". See also at 1064D.

the ban necessary and indispensable for the achievement of good race relations? Could the council, for instance, have lawfully called for a boycott of the club by local residents and spectators which might have had the effect of promoting good race relations without restricting the freedom of conscience of the club members? Could such an alternative course of action allow members of the public to decide for themselves without compelling anyone to uphold any particular view. Such questions were not addressed by Browne-Wilkinson L.J. who preferred to use his moral judgment about the club's constitutional rights and the House of Lords who used the more customary approach in order to make a finding of unreasonableness. Beneath both approaches lies the view that the council's objective itself was to be constrained in order to limit the power of the council. The judges' reasoning, whether expressed in terms of customary wisdom or the discourse of constitutional rights, was concerned with the purpose for which the power was being exercised and not whether the means adopted for the attainment of that purpose were proportionate. Classifying the *Wheeler* case as an application of proportionality

does little to enlighten us as to the possible adoption of that principle. What the case and its interpretation by Jowell and Lester demonstrates is that proportionality can, like *Wednesbury* unreasonableness, be manipulated in order to allow the judiciary some control over the ends for which administrative power is exercised.

D. Brind.

Following Lord Diplock's reference to the possible adoption of proportionality there followed a series of attempts to establish it as a separate head of review.<sup>104</sup> In a few instances the courts decided cases without finding it necessary to rely on proportionality,<sup>105</sup> whereas in other cases the courts found proportionality to be relevant in determining whether the decision was unreasonable.<sup>106</sup> Attempts to introduce proportionality as a separate head of review culminated in the House of Lords decision in *R. v. Secretary of State for the Home Department ex parte Brind*.<sup>107</sup>

This case concerned a challenge to a directive issued by the Home Secretary under the Broadcasting

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<sup>104</sup> See *R. v. Warwick Crown Court ex parte Smalley* [1987] 1 W.L.R. 237, 245G-H; *R. v. Secretary of State for the Home Department ex parte Yeboah* [1987] 3 All E.R. 999, 1005j-1006a.

<sup>105</sup> See *R. v. The London Borough of Enfield ex parte TF Unwin (Roydon) Ltd.* 46 Building L.R. 5, 18; *R. v. Legal Aid Area Committee No. 10 ex parte McKenna* [1990] 2 Admin.L.R. 585, 604; *R. v. British Coal Corporation ex parte Vardy* [1993] I.C.R. 720, 760E-F.

<sup>106</sup> See *R. v. London Borough of Brent ex parte Assegai*, *supra* no. 83; *R. v. Secretary of State for Transport ex parte Pegasus Holdings (Transport) Ltd.* [1988] 1 W.L.R. 990, 1001G *per* Schiemann J.; *R. v. Secretary of State for Health ex parte United States Tobacco International Inc.* [1992] 1 Q.B. 353, 366G *per* Taylor L.J.

<sup>107</sup> *Supra* no. 2.

Act 1981 for the BBC and IBA to refrain from broadcasting on radio and television the words of persons who represented organisations prohibited under the Prevention of Terrorism legislation. In justifying the prohibition the Home Secretary reasoned that these forms of media had allowed such people the opportunity to justify their criminal activities, caused offence to viewers, including the relatives of those killed by terrorists, and allowed terrorists to draw support and sustenance from the media. Pictures or film of people who represented the prohibited organisations could be broadcast and the spoken words could be voiced over by another person so that the person's lips and the actor's voice were synchronised. It was the broadcasting of the speaker's actual voice which was prohibited. A number of grounds of challenge were advanced including separate arguments based on *Wednesbury* unreasonableness and proportionality.<sup>108</sup> In the applicant's argument it was emphasised that a clear distinction existed between an appeal on the merits and review for proportionality.<sup>109</sup> However, it was partially conceded that the court

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<sup>108</sup> Significantly A. Lester Q.C. appeared as counsel for the applicant.

<sup>109</sup> *Ibid.*, 737B.

needed to look to some extent into the merits when the European Convention of Human Rights was relevant and proportionality was to be applied.<sup>110</sup> All five Law Lords agreed that the applicants could not succeed but employed significantly different reasoning.

Lord Bridge stated that when a restriction is made on the freedom of speech it must be justified by an important competing public interest. The court in such circumstances can exercise a secondary judgment by asking whether a reasonable Secretary of State could reasonably make the primary judgment.<sup>111</sup> However, in this case Lord Bridge thought that the Home Secretary had not acted unreasonably as the defeat of the terrorist is a public interest of the highest order in civilised society. Lord Bridge did not see how reliance on proportionality could help the applicants but agreed with Lord Roskill's comments on the possible future development of the law. Lord Roskill himself agreed with Lord Bridge on the substantive issue and only added a few words on proportionality. Lord Diplock's reference to proportionality in the *GCHQ* case had been made in

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<sup>110</sup> *Ibid.*, 738G

view of the increasing influence of Community law and it would be best to develop that principle on a case by case basis. However, the first step could not be taken in the present case as it would involve the court substituting its judgment of what was required to achieve the objective for that of the Home Secretary. However, Lord Roskill stated that the possible development of proportionality was to be left open.

Lord Templeman gave a short opinion. In his view freedom of expression existed as a matter of principle in every democratic constitution whether written or not. However, that principle was not absolute and restrictions of it could be subject to judicial review. After referring to the *Wednesbury* principles Lord Templeman stated:

"The subject matter and date of the *Wednesbury* principles cannot in my opinion make it either necessary or appropriate for the courts to judge the validity of an interference with human rights by asking themselves whether the Home Secretary has acted irrationally or perversely. It seems to me that the courts cannot escape from asking themselves whether a reasonable Secretary of

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<sup>111</sup> *Ibid.*, 741G-742A.

State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable. In terms of the [European] Convention [of Human Rights], as construed by the European Court [of Human Rights], the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent."<sup>112</sup>

Lord Templeman clearly thought that restrictions of human rights demanded a more searching judicial review of substance than the *Wednesbury* principles could provide and proportionality was the applicable tool for this task.<sup>113</sup>

So far proportionality seemed to have been treated neutrally by Lords Bridge and Roskill and favourably by Lord Templeman. It is a credible view that *Brind* was not the "right" case for proportionality to be adopted.<sup>114</sup> Taking account of the relatively limited extent of the broadcasting

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<sup>112</sup> *Ibid.*, 751D-F.

<sup>113</sup> In *R. v. Independent Television Commission ex parte TSW Broadcasting Ltd.*, House of Lords, 26th March 1992, LEXIS transcript, Lord Templeman expressed the will to apply proportionality and undergo a close scrutiny of a possible threat to human rights if necessary.

<sup>114</sup> See Carnwath, *op. cit. supra* no. 54, 248; S. Sedley "Freedom of Expression, The Media and the Courts" (1996) 8 E.R.P.L. 677, 681.

ban which affected the representatives of terrorism, it was perhaps unlikely that the House of Lords would intervene. However, while three Law Lords kept open the possible use of proportionality by English law, the other two Law Lords did not happily contemplate applying it in this case or any other. Lord Ackner began with the observation that while the *Wednesbury* test had been criticised as being too high,<sup>115</sup> it was formulated in a way which ensured that the court's jurisdiction remained one of supervision and not one of appeal. Lord Ackner stated that were the court to accept an invitation to intervene on the basis that the decision was incorrect or objectively unreasonable then this would involve the judiciary in substituting its view for that of the decision-maker.<sup>116</sup> Concerning proportionality Lord Ackner found it to be a severer test than *Wednesbury* though a total lack of proportionality could qualify as being unreasonable. As such proportionality was another way of asking whether the decision was acceptable or not and so it necessarily involved a review of

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<sup>115</sup> *Ibid.*, 757G. In *R. v. Inland Revenue Commissioners ex parte Unilever plc* [1996] S.T.C. 681, 692d Lord Bingham M.R. stated that the "threshold of public law irrationality is notoriously high."

<sup>116</sup> *Ibid.*, 757F-758A.

the merits. Lord Ackner's reasoning has been criticised as "oversimplistic"<sup>117</sup> in that it mistakenly confused the proportionality test with the substitution of the court's view of the merits.<sup>118</sup> On this basis Lord Ackner rejected proportionality.

Lord Lowry dealt at length with proportionality. In one sense it could be seen as a deeply rooted idea of English law. For example, in a negligence action the court has to weigh up the competing factors such as the risk of injury, the likely severity of the consequences, the cost and inconvenience of precautions. However, Lord Lowry emphatically rejected any attempt to import proportionality into the law of judicial review for four reasons.<sup>119</sup> First, review beyond the present limits would result in an abuse of the courts' supervisory jurisdiction. Secondly, judges lack the necessary training, experience and knowledge to engage in a balancing act of the competing interests. Thirdly, stability and certainty would be diminished as there is nearly something that can

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<sup>117</sup> I. Loveland *Constitutional Law: A Critical Introduction* (London: Butterworths, 1996) page 599.

<sup>118</sup> G. Marshall "Lions Around the Throne: The Expansion of Judicial Review in Britain" in J.J. Hesse and N. Johnson (eds.), *Constitutional Policy and Change in Europe* (Oxford: University Press, 1995) page 178, 184.

be said against any administrative decision and proportionality would be frequently invoked by applicants who wished to try their luck with an application for judicial review. Fourthly, the adoption of proportionality would lead to an increase in applications for judicial review thereby increasing uncertainty and the courts' caseload. The cogency of these and other arguments will be considered later.

From both a precedent and conceptual basis it is difficult to determine exactly what *Brind* decided. Very little conceptual discussion of proportionality was conducted and the constant repetition of the word "proportionality" perhaps served to confuse rather than elucidate the issues involved. The following formulation was advanced before the Law Lords in argument: "could the minister reasonably conclude that his direction was necessary?"<sup>120</sup> Exactly what this question was supposed to mean is far from clear. Was it intended to refer to the necessity test of proportionality by requiring the court to ask whether there were alternative means open to the minister which were equally effective of achieving the same objective

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<sup>119</sup> *Ibid.*, 766H-767C.

thereby securing minimal interference with the affected right or interest? However, from Lord Ackner's opinion it seems that the question was not attributed this meaning. Lord Ackner stated that it involved the court in "balancing the reasons, pro and con, for [the Home Secretary's] decision."<sup>121</sup> In Lord Ackner's opinion the necessity test was viewed as a way of enabling the court to decide whether the purpose to be achieved was necessary or desirable rather than assessing whether the decision-maker adopted the least restrictive means in order to achieve this purpose. On this mistaken basis proportionality was rejected as an illegitimate extension of the court's jurisdiction. Similarly others have stated that there is no difference between the concepts of reasonableness and proportionality.<sup>122</sup> This may be viewed as the common lawyer's misunderstanding of exactly what

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<sup>120</sup> *Ibid.*, 762G, 766F.

<sup>121</sup> *Ibid.*, 762H.

<sup>122</sup> See L. Neville Brown "General Principles of Law and the English Legal System" in M. Cappelletti (ed.), *New Perspectives For a Common Law of Europe* (Florence, 1978) page 171, 178; G. Slynn "Judicial Review of Community Administrative Acts" (The Exeter Lecture in European Community Law, 10th May 1985) page 4; Lord Mackenzie Stuart "Recent Developments in English Administrative Law - The Impact of Europe?" in M. Capotorti (ed.), *Du Droit International au Droit de l'intégration. Liber Amicorum Pierre Pescatore*. (Baden-Baden: Nomos Verlagsgesellschaft, 1987) page 411, 418.

Continental legal principles mean<sup>123</sup> or alternatively as seeking to assimilate a new principle into the common law through the myth of continuity but actually changing its meaning in the process.

*Brind* is an unsatisfactory leading authority on proportionality for several reasons. The lack of a full understanding of what proportionality and its constituent tests require; the way proportionality was argued as a subsidiary point to the main argument concerning the European Convention of Human Rights; the ambiguous formulation advanced; the underlying attachment to the doctrine of *Wednesbury* unreasonableness and its implicit assumption of what the merits of public decisions comprise; and a Diceyan distrust of a doctrine of Continental administrative law compared to the common law pragmatism, all contributed to render the judgments unconvincing. However, the decision allows an insight into the reception of the idea of proportionality. Lords Bridge, Roskill and Templeman seemed to be open to the idea of a

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<sup>123</sup> J. Bell "The English Lawyer in the Europe of 1993" (1991/2) 34 *University of Leeds Review* 181, 186; C. Graham "Towards a European Administrative Law? The English Case" [1993] *Rivista Trimstrala di Diritto Pubblico* 3, 9.

variable standard of review by applying proportionality, whereas for Lords Ackner and Lowry, the idea that the court's limited role of supervision should be extended beyond the traditional limits of *Wednesbury* review by a European principle was wholly unacceptable. The House of Lords seemed to be split between a traditional and a more rights orientated model of judicial review. While liberalists, such as Allan, mourn the rejection of proportionality as "misplaced"<sup>124</sup> and traditionalists, such as Irvine, view it as "the high water mark of the courts' strict adherence to the *Wednesbury* principles",<sup>125</sup> the *Brind* decision actually did little to clarify the debate over the possible adoption of proportionality.

#### *E. The Post-Brind Case-Law.*

The legal position following *Brind* was not entirely clear due to the inconclusive and different comments made by their Lordships. Was proportionality, following Lords Ackner and Lowry,

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<sup>124</sup> Allan, *op. cit. supra* no. 8, page 189. See also Jowell "Is Proportionality an Alien Concept?" *op. cit. supra* no. 13, 404.

to be considered as having been completely rejected, or, following Lords Bridge and Roskill, was it to be applied when the European dimension became more prominent, or, following Lord Templeman, was it already applicable in fundamental rights cases? It was not long after *Brind* that the High Court was asked to respond. Popplewell J. refused to recognise proportionality outside the limits of irrationality.<sup>126</sup> In another case Hutchinson J. refused to apply proportionality.<sup>127</sup> Following Lord Roskill, the judge stated that the gradual encroachment of the tide of European law had not been so great in the intervening ten months that the principle ought to be applied as a separate head of review. On appeal Neill L.J., after a review of *Brind*, concluded that it was not open for any court below the House of Lords to depart from the traditional *Wednesbury* criteria when the discretion reviewed belonged to a Minister of the Crown granted by Parliament. Neill L.J. intimated that "[i]n time the English courts will become increasingly familiar with the principle of

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<sup>125</sup> Lord Irvine, *op. cit. supra* no. 21, 74.

<sup>126</sup> *R. v. Secretary of State for the Home Department ex parte Cox* [1992] C.O.D. 72.

<sup>127</sup> *R. v. Secretary of State for the Environment ex parte National and Local Government Officers Association* [1992] C.O.D. 282.

proportionality. It may well be therefore that in cases involving the judicial review of decisions made at a lower level than government level, the law will develop on the lines that lack of proportionality will come to be recognised as a separate ground of intervention...".<sup>128</sup> Neill L.J. considered that applying proportionality to decisions of central government caused difficulty because the "constitutional balance between the courts and the executive is a delicate one."<sup>129</sup>

Inside the limited area left open by Neill L.J. certain judges have found scope to apply the principle of proportionality. In two cases decided by Laws J. the principle has been applied in the review of sanctions imposed by Magistrates' Courts. In *R. v. Eastbourne Magistrates' Court ex parte Hall*<sup>130</sup> the applicant had been imprisoned for three months, the maximum penalty, for non-payment of community charge due to culpable neglect. Laws J. stated that something quite exceptional was

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<sup>128</sup> *R. v. Secretary of State for Environment ex parte National and Local Government Officers' Association* [1993] 5 Admin.L.R. 785, 800H-801A.

<sup>129</sup> *Ibid.*, 801B. However, see *R. v. Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants* [1996] 4 All E.R. 385, 392b per Neill L.J. in favour of proportionality.

<sup>130</sup> Queen's Bench Division, (CO/2026/92), 22nd September 1992, LEXIS transcript. See also *R. v. Highbury Corner Justices ex parte Uchendu*, *The Times*, 28th January 1994.

required for the Magistrates' court to impose the maximum penalty. The review by the court was for irrationality but in a case like this, stated Laws J., it was more accurately described as the application of a requirement of proportionality. The penalty was excessive without good reason and was therefore quashed. Similarly in *R. v. Manchester Metropolitan University ex parte Nolan*<sup>131</sup> it was assumed, for the purpose of reviewing administrative penalties, that proportionality was available as a discrete head of challenge.

The decision of the Court of Appeal case of *R. v. Secretary of State for the Home Department ex parte Leech*<sup>132</sup> is remarkable for the way in which the court tested the necessity of an administrative rule. The case concerned the basic right of correspondence between a client and a legal adviser was protected by the court examining the necessity of a measure. Rule 33(3) of the Prison Rules stated that every communication to or from a prisoner could be examined by the Prison Governor who could

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<sup>131</sup> Queen's Bench Division, (CO/2856/92), 14th July 1993, LEXIS transcript. See also *Customs and Excise Commissioners v. Peninsular and Oriental Steam Navigation Co.* [1992] S.T.C. 809; *Bolton v. Law Society* [1994] 2 All E.R. 486; *R. v. Tamworth Magistrates' Court ex parte Walsh*, Queen's Bench Division, (CO/1756/92), 25th February 1994, LEXIS transcript.

<sup>132</sup> [1994] Q.B. 198.

stop any communication if it was thought that its contents were objectionable or too long. The issue raised in this case was whether such a wide power enabled the reading of letters between a prisoner and his legal adviser on such grounds. As the rule infringed the doctrine of legal professional privilege Steyn L.J. stated that the ability to stop such communications on the grounds of objectionability or prolixity had to be objectively justified. It was accepted that the width of the statutory power allowed some examination of correspondence but that the "authorised intrusion must...be the minimum necessary to ensure that the correspondence is in truth bona fide legal correspondence."<sup>133</sup> In examining the rule, the court held that stopping communications on the grounds of length or objectionable content was not necessary in order to ensure that it was bona fide legal correspondence. The ground of prolixity was inappropriate as a counsel's opinion could run for many pages. Neither was there an objective need to stop letters on the grounds of objectionability. Another prison rule dealing with current legal proceedings only allowed the Governor to stop such

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<sup>133</sup> *Ibid.*, 217G per Steyn L.J.

communications if there was reason to believe that it contained matter not relating to the legal proceedings. The court considered that as the distinction between possible and current legal proceedings was only technical, no objective need had been shown as to why Rule 33(3) should allow correspondence concerning possible proceedings to be stopped on the ground of objectionability while those concerning current legal proceedings could not. The Court of Appeal concluded that the width of the rule had not been objectively justified. In tackling the issue of infringement of the fundamental right of legal professional privilege as a *vires* issue, rather than as an exercise of discretion, the court was able to effectively sidestep arguments over unreasonableness in order to determine the necessity of the rule. Rather than questioning whether the rule was a reasonable one, the court was asking whether the legislature could have intended to allow such a broad interference with an individual's fundamental rights. In doing so the court was able to engage in a close scrutiny of the justification of the rule.<sup>134</sup>

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<sup>134</sup> See also *R. v. Lord Chancellor ex parte Witham* [1997] 2 All E.R. 79.

The leading case concerning the review of an administrative policy affecting fundamental rights is *R. v. Ministry of Defence ex parte Smith*.<sup>135</sup> The Ministry of Defence's blanket policy to discharge homosexuals and lesbians in the armed forces was challenged as an irrational interference with their fundamental rights. The Ministry of Defence had provided detailed reasoning for this policy. Sir Thomas Bingham M.R. accepted the following approach to the question: the court could only interfere with the exercise of a discretion on substantive grounds when it was satisfied that the decision was unreasonable in that it was beyond the range of responses open to a reasonable decision-maker. However, in determining whether a decision-maker had exceeded the margin of appreciation afforded it, the human rights context was important in that the more substantial the interference with human rights, then the more the court would require by way of justification before it is satisfied that the decision is reasonable. According to Sir Thomas Bingham M.R., this test was a correct distillation of the principles laid down by decisions of the

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<sup>135</sup> [1996] Q.B. 517.

House of Lords.<sup>136</sup> While the court should properly defer to the expertise of decision-makers, particularly in policy matters, it could not shrink from its fundamental duty to "do right to all manner of people".<sup>137</sup> The precise wording of the unreasonableness formulation was to enable the court to undertake a more intensive approach without explicitly mentioning the word "proportionality".

However, whether it actually amounts to a test equivalent to the principle of proportionality is uncertain. The concept of "justification" that an infringement of a fundamental right must be justified by a sufficiently important public interest is an important refinement of the traditional *Wednesbury* test.<sup>138</sup> Hunt states that once the courts accept a role in ensuring that decisions are "justified", they have inescapably accepted a role in evaluating the reasoning supporting the decision which inevitably involves a balancing exercise which amounts to applying the

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<sup>136</sup> *Bugdaycay v. Secretary of State for the Home Department* [1987] A.C. 514; *Brind*, supra no. 2.

<sup>137</sup> *Ibid.*, 556E per Sir Thomas Bingham M.R.

<sup>138</sup> This approach was instigated by Lord Bridge in *Bugdaycay* and *Brind*.

principle of proportionality.<sup>139</sup> However, even though the courts appear to require greater justification for a decision, does this actually mean that they are applying proportionality or merely requiring more justification for the decision? For example, Sir Thomas Bingham M.R. stated that the criticisms of the policy had "considerable cogency" but he was not prepared to stigmatise them as irrational. The court did not assess whether the infringement of the applicants' interests was indispensable for the achievement of the stated policy objective of ensuring the operative effectiveness of the armed forces. The court did not question whether a less restrictive policy such as the individual discharge of people from the armed services when they had threatened the operational effectiveness rather than a blanket policy of compulsory dismissal was equally effective and less restrictive of personal liberty. Neither did it ask whether the policy was a suitable means of achieving this objective or whether it imposed a disproportionate burden on those affected. Instead the court stressed that the greater the policy content of a decision, then the

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<sup>139</sup> M. Hunt *Using Human Rights Law in English Courts*

more hesitant it would be in reviewing the decision.

While the development of a requirement of justification is an important conceptual development, it is difficult to read it as the imposition of "proportionality in all but name".<sup>140</sup> Rather than implicitly undertaking an evaluation of means against ends, the concept of justification proves that the *Wednesbury* test "is sufficiently flexible to cover all situations."<sup>141</sup> The difficulty of applying proportionality can be seen in the approach to the question of legality. The Court of Appeal was asking whether sufficient justification has been provided rather than whether the administration could achieve the same policy objective with less restrictive effects on the applicants by an alternative course. As the court acknowledged, it lacked the necessary knowledge of policy in order to determine such questions. Commentators, such as Hunt<sup>142</sup> and Norris,<sup>143</sup> do not appear to question whether the court should have the policy expertise in order to determine whether

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(Oxford: Hart, 1997) page 217.

<sup>140</sup> *Ibid.*, page 216.

<sup>141</sup> *Smith*, *supra* no. 129, 556C per Sir Thomas Bingham M.R.

<sup>142</sup> *Ibid.*

equally effective means less restrictive of individual interests could have been adopted.

The cases decided in the aftermath of *Brind* show a variety of approaches.<sup>144</sup> The orthodox interpretation of *Brind* is that proportionality forms no part of English law.<sup>145</sup> However, in some cases judges have explicitly referred to proportionality,<sup>146</sup> while in other cases the judges do not explicitly refer to the principle but apply the tests of proportionality and necessity.<sup>147</sup> In other cases judges have maintained that the threshold of reasonableness is not to be lowered but they will require greater justification for an infringement of fundamental rights.<sup>148</sup> Sometimes, the higher courts seem to have adopted an attitude that even mentioning the "p-word" is a ground for overruling a decision of a lower court<sup>149</sup> thereby forcing other judges to attempt to undertake

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<sup>143</sup> M. Norris "Ex Parte Smith: Irrationality and Human Rights" [1996] P.L. 590.

<sup>144</sup> See also G. de Búrca "Proportionality and Wednesbury Unreasonableness: The Influence of European Legal Concepts on UK Law" (1997) 3 E.P.L. 561.

<sup>145</sup> *Nalgo*, supra no. 122.

<sup>146</sup> *Hall*, supra no. 124; *Uchendu*, supra no. 124.

<sup>147</sup> *Leech*, supra no. 126.

<sup>148</sup> *Smith*, supra no. 129.

<sup>149</sup> *R. v. Criminal Injuries Compensation Board ex parte Gambles*, Queen's Bench Division, (CO/2674/91), 3rd December 1993, LEXIS transcript (Sedley J.) overruled in *R. v. Criminal Injuries Compensation Board ex parte Cook* [1996] 2 All E.R. 144, 157d-158a per Hobhouse L.J.

proportionality type tests without openly discussing what they are doing.<sup>150</sup> Occasionally a judge has stated that his decision, using unreasonableness, would have been the same even if proportionality formed part of domestic law<sup>151</sup> but whether such assurances are made on the basis of detailed knowledge of applying the European principle is doubtful. The judiciary seem to be continuing their practice of saying one thing and doing another.<sup>152</sup> Hunt has argued that in effect proportionality has come to be recognised as being part of English law "but without, so far, daring to speak its name."<sup>153</sup> Whether or not this is a correct assessment of the variety of approaches which have emerged, it is unfortunate that judges have been unable to undertake this development without being open and clear about it. Inevitably the suspicion is raised that the judiciary is reviewing decisions

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<sup>150</sup> See *R. v. Advertising Standards Authority ex parte Vernons Organisation* [1992] 1 W.L.R. 1289; *R. v. Cambridge District Health Authority ex parte B*, *The Times*, 15th March 1995; *R. v. Secretary of State for the Home Department ex parte Moon* [1996] C.O.D. 54.

<sup>151</sup> *R. v. Governors of St Gregory's RC Aided High School ex parte Roberts*, *The Times*, 27th January 1995.

<sup>152</sup> See, e.g., *Anisminic*, *supra* no. 77.

<sup>153</sup> Hunt, *op. cit. supra* no. 133, page 216. Jowell "Is Proportionality an Alien Concept?", *op. cit. supra* no. 13, 402 states that proportionality is "often smuggled in under different names."

more intensively without providing a coherent explanation of what they are doing or why.

*F. Application of Proportionality under Community Law by the English Courts*

In fulfilling their obligations under Community law the English courts have been required to apply the principle of proportionality with the possibility of a reference to the European Court. In this way Community law could be performing an educative function by familiarising the English courts with the principle.<sup>154</sup> It was the increasing importance of Community law which influenced Lord Diplock to consider the possible adoption of proportionality into English law. By examining the cases in which English courts have applied the principle, it can be assessed whether Community law has been performing an educative function. It will be seen that proportionality has been applied with a mixed record of success.

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<sup>154</sup> Cf. O. Kahn-Freund "Common Law and Civil Law - Imaginary and Real Obstacles to Assimilation" in M. Cappelletti (ed.), *New Perspectives For a Common Law of Europe* (Florence, 1978) page 137, 159.

*R. v. Goldstein*<sup>155</sup> concerned the question of whether a prohibition on importing goods into the UK was contrary to Article 30 concerning the free movement of goods<sup>156</sup> or whether it was covered by one of the exceptions in Article 36. Lord Diplock stated that it was necessary for the Member State to adduce evidence to identify the various mischiefs which the restriction was intended to prevent, to show that such objectives could not have been just as effectively achieved by less restrictive measures and to show that the measures were not disproportionately severe having regard to the gravity of the mischief to which they were directed. According to Lord Diplock "[i]n plain English...[the principle of proportionality]...means 'You must not use a steam hammer to crack a nut, if a nutcracker would do'."<sup>157</sup>

In *R. v. Ministry of Agriculture, Fisheries and Food ex parte Bell Lines Ltd.*<sup>158</sup> a challenge was made to a system limiting the importation of milk

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<sup>155</sup> [1983] 1 All E.R. 434.

<sup>156</sup> See generally S. Weatherill and P. Beaumont *EC Law. The Essential Guide to the Legal Workings of the European Community*. (London, 2nd edn., 1995) chapter 15.

<sup>157</sup> *Ibid.*, 436e.

<sup>158</sup> [1984] 2 C.M.L.R. 502. See also *R. v. Ministry of Agriculture, Fisheries and Food ex parte Roberts* [1990] 1 C.M.L.R. 555.

and cream into the UK. The Minister had banned all imports unless they came through one of the 17 designated ports used for meat imports. The two ports traditionally used for milk imports were excluded. The applicants claimed that this amounted to a restriction on inter-state trade contrary to Article 30. The justification for the restriction offered by the Minister was that the 17 meat ports had greater experience in dealing with health problems. However, none of them had any experience with milk examination. In deciding which test of review to apply Forbes J. recognised that the English court must give full protection for rights arising under Community law and therefore go beyond the *Wednesbury* test and ask whether the measures were disproportionate. Forbes J. held that the obligation to use the designated ports went beyond what was necessary to ensure the safety of imported milk. The Minister did not necessarily have to use the designated ports as they had been previously used for meat imports. As the testing of meat and milk differs greatly it was not necessary for the milk imports to pass through the designated ports; milk tests could be conducted in laboratories and not at the place of entry. The system was therefore

struck down as an unnecessary restriction of the free movement of goods. Forbes J. commented that if the restriction had been reviewable only on the basis of *Wednesbury* unreasonableness, then it would have been difficult to suggest that the court should interfere. In accepting the need to give full protection to Community law rights, Forbes J. recognised that the court is inevitably drawn into the business of fact-finding. The decision has been welcomed as an exemplary judgment.<sup>159</sup> However, not all English courts have been so at ease in applying proportionality.

The Sunday trading litigation<sup>160</sup> provides an example of the English courts experiencing difficulty in applying proportionality. The issue was whether the restrictions of Sunday trading under the Shops Act 1950 amounted to a measure having equivalent effect to a quantitative restriction under Article 30 by preventing Community goods from being sold and whether the restriction was disproportionate. The authorities sought to justify the restrictions as a political

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<sup>159</sup> J. Steiner *Enforcing EC Law* (London: Blackstone, 1995) page 91.

<sup>160</sup> See generally A. Arnall "What Shall We Do on Sunday" (1991) 16 E.L.Rev. 112; R. Rawlings "The Eurolaw Game: Some Deductions from a Saga" (1991) 20 J.L.S. 309.

choice to ensure that working hours are arranged in accordance with national or regional socio-cultural characteristics. The cases involved the English courts in assessing the constitutionality of an Act of Parliament against the free movement of goods provisions by applying the principle of proportionality and therefore put into sharp relief the difference between the traditional model of judicial review against more European notions of assessing the proportionality of measures. In *Stoke-On-Trent City Council v. B. & Q. plc*<sup>161</sup> Hoffman J. stated that the public authority did not have to adduce evidence before the court concerning the proportionality inquiry if the court was satisfied on the basis of judicial notice that the requirements of proportionality had been met. In other words Hoffman J. was unwilling to undertake an examination of the factual basis on which the public authorities sought to enforce the Act against the traders, and therefore the basis upon which the Act remained in force under Community law. In considering the nature of the proportionality inquiry Hoffman J. stated:

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<sup>161</sup> [1991] Ch. 48. See also *W.H. Smith Do-It-All Ltd. v.*

"In my judgment it is not my function to carry out the balancing exercise or to form my own view on whether the legislative objective could be achieved by other means. These questions involve compromises between competing interests which in a democratic society must be resolved by the legislature. The duty of the court is only to inquire whether the compromise adopted by the United Kingdom Parliament, so far as it affects community trade, is one which a reasonable legislature could have reached. The function of the court is to review the acts of the legislature but not to substitute its own policies or values."<sup>162</sup>

Hoffman J. denied that this was an abdication of judicial responsibility; the balancing of interests involved was for the legislature and the judicial role was limited to deciding whether that view was a reasonable one. The primacy of the democratic process was more important than whether Sunday trading laws could be improved. On a subsequent reference to the European Court Advocate General Van Gerven expressly doubted the approach taken by

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*Peterborough City Council* [1991] 1 Q.B. 304.

<sup>162</sup> *Ibid.*, 69D-E. Cf. Lord Hoffman, *op. cit. supra* no. 23.

Hoffman J.<sup>163</sup> It was not for the national court to automatically accept the legislative view or limit itself to deciding whether the legislature could reasonably have adopted the provisions in question. In applying Community law, Advocate General Van Gerven stated that the national court should assess the proportionality of a measure by examining the following issues. First, whether the means had a causal connection with the objective pursued. Secondly, whether the same objective could be equally well attained by other measure less restrictive of the free movement of goods and, thirdly, whether the restriction was disproportionate to its objective which was to be examined by weighing the two values against each other.<sup>164</sup> The proportionality inquiry was to be achieved by comparing the various courses of action which could achieve the greatest possible freedom of intra-Community trade and the policy objective in protecting staff from being forced to work on Sundays. It is clear that in restricting the application of proportionality test to a

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<sup>163</sup> Case C-306/88 *Rochdale Borough Council v. Stewart John Anders* [1992] E.C.R. I-6457, paragraph 27 of the Advocate General's opinion.

<sup>164</sup> *Ibid.*, paragraphs 30 and 31 of the Advocate General's opinion.

reasonableness test and refusing to allow the public authorities to submit evidence before the court, Hoffman J. had not given full protection to Community rights.<sup>165</sup> Though the actual result, that the Act was not contrary to Article 30, was the same, the English court had adopted an approach substantially different from that of the European Court. The case is instructive in that it shows the lack of an institutional confidence by an English court to ask the questions required of it by Community law.

In *R. v. Secretary of State for the Home Department ex parte Adams*<sup>166</sup> the question was raised as to how proportionality should be applied in the conflict between national security and freedom of movement. The applicant, being the President of Sein Fein, had been invited to talk in London. However, the Home Secretary issued an exclusion order under the Prevention of Terrorism Act 1989. Before the High Court it was claimed that Article 8a(1) of the European Treaty provided that every citizen of the European Union had the right to move freely within the Member State. The court was

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<sup>165</sup> Arnall, *op. cit. supra* no. 154, 120-121, 123; Steiner, *op. cit. supra* no. 153, page 90.

<sup>166</sup> [1995] All E.R. (E.C.) 177.

uncertain about the application of proportionality under Community law and sought a reference from the European Court.<sup>167</sup> The court appeared to be uncertain concerning proportionality as "explanations of that principle are not in harmony."<sup>168</sup> According to Steyn L.J.:

"As English judges it seems to us that explanations of the principle span a spectrum of views from a narrow doctrine not essentially very different from *Wednesbury* unreasonableness to a de novo review of the administrative decision. On the other hand, there may be better explanations placing the principle between these extremes. Even in respect of proportionality there may be a margin of appreciation."<sup>169</sup>

By asking the European Court to determine the precise requirements of proportionality, the High Court was effectively asking the European Court to apply the proportionality test in order to avoid doing so itself.<sup>170</sup>

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<sup>167</sup> Arguments based on domestic law were quickly rejected by the court, *ibid.*, 185d-h.

<sup>168</sup> *Ibid.*, 191j.

<sup>169</sup> *Ibid.*, 192a.

<sup>170</sup> As the exclusion order was later lifted, the Article 177 reference to the European Court lapsed. See *R. v.*

The leading case for the application of proportionality by an English court under Community law is *R. v. Secretary of State for Employment ex parte Equal Opportunities Commission*.<sup>171</sup> This concerned a challenge to provisions in the Employment Protection (Consolidation) Act 1978 which granted certain employment rights if an employee worked a specified number of hours during a period of continuous employment. Part-time workers who did not reach the thresholds could not claim the statutory rights. As the majority of part-time workers are female, it was argued that the Act indirectly discriminated against women contrary to Article 119.<sup>172</sup> Such indirect discrimination could be objectively justified if the test laid down by the European Court was satisfied.<sup>173</sup> That is, the national court must find that the measures correspond to a real need on the part of the business, are appropriate for achieving the objective pursued and are necessary for that end. It was argued that the thresholds made more part-time work available as employers would be more

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*Secretary of State for the Home Department ex parte Adams* [1995] 3 C.M.L.R. 476.

<sup>171</sup> [1995] 1 A.C. 1.

<sup>172</sup> See generally Weatherill and Beaumont, *op. cit. supra* no. 150, chapter 20.

likely to employ part-time workers who could not enforce such employment rights against them. In the House of Lords, Lord Keith stated that this aim was a beneficial social policy aim. The question was whether the provisions were a suitable and necessary means of achieving it. The measures were found to be unsuitable as they involved nationwide differential employment rights between full and part-time worker. Neither were the measures necessary to achieve their aim. The Department of Employment had not presented any evidence to justify the view that the thresholds would increase part-time work. The Equal Opportunities Commission relied on reports of the House of Commons Employment Committee and the House of Lords Select Committee on the European Communities which revealed a diversity of views with employers taking the view that removal of the provisions would reduce the availability of part-time work while trade unions, some employers and academics took the opposite view. Furthermore, no other Member State, apart from Ireland, had adopted similar provisions. France which had equal rights for full and part-time employees since 1982 had experienced an

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<sup>173</sup> Case 170/84 *Bilka-Kaufhaus v. Karin Weber von Hartz*

increase of part-time work of 36.6% between 1983 and 1988 compared with an increase of 26.1% in Britain. Lord Keith concluded that the measures had not been objectively justified and therefore the provisions were unlawful.

The tension between democratic processes and judicial protection under proportionality becomes more acute in relation to an Act of Parliament. Examining the proportionality of a Parliamentary measure is completely at odds with the Diceyan heritage. That problems have arisen is therefore unsurprising. Such tensions are reflected in the views of Hoffman J. where the application of proportionality is assimilated with the judge simply replacing his views for that of the legislature. However, in the *Equal Opportunities Commission* case the House of Lords appears to have confidently applied proportionality and the different judicial techniques required. For example, the reliance on economic and social evidence in order to determine whether a measure is objectively justified requires the court to adopt a more purposive attitude rather than the traditional formalistic approach. In applying proportionality

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[1986] E.C.R. 1607, paragraph 36.

judges have been introduced to new judicial techniques.

In their role as Community courts, the English courts have had to apply the principle of proportionality. Inevitably tensions arise. If proportionality is considered to be unacceptable under domestic law then why should it be acceptable under Community law? Should the courts maintain a sovereignty based *Wednesbury* review for domestic law issues now that the doctrine of Parliamentary sovereignty has had to be adjusted to allow for Community law thereby upholding the strict dualist position?<sup>174</sup> Or should the courts allow themselves to be influenced in their articulation of domestic law by the methods of review which they have to apply under Community law? A variety of responses have emerged. For example, in the *Stoke-on-Trent* case Hoffman J. refused to apply proportionality as a matter of Community law. In the *Adams* case, Steyn L.J. maintained a strictly dualist approach by reserving the *Wednesbury* standard of review under English law but acknowledged that proportionality was a cardinal principle of Community law. Some

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<sup>174</sup> For a discussion of the breakdown of the dualist position due to Community law see Hunt, *op. cit. supra* no. 133, chapters 1 and 2.

judges have recognised the fact that proportionality is applicable under Community law may affect the review under English law. For example, Lord Slynn has stated that although English judges have no duty to apply proportionality in solely domestic law cases "it may creep in, particularly in situations where Community law and domestic law issues coincide or overlap....When a judge in the same case is going to have to decide national law and Community law issues, it is almost too much to ask that he should try to keep *Wednesbury* unreasonableness for one, proportionality for the other. It may even be undesirable that he should try to do so."<sup>175</sup> Similar concerns have been expressed by Sedley J. when faced with a challenge to an exclusion order under both Community and English law. When reviewing a measure which threatens the right to life the common law would subject it to the most anxious scrutiny. However, Sedley J. stated that this did not mean that the European Convention of Human Rights was otiose for "[o]nce it is accepted that the standards articulated in the convention are

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<sup>175</sup> Lord Slynn "European Law and the National Judge" in *Butterworth Lectures 1991-92* (London: Butterworths,

standards which both march with those of the common law and inform the jurisprudence of the European Union, it becomes unreal and potentially unjust to continue to develop English public law without reference to them."<sup>176</sup>

Such statements reflect the concerns of Lord Diplock that the common law should keep in a moving relationship with the increasing influence of Community law.<sup>177</sup> However, while the desire to keep English law up to standard with Community law has been expressed by some judges, others have preferred to maintain the strict dualist position in order to shield the common law from European notions of proportionality. None of the possible options seem adequate. To maintain a dualist position ignores the consequently unequal protection of the individual between English law and Community law. Alternatively to apply proportionality in both Community and English law will require the courts to make decisions, such as the *Stoke-on-Trent* case, which they feel ill-

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1993) page 18, 27-28. See also Lord Justice Glidewell, *op. cit. supra* no. 4, 18.

<sup>176</sup> *R. v. Secretary of State for the Home Department ex parte McQuillan* [1995] 4 All E.R. 400, 422h. Sedley J. referred to Laws "Is the High Court the Guardian of Fundamental Constitutional Rights?", *op. cit. supra* no. 12.

<sup>177</sup> See chapter 3, section 1.

prepared to undertake and which they think should properly be left to Parliament. Neither is it certain that allowing proportionality to "creep in" when issues of domestic and Community law coincide or overlap will adequately address the necessary issues such as a proper understanding of the principle and the procedural competence of the court to effectively undertake its application.

#### **4. A Variable Standard of Review**

A variable standard of review enables the court to go about its task of reviewing administrative action in a more or less rigorous manner. Principles of review such as reasonableness and proportionality can be applied at different standards of review by the court thereby allowing the decision-maker a correspondingly variable margin of appreciation. Often the level at which the intensity of review is set can determine whether the challenged decision stands or not. The means by which such a standard is set therefore has great practical and conceptual importance. This can be shown by the following cases.

It has already been mentioned that in *Brind* some Law Lords favoured a close analysis of any restriction of a fundamental right. Such comments follow a previous House of Lords decision in *Bugdaycay v. Secretary of State for the Home Department*<sup>178</sup> which concerned a decision to deport a person to a country where there was a serious threat to his life. Lord Bridge explained the role of the court:

"The limitations of the scope of that power [of judicial review] are well known and need not be restated here, Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."<sup>179</sup>

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<sup>178</sup> [1987] A.C. 514.

A restriction on a fundamental right will require the court to operate a more rigorous review process and have a greater readiness to intervene than would normally be the case. An important competing interest must be provided which could reasonably be judged to justify the restriction of the fundamental right.<sup>180</sup> Similarly, the courts have stated that they will impose a more relaxed degree of control when they are concerned with decisions involving policy matters. For example, in *R. v. Secretary of State for the Environment ex parte Hammersmith and Fulham London Borough Council*<sup>181</sup> the House of Lords was met with a challenge to the rates for charge capping which had been set by the Secretary of State. Lord Bridge stated:

"The formulation and implementation of national economic policy are matters depending essentially on political judgment. The decisions which shape the, are for politicians to take and it is in the political forum of the House of Commons that they are properly to be debated and approved or disapproved on their

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<sup>179</sup> *Ibid.*, 531F-G. See also at 537H per Lord Templeman.

<sup>180</sup> *Smith, supra* no. 123, 554E-F per Sir Thomas Bingham M.R.

merits. If the decisions have been taken in good faith within the four corners of the Act, the merits of the policy underlying the decisions are not susceptible to review by the courts and the courts would be exceeding their proper function if they presumed to condemn the policy as unreasonable."<sup>182</sup>

In assessing whether the decisions were unreasonable the court could only ask whether they were made on the "extremes of bad faith, improper motive or manifest absurdity."<sup>183</sup> The House of Lords did not therefore hold that such decisions were in principle non-justiciable but that a court could only properly make a finding of illegality in the most exceptional circumstances.

The evolution of a variable standard of review has been welcomed by the liberalists. According to Allan "...the distinction between appeal and review must be an elastic one, permitting more intensive scrutiny of executive action which threatens basic liberties than might be appropriate in other cases... [t]here must inevitably be a spectrum of

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<sup>181</sup> [1991] 1 A.C. 521. See generally Loughlin *Legality and Locality. The Role of Law in Central-Local Government Relations.*, *op. cit. supra* no. 88, chapter 5.

<sup>182</sup> *Ibid.*, 597G-H.

<sup>183</sup> *Ibid.*, 597F.

legitimate judicial responses to administrative acts and decisions."<sup>184</sup> Commentators advocating the adoption of proportionality have seen these cases as the judicial development of a variable standard of review suited to the transplantation of that principle. For Sir John Laws the recent authorities represent "a conceptual shift away from *Wednesbury* unreasonableness: or...at any rate a significant refinement of it...[towards]...the development of differential standards in judicial review."<sup>185</sup> Jowell comments that English law now has a sliding scale of deference similar to Community law which would allow proportionality to fit comfortably into existing English law.<sup>186</sup>

However, the extent to which such developments form an effective variable standard of review and whether this amounts to a suitable environment for the growth of proportionality is open to question. While the courts have been identifying areas where they feel more comfortable in engaging in a more or less intensive review, this does not necessarily

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<sup>184</sup> Allan, *op. cit. supra* no. 8, pages 187-188.

<sup>185</sup> Laws "Is the High Court the Guardian of Fundamental Constitutional Rights?", *op. cit. supra* no. 12, 69. For a traditional view see Lord Irvine, *op. cit. supra* no. 21, 63-67.

<sup>186</sup> Jowell "Is Proportionality an Alien Concept?", *op. cit. supra* no. 13, 406, 410. Cf. G. de Burca "The

mean that they have been developing a similar framework of review as that adopted by the European Court in its review for proportionality. For instance, in the *Hammersmith* case did the House of Lords draw an appropriate framework of review in which to assess the legality of the challenged decisions or was it signalling that it was incapable of adequately dealing with the issues raised except on the extremes of bad faith or manifest absurdity? Unlike the European Court in its review of economic policy decisions, the House of Lords was not determining the function being served by the administration and then shaping its framework of review around that function. According to Loughlin, the *Hammersmith* case shows that the courts simply lack "both the institutional capacity and constitutional legitimacy to perform the exercise being demanded of them."<sup>187</sup> Rather than supporting the view that the courts have been elaborating differential standards of review, the case shows that the courts are not competent to exercise an effective form of review outside the exceptional circumstances of bad faith and manifest

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Principle of Proportionality and its Application in EC Law" (1993) 13 Y.E.L. 105.

<sup>187</sup> Loughlin, *op. cit. supra* no. 175, page 320.

absurdity. Similarly, the courts may now state that they will adopt a more interventionist role when reviewing an infringement of fundamental rights<sup>188</sup> but does this amount to a proportionality test? The concept of "justification" may require the decision-maker to provide justification for its decision infringing fundamental rights but the focus of such an approach is on the policy itself and the strength of the reasons underlying it rather than with the proportionality question of whether the infringement was indispensable for the achievement of the policy objective. While the courts may say that they are engaging in more intensive controls, if they still feel inhibited by their lack of knowledge as regards policy, this will prevent them from effectively applying proportionality. While advocates of proportionality would interpret the recent judicial developments as evidence of an emerging variable standard of review, it remains to be seen whether the English judiciary can effectively utilise it in a similar manner to that of the European Court.

## **5. Issues in the Proportionality Debate**

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<sup>188</sup> *R. v. Coventry City Council ex parte Phoenix Aviation*

In this section issues concerned in the possible adoption of proportionality will be raised and discussed. A consequence of the tendency of the debate to become conducted by two broad camps - the traditionalists and the liberalists - has been that certain issues have not been raised or adequately explored. It is the purpose here to identify such issues.

*A. Different Meanings Given to the Concepts of Proportionality and Freedom*

Unsurprisingly, there are disagreements over the actual meaning of the principle of proportionality. This may be viewed as a consequence of the fact that the principle is rooted in the Civilian tradition of public law. Lord Diplock envisaged the adoption of proportionality as a means of borrowing from the European tradition. Therefore, a thorough knowledge of the meaning and place of proportionality within the different Civilian systems would be required. However, some advocates have sought to eschew the

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[1995] 3 All E.R. 37, 62g per Simon Brown L.J.

development of proportionality as a transplantation towards the articulation of a more home grown principle within a particular model of judicial review. The difficulty with such an approach is that it overlooks the benefit that could be drawn from comparative work. The articulation of a different conception of proportionality can be seen in the views of Sir John Laws whose purpose has been to determine how the common law can give protection to fundamental rights.<sup>189</sup>

According to Laws, proportionality is the tool with which to determine whether an infringement of fundamental rights in the exercise of a statutory discretion is legal. In the exercise of such a discretion the decision-maker has to decide how to order its priorities and in doing so it may reach a decision which affects fundamental rights.<sup>190</sup> For Laws, it is in the ordering of such priorities that proportionality comes into play. If a decision affects fundamental rights, then under the variable standard of review and the principle of proportionality, it will be for the decision-maker to "accord the first priority to the right unless

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<sup>189</sup> Laws "Is the High Court the Guardian of Fundamental Constitutional Rights?", *op. cit. supra* no. 12.

<sup>190</sup> *Ibid.*, 73.

he can show a substantial, objective public justification for overriding it."<sup>191</sup> Proportionality is the means by which to assess whether the public authority has given enough weight to the affected right. Under this approach, it is the court's role to judge which order of priorities are acceptable when fundamental rights are affected. The court would examine the proportionality of the infringement of fundamental rights by the quality of the reasons given by the public authority. For example, whether funding for a hospital operation should be withdrawn.<sup>192</sup>

What this type of inquiry seems to exclude is the examination of other alternative means of achieving the same policy objective and thereby reconciling the needs of the public authority and the individual. For Laws the proportionality principle is constructed as a rule of permissible priorities rather than an examination of permissible courses of action open to the administration to be tested in a goal-oriented balancing exercise. By adopting such a conception of the principle the danger is that the court will

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<sup>191</sup> *Ibid.*, 74.

moralise over what objectives the public authority should or should not adopt rather than examine the various alternatives open to it, in order to determine a more suitable and less restrictive means of implementing a given policy objective. Consider the following passage by Laws:

"...if we are to entertain a form of review in which fundamental rights are to enjoy the court's distinct protection, the very exercise consists in an *insistence that the decision-maker is not free to order his priorities as he chooses*...If a government or local authority, perhaps too much in love with a particular policy objective, were to take a decision which curtails free speech for no convincing reason, to excoriate it as having lost its sense looks too much like sending people with *unacceptable politics* to the psychiatric hospital. The deployment of proportionality sets in focus the true nature of the exercise: the elaboration of a *rule about permissible priorities*."<sup>193</sup>

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<sup>192</sup> *R. v. Cambridge District Health Authority ex parte B*, *The Times*, 15th March 1995 decided by Laws J and later overruled by the Court of Appeal [1995] 2 All E.R. 129.

<sup>193</sup> *Ibid.*, 73-74 (italics added).

Such an approach would involve the court moving away from deciding how public administration can best be conducted and toward telling the administration how to conduct itself by detailing its permissible priorities. Furthermore, a concern over adopting this rights model of judicial review is that it has a tendency toward an absolutist rights discourse to the effect that an individual's rights must be protected even when the general interest requires otherwise.<sup>194</sup> While Laws recognises the difficulties of determining what is to count as sufficient justification for the infringement of a fundamental right, he discounts the benefit of the court in examining whether the policy objective could have been achieved by less onerous means. In doing so Laws effectively reformulates the principle of proportionality from a means of reconciling the achievement of policy objectives with private interests to a means of moralising over the permissible priorities of policy formulation. Put shortly, the conception of

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<sup>194</sup> See, e.g., Dworkin *Taking Rights Seriously*, *op. cit. supra* no. 9, pages 146, 269-270; Norris, *op. cit. supra* no. 137, 598. Cf. Dworkin, *ibid.*, pages 197-200 states that a balancing test amounts to a utilitarian limitation of rights and that rights should only be limited by some compelling reason which "is consistent with the suppositions on which the original right must be based."

proportionality Laws advocates requires the court to judge the purpose which the public authority adopted rather than advise on the most suitable and proportionate means of achieving that purpose.

In a more recent publication Laws seems to moderate his position towards the development of a proportionality based review within the limits of *Wednesbury* unreasonableness. Emphasising "the true nature of the common law" as an "incremental quality which above all else allows it to harness old principles to new conditions without offence to the democratic arms of government", Laws states that the challenge for the common law is to define the substantive content of the rule of law.<sup>195</sup> The courts should develop the evolutionary standards of common law reasonableness in the "interaction between informed public opinion and the independent judicial mind, which must pay heed to all the law that has gone before."<sup>196</sup> The principle of reasonableness reigns supreme in the courts' endeavour to articulate the principles of a free society which are logically prior to the policies

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<sup>195</sup> J. Laws "Wednesbury" in C.F. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord. Essays on Public Law in Honour of Sir William Wade QC.* (Oxford: Clarendon Press, 1998) page 185, 199.

<sup>196</sup> *Ibid.*, page 200.

of elected government. It is for these reasons that Laws thinks that the courts will not "make much progress towards the acceptance of a concept such as proportionality as an engine of principle in judicial review until we cast it in the language of reasonableness, and also firmly leave behind us the misleading notion that *Wednesbury* can only represent a monolithic standard of review...Proportionality need not be a separate category for it to have independent life. The tendency to institutionalize *Wednesbury* and proportionality in rigid terms, each excluding the other, forgets the common law's incremental method."<sup>197</sup>

Indeed Laws suggests, alongside Lord Hoffman,<sup>198</sup> that the difficulties surrounding the adoption of proportionality have their beginnings in the language of Lord Diplock who redefined unreasonableness into irrationality and envisaged proportionality as a separate category of review. This development of Laws' argument can be read as a means of transcending the difficulties over proportionality by relying upon the common law tradition of continuity and innovation.

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<sup>197</sup> *Ibid.*, page 201.

Proportionality is redefined away from being a transplant and towards an element of the supreme test of unreasonableness. In this process, the principle has essentially been rewritten in a manner acceptable to the common law but is very different from the principle as applied in European law. Laws' conception of proportionality does not view the courts as enabling government to carry out its policy objectives or determining the most suitable means of policy implementation. Rather it is a conception of proportionality to be developed within the common law tradition of the "interaction between informed public opinion and the independent judicial mind."<sup>199</sup> In other words, the common law allows the courts to retain the value of political experience allowing them to determine which particular decisions are appropriate and which are not.

That English law should be considering the adoption of a principle which is not given a settled meaning is unhelpful. Whereas the traditionalists have been prepared to assume that proportionality is simply a disguised form of remaking the original decision, some liberalists

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<sup>199</sup> Lord Hoffman, *op. cit. supra* no. 23, page 5.

too have distorted its meaning. This is not to overlook other writers who have provided useful analyses of the principle<sup>200</sup> but that this has not always informed the debate.

As well as disagreement over the meaning to be accorded to proportionality, different conceptions of freedom are adopted by participants in the debate which, unless such differences are clearly articulated, remain ambiguous and therefore unexplored areas of debate. While both the traditionalists and the liberalists tend to view freedom as the absence of external restraint this manifests differently. For instance, the traditionalists would not base freedom upon a theoretical concept of human nature but as encapsulated within the traditions of the common law<sup>201</sup> whereas for the liberalists freedom is an ideal to be protected by the rule of law which enables the individual to enforce his fundamental rights against the State.<sup>202</sup>

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<sup>199</sup> *Ibid.*, page 200.

<sup>200</sup> See Craig, *op. cit. supra* no. 30, page 414-415.

<sup>201</sup> See M. Oakeshott "Political Education" in *Rationalism in Politics and other essays* (Liberty Fund, new and expanded edn., 1991) page 43, 54.

<sup>202</sup> See Allan, *op. cit. supra* no. 8, chapters 2, 3 and 6; F.A. Hayek *The Constitution of Liberty* (London, 1960) chapter 1.

What is at issue here is an appropriate framework in which to conceptualise the principle of proportionality. The traditionalist conception of freedom rejects proportionality as freedom is viewed as being imparted within the practical knowledge of the anti-rationalist tradition of the common law. Is then the liberalist conception of freedom suitable? The tendency of the liberalist conception is to adopt an individualistic or atomistic view of individuals using society in order to serve their own ends which de-emphasizes the collective ends served by society. It is questionable whether this provides the most appropriate framework in which to transplant proportionality as that principle is concerned with the purpose served by administrative action and is used to ensure that while individual freedom is restricted as little as possible, the administration is able to achieve its end objective. The liberalist conception of freedom ignores the role proportionality has in guiding administrative action and concentrates solely upon the protection of individual fundamental rights. The tradition of Continental administrative law is characterised by "a continuous dialectic between

authority and liberty"<sup>203</sup> and the principle of proportionality is used to structure as well as control the administration. If so, then the liberal ideal of freedom would not appear to be most suited to adopting proportionality as it fails to account for the freedom which may be created by administrative action. In other words, freedom needs to be thought of in both negative and positive senses.<sup>204</sup> What would seem to be required is a more organic conception of freedom which can change with the relationship between the individual and the State rather than a fixed and static conception of freedom. That such issues have not been expressly articulated as part of the debate concerning the possible adoption of proportionality means such differences have been largely ignored thereby making their resolution more distant.

#### *B. Proportionality and Procedure*

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<sup>203</sup> M.P. Chiti "Administrative Comparative Law" (1992) 4 E.R.P.L. 11, 19. See also G. Arena "Rights vis-à-vis the Administration" in A. Cassese, A. Clapham and J. Weiler (eds.), *Human Rights and the European Community: Methods of Protection* (Baden-Baden: Nomos Verlagsgesellschaft, 1991) page 495, 50.

<sup>204</sup> Cf. I. Berlin "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford, 1969) page 118; C. Taylor "What's Wrong With Negative Liberty" in *Philosophy and*

There are important questions concerning the institutional ability of the courts to apply the principle of proportionality which have not been sufficiently considered in the debate. The English tradition is of an adversarial court hearing where two parties battle for the truth. The judge takes the role of umpire between the two sides. However, this traditional bi-polar structure is unsuited to deciding the more polycentric questions of public law.<sup>205</sup> A proportionality inquiry will by its very nature involve more than just the two or more parties appearing before the court. For example, if an applicant complains that the impugned measure adversely affects his or her interests, then how can the court determine whether this was disproportionate and whether other measures could have been adopted, when alternative measures may equally affect another's interests and possibly have wide-ranging ramifications. If the court is unable to determine what the possible consequences of applying proportionality are, then it will be procedurally ill-equipped for the task.

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*the Human Sciences: Philosophical Papers Volume 2*  
(Cambridge: University Press, 1985) page 211.

<sup>205</sup> See A. Chayes "The Role of the Judge in Public Law Litigation" (1976) 89 Harv.L.R. 1281; J.W.F. Allison "The Procedural Reason for Judicial Restraint" [1994] P.L. 452.

The ability of the court to undertake a proportionality inquiry can be examined in relation to fact-finding. The general principle in English law is that "[u]nder public law, it is not the role of the courts to find facts: it is not for the courts to specify what is reasonable and its views on policy questions are normally of no relevance."<sup>206</sup> The judicial review court is confined in its approach to fact-finding for fear of substituting its views of the merits for that of the public authority. However, advocates of proportionality have not adequately addressed how that principle is to be applied within the present limitations on judicial fact-finding. The application of that principle requires the court to engage in a goal-oriented fact-finding process to determine whether the chosen policy objective could have been achieved by alternative measures, which had an equal effectiveness in achieving the same result but imposed a less onerous restriction on the affected interest. If the courts are unable to

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<sup>206</sup> H. Woolf "Public Law-Private Law: Why the Divide? A Personal View" [1986] P.L. 220, 225. See also *O'Reilly v. Mackman* [1983] 2 A.C. 237, 282E-F per Lord Diplock. However, Lord Woolf "Judicial Review: A Possible Programme For Reform" [1992] P.L. 221, 230 has recognised that "[t]he European dimension could well act...as a catalyst" for the English courts to adopt "a

probe behind the formal account of how a measure was made then their power to review will be severely limited.<sup>207</sup> The suggested improvements such as the possibility of interventions in public interest cases<sup>208</sup> and the establishment of a Director of Civil Proceedings<sup>209</sup> appear to be limited solutions to the problem. In order to facilitate the development of judicial review and accommodate the changes resulting from the European influence, a fundamental reorientation in judicial procedure may be required.<sup>210</sup> The European Court<sup>211</sup> and French<sup>212</sup> and German<sup>213</sup> administrative courts,

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greater readiness to allow discovery and cross-examination."

<sup>207</sup> M. Purdue "The Scope For Fact Finding in Judicial Review" in G. Hand and J. McBride (eds.), *Droit Sans Frontieres. Essays in Honour of L. Neville Brown*. (Birmingham: Holdsworth Club, 1991) page 193, 201.

<sup>208</sup> JUSTICE REPORT *A Matter of Interest: Reforming the Law and Practice on Interventions in Public Interest Cases* (JUSTICE, 1996). See K. Schiemann "Interventions in Public Interest Cases" [1996] P.L. 240.

<sup>209</sup> H. Woolf "Public Law-Private Law: Why the Divide? A Personal View", *op. cit. supra* no. 195, 235-237; H. Woolf *Protection of the Public - A New Challenge* (London, The Hamlyn Lectures, 1990) pages 109-113. See also J.A.G. Griffith "Judicial Decision-Making in Public Law" [1985] P.L. 564.

<sup>210</sup> Allison, *op. cit. supra* no. 194, 473.

<sup>211</sup> J. Mertens de Wilmars "The Case-Law of the Court of Justice in Relation to the Review of the Legality of Economic Policy in Mixed-Economy Systems" [1982/1] L.I.E.I. 1, 7-8.

<sup>212</sup> L. Neville Brown and J.S. Bell *French Administrative Law* (Oxford: Clarendon Press, 4th edn., 1993) pages 245-250; J. Bell "The Expansion of Judicial Review Over Discretionary Powers in France" [1986] P.L. 99, 113-116.

<sup>213</sup> M.P. Singh *German Administrative Law in Common Law Perspective* (Berlin: Springer-Verlag, 1985) pages 71,

which all apply the principle of proportionality, have the ability to review the factual basis of decisions. The English courts lack that same ability and for that reason may be precluded from operating a comparable review for proportionality.

Such concerns have been expressed by Lord Lowry who has stated that the judges "are not, generally speaking, equipped by training or experience, or furnished with the requisite knowledge and advice, to decide the answer to an administrative problem where the scales are evenly balanced".<sup>214</sup> A significant problem concerning the debate over proportionality is that its advocates have failed to respond to these concerns. Jowell and Lester state that proportionality "by no means releases judges from their proper reserve in interfering with decisions on the...assessment of fact".<sup>215</sup> How then are judges to apply the principle at all? In a subsequent publication Jowell argues that proportionality would be beneficial as it would require administrators to consider

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77, 88-92. German commentators view the inability of the British courts to inquire into questions of fact as a serious shortcoming: D. Conrad "Introduction" in Singh, *ibid.*, page xii; M. Brenner "Administrative Judicial Protection in Europe: General Principles" (1997) 9 E.R.P.L. 595, 614.

<sup>214</sup> *Brind*, *supra* no. 2, 767A.

alternative courses of action.<sup>216</sup> However, if the courts are incapable of assessing whether equally effective alternative courses of action are open to the administration, then how can the adoption of proportionality have the effect of encouraging administrators to consider such alternatives? If the courts lack the institutional ability to determine such issues then adopting a principle which enables it to state whether a given measure was disproportionate makes little sense as it depends upon the assessment of whether alternative measures exist which in turn requires the court to have the institutional ability to examine their effectiveness. Alternatively, if a court decides to make a finding of disproportionality without being able to assess the alternatives, such a decision would be ill-informed and have unforeseeable consequences for the administration. Both options seem inadequate for the effective deployment of proportionality. Furthermore, some advocates have

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<sup>215</sup> Jowell and Lester "Proportionality: Neither Novel Nor Dangerous", *op. cit. supra* no. 13, page 68.

<sup>216</sup> Jowell "Is Proportionality an Alien Concept?", *op. cit. supra* no. 13, 410-411. Cf. I. Harden and N. Lewis *The Noble Lie: The British Constitution and the Rule of Law* (London: Hutchinson, 1986) chapter 9 and the comparison of European proportionality and review for the "least drastic means" in American law by G.A. Bermann "The Principle of Proportionality" (1978) 26 A.J.C.L. (supplement) 415, 430-432.

denied that proportionality has any place in relation to fact-finding. For example, in distinguishing between two variants of the irrationality rule, those involving questions of fact and those involving the ordering of priorities, Laws states that proportionality has no role in the fact-finding case at all.<sup>217</sup> By adopting a significantly different conception of proportionality Laws has effectively dismissed the role that the court might have in assessing whether it was factually possible for the administration to have adopted different measures.

A related issue is the lack of judicial knowledge and experience of governmental processes. Judges are drawn from the bar and not from the Civil Service. They receive their political education in the traditions of the common law and public life and know how to maintain the "delicate constitutional balance" between themselves and Ministers of the Crown.<sup>218</sup> Judges are not given any training in public administration and have little

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<sup>217</sup> Laws "Is the High Court the Guardian of Fundamental Constitutional Rights?", *op. cit. supra*, no. 12, 73.

<sup>218</sup> See text at no. 117 above per Neill L.J. Cf. Wade & Forsyth, *op. cit. supra* no. 7, page 25: the judges "must rely on their own judgment, sensing what is required by the interplay of forces in the constitution."

experience of governmental processes.<sup>219</sup> This lack of knowledge of public administration would seriously prejudice the effective application of proportionality. For a judge to determine the effectiveness of alternative measures for achieving a specific objective without the necessary knowledge and experience of governmental processes seems little more than guesswork. According to Lord Woolf "complaints are raised by government departments that judges are insufficiently aware of the problems with which administrators are faced and that on occasions they are required to adopt unrealistically high standards in order to comply with decisions of the court."<sup>220</sup> The likelihood is that such complaints would increase if the judges began to undertake proportionality review without the requisite knowledge and procedural equipment.

The present evidence shows that the courts simply lack the institutional ability to undertake this type of inquiry in certain areas such as national economic policy. Furthermore, the

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<sup>219</sup> L. Blom-Cooper "Lawyers and Public Administrators: Separate and Unequal" [1984] P.L. 215, 230. For comparison with Continental judges see Neville Brown and Bell, *op. cit. supra* no. 212, pages 76-80; Singh, *op. cit. supra* no. 213, pages 107-110, 114-115; N. Johnson *State and Government in the Federal Republic of Germany. The Executive at Work*. (Pergamon, 2nd edn., 1983) pages 208-209.

judiciary has traditionally separated itself from the public administration for fear of destroying judicial independence.<sup>221</sup> For the judiciary to decide whether it was factually possible for the administration to adopt an alternative course of action could be viewed as threatening their highly-prized judicial independence. According to Lord Lowry, the judges "have a much better chance of reaching the right answer where the question is put in a *Wednesbury* form."<sup>222</sup>

### *C. Proportionality, Function and Policy*

If the tendency for traditionalists is to view law as a hierarchical system of rules, then the liberals view law as "purpose-independent rules" of just conduct<sup>223</sup> or principles of good administration which "are independent of any particular purpose or policy".<sup>224</sup> Just as the traditional model of judicial review makes a distinction between appeal

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<sup>220</sup> Woolf, *op. cit. supra* no. 198, 18.

<sup>221</sup> Blom-Cooper, *op. cit. supra* no. 219, 234. See also G. Drewry "Public Lawyers and Public Administrators: Prospects for an Alliance?" (1986) 64 *Public Administration* 173; G. Drewry "Public Law" (1995) 73 *Public Administration* 41.

<sup>222</sup> Brind, *supra* no. 2, 767A.

<sup>223</sup> F.A. Hayek *Law, Legislation and Liberty. Volume I Rules and Order.* (London, 1973) page 85.

<sup>224</sup> Allan, *op. cit. supra* no. 8, page 5.

and review through *Wednesbury* unreasonableness, a rights based model of review is predicated on the difference between questions of principle and policy. For example, Allan states that though this difference may be elastic and sometimes difficult to discern, it is nonetheless fundamental.<sup>225</sup> This can be seen in the purpose of the court's review which is to protect the individual "as opposed to the wider objectives of the public authority."<sup>226</sup> Within this model of judicial review, proportionality is given a distinct place as an objective principle which does not draw the court into policy decisions. Jowell and Lester argue that "[b]y concentrating on the specific...[proportionality]...is more effective in excluding general considerations based on policy rather than principle."<sup>227</sup> Under the rights model of judicial review, the courts have no creative role in relation to policy. Instead the courts are to exercise their "independent moral judgment"<sup>228</sup> to determine those "principles of justice, fairness

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<sup>225</sup> *Ibid.*, pages 8, 57-58, 185, 204-206.

<sup>226</sup> *Ibid.*, page 184.

<sup>227</sup> Jowell and Lester "Proportionality; Neither Dangerous Nor Novel", *op. cit. supra* no. 13, page 68.

<sup>228</sup> Allan, *op. cit. supra* no. 8, page 185. See also Laws "Law and Democracy", *op. cit. supra* no. 6, 80: the substantive principles of judicial review are "not

and procedural due process that provide the best constructive interpretation of the community's legal practice."<sup>229</sup> The tendency is then for the debate to have ignored the issues of whether the application of proportionality can legitimately involve questions of function and of policy.

It is submitted that this has been unfortunate and unhelpful. In Community law the purpose for which the power is exercised is central to the European Court's review. Proportionality is a tool which serves the function for which the power is exercised. For example, the philosophy of the European Community is founded on market liberalisation with the Community institutions intervening for the purpose of creating the conditions for workable competition and the European Court's review is shaped by this. Proportionality is used as a tool to ensure that economic intervention is subsidiary in nature.<sup>230</sup> By failing to address the different functions that could be served by the principle, advocates of proportionality have ignored the central meaning of the principle: that it can enable the

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morally colourless...[t]hey constitute ethical ideals as to the virtuous conduct of the state's affairs."

<sup>229</sup> Dworkin *Law's Empire*, *op. cit. supra* no. 9, page 225.

administration to achieve its functions more efficiently and effectively while protecting the interests and rights of individuals as far as possible. It is this purposive element of proportionality which is incompatible with the traditional common law approach which views the law as a means of controlling, as opposed to promoting and guiding, the administration.<sup>231</sup> Similarly, the liberals focus solely on the function of proportionality in giving protection to fundamental rights and view it as a means of preventing State action which affects individual rights. In doing so they overlook the role proportionality could play in relation to other areas of public administration and its purposive element. Throughout the debate the principle has been viewed as a self-standing principle rather than a tool by which the law can contribute to the achievement of governmental functions.

The traditional view of law acting as a control on bureaucracy has become so deeply entrenched that when proportionality is examined it

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<sup>230</sup> Mertens de Wilmars, *op. cit. supra* no. 211, 13.

<sup>231</sup> Cf. Wade and Forsyth, *op. cit. supra* no. 7, page 5: "[t]he primary purpose of administrative law...is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The

is through that framework of ideas rather than as a principle which has developed within a distinctive Continental tradition of administrative law. For example, according to Greene proportionality in Community law acts "as a curb on the powers of legislatures" and shares the general characteristic of the general principles of Community law of being able to be used "as a sword against legislation".<sup>232</sup> Such views betray the dangers of misunderstanding by viewing a Continental principle of law from within a common law perspective. More fundamentally the limited patterns of thought in English administrative law appear to be incapable of being able to adequately adopt the full meaning of proportionality.

The difficulties of adopting proportionality in this regard intensify when it is considered as a principle of constitutional review.<sup>233</sup> The British constitution conforms to no agreed or clearly articulated principles or values. The State is

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powerful engines of authority must be prevented from running amok."

<sup>232</sup> N. Greene "Proportionality and the Supremacy of Parliament in the UK" (Institute of European Law, University of Birmingham, 20th March 1998) page 3.

<sup>233</sup> See Laws "The Constitution: Morals and Rights", *op. cit. supra* no. 12, 631 where the author argues that proportionality is a requirement of "the good constitution" which recognises both positive and negative rights.

represented by the interests of whichever party commands a majority in Parliament through the doctrine of Parliamentary sovereignty. There is no distinct set of purposes or functions of government against which the constitutionality of statutes can be assessed. This is in distinct contrast to Continental constitutions and the European Community. For instance, under the German Basic Law, the Federal Republic of Germany is a *Sozialstaat* which the Federal Constitutional Court has held imposes a duty on the legislature to take up constitutional social welfare activities and balance the competing interests in doing so.<sup>234</sup> Proportionality is used as a constitutional requirement to be observed in the achievement of the social state. The adoption of proportionality as a principle of review in British constitutional law would make little sense in the absence of a distinct set of purposes for the government to pursue. Similarly, it would be undesirable to require the judiciary to articulate such purposes and values.<sup>235</sup>

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<sup>234</sup> Singh, *op. cit. supra* no. 213, pages 7-8.

<sup>235</sup> While it could be argued that Laws' positive rights could set out the functions of government, as they are neither expressly articulated nor agreed upon, then they would be subject to the substantial disagreement and different interpretations. Such a course would suffer

As well as sidelining the purposive element of proportionality, its advocates have also argued that application of the principle does not involve the court in making policy decisions but only articulating principles of law. However, the application of proportionality requires the court to determine whether the policy objective could have been achieved by other means or whether the methods of policy implementation could have been changed in favour of a less onerous course of action. Proportionality involves making judicial decisions about the implementation of policy. Functionalist writers, such as Robson<sup>236</sup> and

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from the very imprecision and ambiguity of what the phrases "fundamental law" or "positive rights" actually mean. Cf. C. Hill *The Century of Revolution 1603-1714* (London: Routledge, 2<sup>nd</sup> edn., 1980) page 55: "In 1641 Strafford was impeached, among other charges, for subverting the fundamental laws of the kingdom. The Commons were just about to vote the charge when the witty and malicious Edmund Waller rose, and with seeming innocence asked what the fundamental laws of the kingdom were. There was an uneasy silence. No-one dared to attempt a definition which would have divided the heterogeneous majority...The situation was saved by a lawyer who leapt to his feet to say that if Mr Waller did not know what the fundamental laws of the kingdom were, he had no business to be sitting in the House."  
<sup>236</sup> W.A. Robson *Justice and Administrative Law. A Study of the British Constitution*. (London: Stevens, 3rd edn., 1951) pages 432, 572-573. See also K.C. Davis "The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence" (1961) 61 *Columbia L.R.* 201, 211. On the functionalist style in public law see Loughlin, *op. cit. supra* no. 8.

Mitchell,<sup>237</sup> have argued that the distinction between questions of legality and policy cannot be drawn with any precision. The issue of whether a means of policy implementation is legal is virtually inseparable from the question of which other means of implementation could better serve the chosen policy objective. By insisting on the fundamental distinction between principle and policy, the liberals confuse the role of proportionality with that of moralising over principle rather than viewing administrative law as a series of individual disputes concerning the application of policy and determining how public administration can be best conducted. The traditionalists may be wedded to a distinction between appeal and review that is out of date, but this does not mean that the distinction between principle and policy is adequate either. In separating proportionality from both function and policy, the rights based model of judicial review may be equally inappropriate as the traditional model for the successful transplantation of proportionality.

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<sup>237</sup> J.D.B. Mitchell "The Flexible Constitution" [1960]

#### *D. Statutory Drafting and Interpretation*

The proportionality debate has ignored the extent to which the application of the principle is dependent on the particular style of drafting and interpretation of Community legislation. If the process of reviewing the proportionality of administrative measures is connected with the way in which those measures are drafted and interpreted, then this should be a relevant factor in debating whether that principle should be adopted by another legal system with different methods of drafting and interpretation. However, the proportionality debate has overlooked the issue of whether the effective application of that principle requires a different approach to statutory interpretation.

The traditional English approach is for Parliament to lay down detailed rules in advance in a statute. The legality of official action is then determined by whether it falls within the ordinary meaning of the legislative wording. The role of the court is not to give effect to any policy but merely to apply the intention of Parliament as

expressed through the literal interpretation of the measure against the established common law presumptions.<sup>238</sup> In contrast the European approach is to determine the objectives or functions of the administration and for the administrative courts to determine the general principles which should govern such action.<sup>239</sup>

The style of legislative drafting in the European Community follows the European tradition. The Treaties set out the general objectives for Community action and secondary legislation, such as directives and regulations, are adopted to give effect to such objectives. Even secondary legislation may be worded at a very general level and will be complemented by a preamble setting out the purposes for which the measure was adopted and its aims and objectives. When a dispute arises it falls to the European Court to interpret the measure. The European Court has a number of methods of interpretation; the most important being the

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<sup>238</sup> See generally J. Bell and G. Engle *Cross Statutory Interpretation* (London: Butterworths, 3rd edn., 1995).

<sup>239</sup> See generally J.A.C. Smith "Legislative Drafting: England and Continental" (1980) 2 *Statute L.R.* 14; D.N. MacCormick and R.S. Summers (eds.), *Interpreting Statutes: A Comparative Study* (Dartmouth, 1991).

teleological method.<sup>240</sup> According to Dumon "[t]he purpose of the legal teleological method is to interpret a rule taking particular account of the purpose, the aim and the objective which it pursues."<sup>241</sup> A specific measure will fall to be interpreted against the actual purpose and objective for which it was adopted. This method of interpretation is facilitated by the preamble to Community legislation which sets out the purposes for which it was adopted and its aims and objectives.<sup>242</sup>

According to Lord Mackenzie Stuart, the form of Community legislation enables the European Court to perform its task of reviewing the legality of a measure; the importance of a preamble in terms of ascertaining whether a measure is in conformity with its empowering instrument and whether it is justifiable in fact and in law cannot be over-

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<sup>240</sup> T. Millett "Rules of Interpretation of E.E.C. legislation" (1989) 10 Statute L.R. 163, 173; Bell and Engle, *op. cit. supra* no. 239, page 108.

<sup>241</sup> F. Dumon "The Case-Law of the Court of Justice - A Critical Examination of the Methods of Interpretation" in *Judicial and Academic Conference 27th-28th September 1976* (Luxembourg, 1976) page III-87. See also H. Kutscher "Methods of Interpretation as seen by a Judge at the Court of Justice" in *Judicial and Academic Conference 27th-28th September 1976, ibid.*, pages I-39-42; Millett, *op. cit. supra* no. 240, 170-173.

<sup>242</sup> Lord Slynn "Looking at European Community Texts" (1993) 14 Statute L.R. 12, 16-17.

emphasised.<sup>243</sup> For example, when the European Court is applying the principle of proportionality, the preamble of the measure has a special importance in setting out the purpose and objective of the measure. The European Court then tests the proportionality of the substantive measure against the objective for which it was adopted by examining whether alternative means were open to the administration which were equally effective for the achievement of that same objective. The application of proportionality in Community law is dependent on the existence of preambles and the teleological method of interpretation. For example, in the "skimmed-milk" case,<sup>244</sup> the European Court acknowledged that the impugned measure "was promulgated at a time when the stocks of skimmed-milk powder brought in by the intervention agencies...had reached considerable proportions and were continuing to increase" and that the measure "was designed to reduce stocks through the increased use of feeding-stuffs of the protein

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<sup>243</sup> Lord Mackenzie Stuart *The European Communities and the Rule of Law* (London, The Hamlyn Lectures, 1978) page 66.

<sup>244</sup> Case 114/76 *Bela-Mühle Josef Bergmann KG v. Grows Farm GmbH & Co. KG* [1977] E.C.R. 1211. See chapter 6, section 5A.

contained in skimmed-milk powder."<sup>245</sup> On the basis of the actual objective served by the measure and the context of the situation in the skimmed-milk sector, the European Court proceeded to find that the measure imposed a disproportionate financial burden on milk and agricultural producers by requiring them to purchase certain quantities of animal feed made from skimmed-milk powder at a cost three times its value. The objective of the measure was derived from its preamble and the teleological method of interpretation was essential for the application of proportionality. Against this, it must be asked whether the English style of drafting and interpretation is suitable to the application of proportionality.

The common law tradition contains a deep-seated attitude that "Parliament generally changes the law for the worse"<sup>246</sup> and legislation is sometimes viewed as a foreign intrusion on the purity of the common law. Such ideas derive from the time when legislation was primarily made for and by lawyers. However, with the vast development

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<sup>245</sup> *Ibid.*, paragraph 2.

<sup>246</sup> Pollock *Essays in Jurisprudence and Ethics* page 85 quoted by H.J. Laski in *The Report of the Committee on Ministers' Powers Report* Cmd. 4060 (London: HMSO, Donoughmore Report, 1932) Annex V "Note by Professor

in the role of the State, which has been possible through the use of legislation, the common law tradition has remained dominant and still informs the style of drafting and interpretation. English statutes are drafted by Parliamentary draftsmen<sup>247</sup> and set out the detailed rules to be interpreted by the judges by giving the words their literal meaning. Statutes are viewed as passed in order to correct some mischief rather than as a means of achieving a distinct social function. It is the judge's role to give effect to the ordinary meaning of the words used by Parliament subject to certain common law presumptions about the intention of Parliament. The judge does not seek to give effect to the aims and objectives of a measure but merely to interpret it literally. When a judge does interpret a measure in light of its "mischief", that purpose has to be gleaned from the language of the statute. The result is that the court does not apply the purpose which was behind the measure but

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Laski on the Judicial Interpretation of Statutes" page 135, 137.

<sup>247</sup> See A.G. Donaldson "The High Priests of the Mystery: A Note on Two Centuries of Parliamentary Draftsmen" in W. Finnie, C.M.G. Himsworth and N. Walker (eds.), *Edinburgh Essays in Public Law* (Edinburgh: University Press, 1991) page 99.

the purpose which the court itself induces from the language of the measure.<sup>248</sup>

Despite advocates, such as Laski, who argued that the courts' "method of interpretation should be less analytical and more functional in character; it should seek to discover the effect of the legislative precept in action so as to give full weight to the social value it is intended to secure",<sup>249</sup> the courts still generally interpret legislation by the ordinary meaning given to its wording. As Corry observes, this approach is somewhat unreal: "[n]o enactment is ever passed for the sake of its details; it is passed in an attempt to realize a social purpose...The statute must be treated as a means to an end; the end should be determined by social forces which brought it about and not by private choice of the judge."<sup>250</sup> While English judges have in recent years begun to adopt a more purposive method of interpretation, these seem like small steps when compared with the European approach.<sup>251</sup> According to Bennion, the

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<sup>248</sup> W.I. Jennings "The Report on Ministers' Powers" (1932) 10 *Public Administration* 333, 339; J.A. Corry "Administrative Law and the Interpretation of Statutes" (1936) 1 *University of Toronto L.J.* 286, 308-309.

<sup>249</sup> Laski, *op. cit. supra* no. 246, page 135, 137.

<sup>250</sup> Corry, *op. cit. supra* no. 248, 292.

<sup>251</sup> Lord Oliver "A Judicial View of Modern Legislation" (1993) 14 *Statute L.R.* 1, 2-3, 5 is suspicious of a

British doctrine of purposive construction is more literal than the European variety, and permits a strained construction only in comparatively rare cases.<sup>252</sup> For example, the House of Lords has reversed the rule that the courts should not have reference to Hansard but only when the ordinary meaning of the legislation is ambiguous or obscure or it would to an absurdity.<sup>253</sup> Also, in order for a court to give effect to a purposive interpretation, the judge must be aware of the specific context and function of the administration in that specific area. The court must know what the measure is trying to do within that area of public administration. Doubts have already been raised over judicial knowledge of public administration. Furthermore, the sheer volume of legislation and the pressure on Parliament has reduced the clarity of statutory drafting and Parliament does not clearly set out its purposes in preambles like European legislation.<sup>254</sup>

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purposive approach because in the absence of Parliament clearly stating its purpose and objective, the judge has to impose a policy on the ordinary meaning of the statutory wording.

<sup>252</sup> F.A.R. Bennion *Statutory Interpretation: A Code* (London: Butterworths, 1997) section 311.

<sup>253</sup> *Pepper (Inspector of Taxes) v. Hart* [1993] A.C. 593.

<sup>254</sup> See *Making the Law: The Report of the Hansard Society Commission on the Legislative Process* (London, 1993) chapter 4.

Statutes and administrative measures are adopted for distinct purposes and the principle of proportionality can be applied in order to determine that the administration does not go beyond what is necessary for the achievement of such purposes. However, the style and interpretation of English law hinders the effective application of the principle. Legislative drafting does not clearly state the purpose and objectives for which measures can be adopted. The literal interpretation of the ordinary meaning of the statutory wording precludes courts from giving effect to those purposes and ensuring that in the achievement of those objectives, the administration does not adopt disproportionate means. If proportionality is to be adopted then changes will need to be made to the English style of statutory drafting and interpretation.

## **6. Conclusion**

When Lord Diplock intimated that he had contemplated the potential development of a ground of proportionality in view of the increasing influence of Community law he identified one of the

most important contemporary issues facing English administrative law. Were English law to adopt this principle then it would show that it is concerned about the equal protection of individuals between English and Community law, open to outside influence and prepared to develop towards a sound body of administrative law. However, while the debate has raised issues central to the possible adoption of proportionality in English law, it has sometimes been ill-informed and has sidelined important issues. The discussion has largely been conducted between the adherents of two conceptions of administrative law - the traditionalists and the liberalists - with little genuine debate as to whether the transplant would be a beneficial step towards a better system of administrative law and a means of accommodating the growing influence of Community law.

Those adopting the traditional conception of administrative law have rejected proportionality because it threatens to assimilate appeal and review and therefore the legitimacy of the judicial function. The rejection of proportionality is viewed as a means of defending the purity of judicial independence and the traditional common

law method of review articulated through the principle of *Wednesbury* unreasonableness. However, in order to understand why there is a felt need to reject proportionality, attention should be focused upon the cultural differences between English and European administrative law. Proportionality is viewed as incompatible with the culture of the common law which informs the traditional approach to judicial review. The proposed transplantation of the principle forms part of the cultural challenge of Community law which is viewed as a threat by the traditionalists. It is because of this perceived threat to the dominant paradigm that the search has been made for a defining rule in order to ensure that the new principle can be excluded. This defining rule has taken the form that only *Wednesbury* unreasonableness provides the correct division between the judicial and administrative roles. The traditionalists reject the need to re-equip the judiciary with a new tool of review precisely because the *Wednesbury* test best serves the purposes of the traditional approach; it allows the judges to express their views on administrative decisions through the accumulated wisdom of the common law. By contrast the liberalists

enthusiastically welcome proportionality. For them proportionality is a principle of good administration independent of any purpose or policy. Proportionality is a rational principle of review and can therefore provide more intelligible judicial reasons as to why a certain decision is impermissible than reliance upon *Wednesbury* unreasonableness.

These two views have come to dominate the debate; yet neither of them seem appropriate to the successful transplantation of the principle. By turning the possible adoption of proportionality into a question of the legitimacy of judicial review, the traditionalists have developed an argument to trump all others. However, this argument itself rests upon a question-begging premise that *Wednesbury* unreasonableness is the only way of distinguishing between the merits and legality. By arguing for the adoption of proportionality, the liberalists recognise that the English courts would be significantly departing from their more formal traditional approach. However, it should not be assumed that the adoption of proportionality under a rights model of judicial review will be able to successfully accommodate the

growing European influence. The tendency of this approach is to moralise over the infringement of fundamental rights by the State and ignore the other purposes served by proportionality. Rather than being suited to the growing European influence, the rights model may adopt an equally rigid conception of the relationship between the State and the individual as the traditional model. Furthermore, while some judges have desired to speak in terms of rational principles, others still prefer to articulate through the customary language of the common law. The *Wheeler* and *Brind* cases are classic examples of these different influences. In *Wheeler Browne-Wilkinson L.J.*'s rights discourse was not endorsed by the House of Lords who preferred the traditional common law approach. In *Brind* the House of Lords was itself split between a sovereignty and a rights model. Cotterrell has recognised the "sheer difficulty of finding a rigorous grounding for principle in a climate of legal thought dominated by the image of *imperium*."<sup>255</sup> Whether a rights model of judicial review can be successfully superimposed on the

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<sup>255</sup> R. Cotterrell "Judicial Review and Legal Theory" in G. Richardson and H. Genn (eds.), *Administrative Law &*

distinct traditions of the common law remains to be seen.

The proportionality debate has also been conducted through the established dualisms of procedure and substance, judicial restraint and activism, appeal and review, principle and policy, administration and adjudication, which have concealed more than they illuminate in that they have served to distort analysis of administrative reality. As the proportionality debate has formed part of the wider debate in public law, such dualisms can be seen as reflecting the question of the conception of English law; is law a product of legislative will (the Crown in Parliament) or a product of judicial (artificial) reasoning (the Crown as represented in Her Majesty's Courts)?<sup>256</sup> The issue of proportionality has entered into this existing debate rather than as a means of

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*Government Action. The Courts and Alternative Mechanisms of Review.* (Oxford: Clarendon Press, 1994) page 13, 27.

<sup>256</sup> Cf. Robson, *op. cit. supra* no. 236, page 421. These dualisms can be seen in the famous conversation between James I and Sir Edward Coke C.J. in *Proclamations del Roy* (1607) 12 Co. Rep. 63. For a recent attempt to reconcile this dualism see *X Ltd. v. Morgan Grampian Ltd.* [1991] A.C. 1, 48E per Lord Bridge and Sedley, *op. cit. supra* no. 12, 289, 291 where the rule of law is said to rest on the twin foundations of Parliamentary sovereignty and the sovereignty of the common law. Such a view is undercut by the very concept of sovereignty itself which requires that unified power is one and indivisible otherwise sovereignty is lost.

developing towards a sound body of administrative law which can accommodate both the protection of the individual and the purpose for which governmental power is exercised.<sup>257</sup>

Within this debate significant issues concerning the successful transplantation of proportionality have been either ignored or sidelined. First, the debate has been conducted by some under a limited or mistaken understanding of what the concept of proportionality actually means and how it works in Community law. Second, little regard has been to the purposes that may be served by the principle across the broad range of governmental activity. Third, within the debate it has been unquestionably accepted that questions of law are completely separate from questions of policy. The application of proportionality requires the court to address questions of policy in assessing whether the policy objective could be adequately achieved by other means. Fourth, the courts are currently limited in their knowledge of public administration and procedurally ill-equipped to effectively apply the principle of proportionality; they appear to lack the necessary

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<sup>257</sup> Cf. Robson, *op. cit. supra* no. 236, page 640.

institutional confidence. Finally, the style of statutory drafting and interpretation needs to be more purposive in order to facilitate the application of proportionality. If proportionality is to be successfully adopted then attention should be paid to what role it could most effectively serve in evaluating governmental performance by focusing on the functions of governance. Also institutional reform will be necessary to ensure that a review body can effectively apply the principle.

## Chapter 8: Conclusion

This study has examined the principles of legitimate expectations and proportionality in English and Community law against the different traditions of public law. The main objective has been to examine the relationship between English and European Community administrative law and this has been conducted through an assessment of the success of the principles as legal transplants. A related purpose has been to examine the challenge presented by Community law for English law. On the basis of the detailed studies the following conclusions can be made.

According to the political philosopher Oakeshott "[a] tradition of behaviour is not a fixed and inflexible manner of doing things; it is a flow of sympathy...even the help we may get from the traditions of another society...is conditional upon our being able to assimilate them to our own arrangements and our own manner of attending to our arrangements."<sup>1</sup> By viewing the common law as a "tradition of behaviour", it may be possible to

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<sup>1</sup> M. Oakeshott "Political Education" in *Rationalism in Politics and other essays* (Liberty Fund, new and extended edn., 1991) page 43, 59.

examine the extent to which the "flow of sympathy" towards the European principles has enabled their assimilation within the traditional English arrangements concerning administrative activity.

Those traditional arrangements consist of the superiority of established common law principles for controlling the administration. It is because of the dominance of the common law tradition that, in the words of Redlich and Hirst, "there has never grown on English ground the idea...that questions of administration or of disputes between the State and the citizen should be governed by different principles from those which are applied to 'private' disputes between one citizen and another."<sup>2</sup> When Dicey rejected administrative law as "fundamentally inconsistent" with the English Rule of Law,<sup>3</sup> he was reaffirming the superiority of the anti-rationalist values and traditions of the common law. While the common law has had to adapt to the growth in State activity and recognise an "administrative law", this has not been accompanied by the development of distinct principles which

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<sup>2</sup> J. Redlich and F.W. Hirst *Local Government in England* Volume II (London: Macmillan, 1903) page 329.

<sup>3</sup> A.V. Dicey *An Introduction to the Study of the Law of the Constitution* (London: Macmillan, 10th edn., 1959) page 203.

characterise Continental administrative law. To the extent that an English public law exists, it is in the systematization of procedural developments which has served to reveal the absence of a distinct public law jurisprudence.<sup>4</sup> When compared with the Continental approach to administrative law, it can be seen just how particular the common law approach is. In transplanting the principles of legitimate expectations and proportionality English judges have struggled to articulate principles specifically designed for public law adjudication in a system which lacks a public law jurisprudence. In other words, the introduction of rational principles within the anti-rationalist culture of the common law was always likely to create friction and difficulties.

With the recognition by Lord Diplock that English law should assimilate proportionality and legitimate expectation into English law, there was an evident "flow of sympathy" toward the principles.<sup>5</sup> While this "flow of sympathy" has been stronger in regard to legitimate expectations, it has not enabled complete assimilation. Insofar as the principle of legitimate expectations reflects

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<sup>4</sup> See chapter 2, section 1.

the idea underlying estoppel, it has appealed to the common law. However, when the courts have been called upon to articulate a separate principle between the State and the citizen to determine the legitimacy of an expectation, they have insisted on the primacy of the reasonableness test over any explicit or rational weighing up of the public and private interests. So while the courts have recognised the principle of legitimate expectations to an extent, they have rejected that element of a balancing test which forms a special principle to resolve a dispute between the individual and the State.<sup>6</sup> In relation to proportionality such concerns have prevented even the mention of the principle without controversy. As the principle essentially concerns the balancing test itself, those defending a traditionalist conception of administrative law have firmly rejected its importation into the common law. The "flow of sympathy" towards proportionality has instead come from those who wish to modernise the common law within a liberal rights-based framework. Difficulties arise here as this modernising project is incompatible with the common law tradition and is an inappropriate

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<sup>5</sup> See chapter 3, section 1.

framework in which to transplant the principle of proportionality.<sup>7</sup> Principles of Continental administrative law "make little sense when lifted out the context of a general philosophy of law and the state."<sup>8</sup> This is particularly so in regard to the principle of proportionality. However, rather than attempting to understand proportionality as a principle serving distinct purposes within an established philosophy of law and government, the debate has been conducted between two distinct philosophies - the traditionalists and the liberalists - for their own ends with consequently little real debate over whether the adoption of that principle would be beneficial for English law.

The evidence supports the view that the English courts have been unable to adequately transplant the principles into English law. The courts have recognised the principle of legitimate expectations but have been unable to guide the administration in the balancing of the public interest with private expectation. While it is highly likely that proportionality will come to be formally recognised as a principle of English law

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<sup>6</sup> See chapter 5, section 9.

<sup>7</sup> See chapter 7.

following the passing of the Human Rights Bill,<sup>9</sup> it is doubtful whether the courts will be able to review the proportionality of administrative measures when a violation of human rights is not argued. Furthermore, it seems that the specific conception of proportionality will markedly differ from that applied in European Community law. Without institutional reform the courts lack the necessary sophisticated knowledge of the administration which the effective application of the principles require.<sup>10</sup>

However, that the English courts have been able to assimilate the principles within their language of review has led some to conclude that the principles have been successfully transplanted, or that there has at least been "an intriguing degree of parallel development" between English and Community law.<sup>11</sup> For example, Wade has stated that "[e]xpressions such as proportionality and legitimate expectations are becoming familiar as we

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<sup>8</sup> W.J.M. Mackenzie *Politics and Social Science* (Harmondsworth: Penguin, 1967) page 278.

<sup>9</sup> See J. Laws "The Limitations of Human Rights" [1998] P.L. 254.

<sup>10</sup> M. Purdue "The Scope for Fact Finding in Judicial Review" in G. Hand and J. Macbride (eds.), *Droit Sans Frontieres. Essays in Honour of L. Neville Brown*. (Birmingham: Holdsworth Club, 1991) page 193. See chapter 7, section 5B.

translate our rules into European terms."<sup>12</sup> In order to understand this statement, it needs to be interpreted against the principle of continuity in the common law tradition.<sup>13</sup> In doing so it can be seen that the myth of continuity is being used in order to comfortably assimilate what Wade sees as pre-existing common law rules with European expressions through a simple process of linguistic translation. Wade's statement is essentially an exercise of invention in order to support the view that English law is fully equal to European law in its effectiveness in controlling the administration. Furthermore, this view ignores the context of the different philosophy of law and the State in which the principles have developed.<sup>14</sup> Alternatively, Sedley has explained that English law has developed "the still incomplete doctrine of legitimate expectation; but...[has]...not embraced

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<sup>11</sup> J.A. Usher *General Principles of EC Law* (London: Longman, 1998) page 156.

<sup>12</sup> H.W.R. Wade "Speech at the Laudatio" (1997) 9 E.R.P.L. 517, 521. See also H.W.R. Wade *Constitutional Fundamentals* (London, The Hamlyn Lectures, Revised edn., 1989) page 95. Cf. Wade's view that problems in administrative law stem from terminological confusion.

<sup>13</sup> Cf. Oakeshott, *op. cit. supra* no. 1, page 61.

<sup>14</sup> Cf. the warning of J.D.B. Mitchell "Why European Institutions?" in J.D.B. Mitchell and L.J. Brinkhorst *European Law and Institutions* (Edinburgh: University Press, 1969) page 30, 50 that "[s]uperficiality remains a real danger which is enhanced by facile but misleading translation of terms."

the doctrine of proportionality which our Continental partners seem at home with" because of the common law's quandary to be both simultaneously certain and adaptable and "public law's hesitantly incremental process of growth".<sup>15</sup> However, explanations premised on the continuity myth or the incremental nature of the common law cannot overshadow the deep-set problems of English law as regards public administration. As this study shows, the problems of effectively integrating the principles into English law are complex and cannot be remedied by the mere change of language; they concern the common law model of judicial review.

The difficulties of transplantation resulting from the underlying differences between English and Continental administrative law can be demonstrated by examining the balancing of interests test which forms an integral part of both principles.<sup>16</sup> The Continental conception of legality requires the administrative court to optimize the affected private interest to the extent that achievement of the public interest remains factually possible; any

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<sup>15</sup> S. Sedley "The Common Law and the Constitution" in Lord Nolan and S. Sedley *The Making and Remaking of the British Constitution* (London: Blackstone, 1997) pages 15, 29-30.

<sup>16</sup> See chapters 4 and 6.

interference with private interests must be indispensable for the achievement of the public interest. This balancing of interests requires the administrative court to go beyond the interpretation of the law and to realise values in concrete cases. In contrast, in English law the idea that the courts should undertake a detailed inquiry in order to balance the interests of the individual with those of the State is simply heretical: the role of the court is only to apply the law as it originates in the will of Parliament as supplemented by the ordinary common law rules. Any balancing exercise concerns policy questions and is therefore to be undertaken by the decision-maker and not the court. While the language of balance is sometimes employed,<sup>17</sup> it does not signify a detailed weighing-up exercise, but that the courts maintain a balance between executive power and individual liberty articulated through the accumulated wisdom of the common law. Principles such as legitimate expectations and proportionality which require the court to openly engage in a balancing test are viewed as a means of moving the

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<sup>17</sup> See D.C.M. Yardley *Principles of Administrative Law* (London: Butterworths, 1981) page viii; H.W.R. Wade and

focus away from questions of law to questions of policy. The European balancing exercise differs from the common law test of reasonableness not only because it involves testing the necessity of a measure but it also requires explicit rationalisation. The English courts have found that such exercises require more knowledge of the administration than they possess and run counter to their anti-rationalist common law traditions. Furthermore, undertaking balancing tests requires the administrative court to intervene in administrative processes and make judgments about the implementation of policy objectives, while the English courts have always sought to distance themselves from any association with the administration.

That the same principle of the balancing of interests which "is one of the fundamental concepts of...[Continental]...administrative law, and...without doubt the chief justification for the very existence of administrative courts"<sup>18</sup> can be

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C.F. Forsyth *Administrative Law* (Oxford: Clarendon Press, 7th edn., 1994) page 25.

<sup>18</sup> Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v. High Authority of the European Coal and Steel Community* [1962] E.C.R. 253, 283 (col. 1) of the opinion of Advocate General Lagrange.

labelled as "heresy"<sup>19</sup> by the English courts demonstrates that, in the words of Mitchell, "the distinction between public and private law, and between the British and Continental systems, is a philosophic one, or at least a jurisprudential one."<sup>20</sup> This difference stems from the failure of British administrative law to provide an adequate juridical response to the problems created by the development of modern government. This has resulted in a fundamental difference of approach. The Continental balancing exercise is a means of facilitating and structuring administrative action as well as protecting private interests; it serves the purposive orientation of Continental administrative law. Whereas in England the dominant view is that law acts as a control on the administration and therefore such balancing tests have been rejected.

This analysis suggests that the critical issue in the transplantation of the principles into English law has been the cultural differences underpinning the English and European conceptions

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<sup>19</sup> *R. v. Secretary of State for the Home Department ex parte Hargreaves* [1997] 1 All E.R. 397, 412h per Hirst L.J.

<sup>20</sup> J.D.B. Mitchell "Administrative Law and Policy Effectiveness" in J.A.G. Griffith (ed.), *From Policy to*

of legality.<sup>21</sup> The unreconstructed common law model of legality has failed to adapt to the vast increase in statute law-making. The result is that legality has come to be expressed in a crude formula whereby public authorities can do as they please within the limits of their powers so long as it is not unreasonable. In contrast Continental law has sought to positively adapt conceptions of legality to the changing needs of public administration. The general principles of law have been developed as a means of guiding and evaluating administrative action and ensuring protection of individual interests to be applied by a specialist court with the necessary institutional confidence and ability. In attempting to transplant two principles of Continental administrative law, English law has been unsuccessful because, in light of its cultural heritage, it has failed to re-conceptualise legality in response to the changes in public administration. To the extent that English law has adopted the principles it has only been a linguistic change which has served to skew their meaning and obfuscate clear understanding of

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*Administration. Essays in Honour of William A. Robson.* (London: Allen & Unwin, 1976) page 174, 179.

<sup>21</sup> See chapter 2.

the difficulties of effective assimilation.

Problems have been exacerbated when judges have failed to have regard to comparative materials and superficial translations of the principles have been made in order to assimilate them under an all-encompassing principle of unreasonableness which has assumed an almost mythical status.<sup>22</sup>

English law has been unable to assimilate the principles for precisely the same reasons that Mitchell argued that England lacks a system of public law suited to the needs of modern government: the common law is not sufficiently purposive and susceptible to the realities of governance.<sup>23</sup> To return to Oakeshott's statement, it has proven difficult for English law to derive help from these principles of public law as it has been conditional on being able to assimilate them to the traditional arrangements which deny the distinctiveness of public law. This conclusion supports the view of those comparative lawyers who insist that the environment must be carefully prepared for a transplant<sup>24</sup> and that the legal

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<sup>22</sup> See chapter 5, section 9 and chapter 7.

<sup>23</sup> On Mitchell see chapter 3, section 2.

<sup>24</sup> P.S. Atiyah and R.S. Summers *Form and Substance in Anglo-American Law. A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions*. (Oxford:

system adopting the transplant must also incorporate part of the philosophy of the native system.<sup>25</sup> It also cautions against any view that the adoption of the two principles has led to an approximation between English and European administrative law.<sup>26</sup>

The relationship between English and European Community administrative law is then defined by the different conceptions of the role of law in relation to the administration. These different visions of law inform this relationship as seen by the different approaches taken to the two principles considered here.

The implications of this conclusion in terms of the growing challenge of Community law deserve articulation. Just as Dicey rejected Continental administrative law as incompatible with the English Rule of Law, some contemporary judgments are disdainful and even contemptuous of the "heretical" European principles. This language suggests that the dominant view is that the European principles,

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Clarendon Press, 1987) page 428. See chapter 1, section 2.

<sup>25</sup> F.S.C. Northrop "The Comparative Philosophy of Comparative Law" (1960) 45 Cornell L.Q. 617, 657.

<sup>26</sup> J. Schwarze "The Europeanization of National Administrative Law" in J. Schwarze (ed.), *Administrative Law Under European Influence. On the Convergence of the*

not being grounded on the practical experience of the common law tradition, are viewed as Continental contaminants threatening the purity of English law.<sup>27</sup> However, far from reflecting "the complacent contrast between happy Englishmen free from *droit administratif* and unhappy Frenchmen subject to its terrors"<sup>28</sup> which existed in Dicey's time, the courts' attitude displays an inability to appreciate and apply developed principles of administrative law due to the failure to provide an adequate juridical response to the development of governmental activities. Far from celebrating the lack of a separate administrative law, the traditional approach now has to act defensively against the challenge of Community law. In other words we have turned full circle. The growing normative importance of Community law will continue to influence English law. However, rather than allowing Community law to exercise a positive influence, the traditional model of judicial review

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*Administrative Laws of the EU Member States.* (London: Sweet & Maxwell, 1996) pages 789, 792-794.

<sup>27</sup> Cf. M. Oakeshott "Contemporary British Politics" (1947-48) 1 *Cambridge Journal* 474, 490 arguing that laws which are not the fruit of the common law's "own experience and inventiveness" serve to "confound our politics and corrupt our minds".

<sup>28</sup> W.A. Robson "Administrative Law in England 1918-1948" in G. Campion (ed.), *British Government Since 1918* (London, 1950) page 85, 86.

if it remains dominant will serve to prevent improvements being made to English administrative law. It would be mistaken to assume that all judges are hostile to the European influence. Clearly Lord Diplock and other judges have welcomed the opportunity to learn from European lawyers who had more experience in resolving problems between the individual and the State.<sup>29</sup> However, the danger is that either the European principles are rejected as Continental contaminants or are welcomed and inadequately transplanted.

Within this developing inter-relationship between English and European administrative law it is likely that such problems and difficulties will continue to arise because of the very different approaches to the place of law in government and the different styles of common law and Continental legal systems. Through the influence of Community law and the inevitable differences in legal protection, English law is now experiencing the consequences of its approach. Today the challenge

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<sup>29</sup> See chapter 3, section 1. Consider also the views of J. Laws "The Judiciary and the Executive" in *The Inner Temple Yearbook 1997/98* (London, 1997) page 12: "[t]he distinguished philosopher, Professor Roger Scruton, regards the influx of European legal influence as a threat to the common law. I do not. Our principles will develop as they always have: by the accretion of new ideas age by age."

of Community law is causing us to question whether the traditional common law approach is suitable to explain the judicial review of administrative action. The Community law challenge, with its strong tendency towards the judicialisation of politics, therefore becomes more than a mere marginal issue but goes to the foundations of our system of judicial review. In order to be able to effectively transplant the principles and meet the challenge of Community law, England needs to develop an administrative law which is sufficiently purposive and susceptible to the realities of modern government. Significant modernisation and institutional reform will need to be undertaken in order to develop such an administrative law. It is with such issues in the foreground that the profound changes in public power and European integration will require the accommodation of the English constitution, being "the fruit not of abstract theory but of...instinct",<sup>30</sup> and the different Continental constitutional traditions within the emerging European constitution.<sup>31</sup>

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<sup>30</sup> Dicey, *op. cit. supra* no. 3, page 3.

<sup>31</sup> On the emerging European constitution see T.C. Hartley "Federalism, courts and legal systems; the emerging constitution of the European Community" (1986) 34 A.J.C.L. 229; I. Harden "The Constitution of the European Union" [1994] P.L. 609; N. Walker "European

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Constitutionalism and European Integration" [1996] P.L.  
266; P. Allott "The Crisis of European  
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