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LORD JUSTICE LAWS

DO HUMAN RIGHTS MAKE BAD CITIZENS?

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1. In this lecture I will explore the relationship between three ideas: (1) the proposition that the language of rights has hijacked the language of morals; (2) the doctrine of proportionality in our public law; (3) what I and others have called the principle of minimal interference. The first involves some philosophical reflections. The second involves some case-law, and I will keep it short. The third is an important constitutional principle.

2. The relationship between the three arises in the context of a particular constitutional challenge, in whose resolution each of them has a part to play. The challenge is this: where in principle should the line be drawn between judicial and governmental power? The second and third ideas, proportionality and the principle of minimal interference, are the means of drawing the line. The first, the pressure of rights over morals, is the road map, or part of the road map, to tell us how it might be done.

3. The distribution of power between courts and government is in many areas perfectly uncontroversial. Parliament passes statutes. Courts interpret them. The executive evolves policy and carries it out. Courts try accused persons and sentence the guilty. The challenge arises in the field of public law: the law that deals with the control of government power. When courts review the legality of government action, to what

extent should they judge the action's merits? They are not, after all, the policymakers. The question is most acute in cases concerning human rights. Take a concrete case. The Home Office proposes to remove or deport an alien criminal. Having fathered a child here, he claims a right to remain pursuant to Article 8 of the European Convention on Human Rights which, as is very well known, guarantees the right to respect for private and family life. A balance has to be struck between his Article 8 claim and the public interest in his removal. Are the courts to apply their own judgment of the merits, and be the substantive arbiters of the question, where the balance should fall? Where does that leave the formation and execution of government policy on immigration? This exemplifies the challenge: where in principle should the line be drawn between judicial and governmental power?

4. A principled answer requires a particular understanding of the second idea to which I referred: the doctrine of proportionality, which has taken its place in our law under the influence, in part, of the ECHR and the law of the European Union. And the way to understand what difference proportionality makes to our public law is through the third idea, the principle of minimal interference. I will come to these ideas in due course. But the first idea is just as important, and I will deal with it first. If we are to locate judicial and government power wisely, through the practical medium of the second and third ideas, we must possess a particular understanding of the nature and force of rights. Unless we give them their proper place and no more than their proper place, there is a danger that the judicial power will become dislocated from the public interest. Hence the question: has the language of rights hijacked the language of morals. It is this in particular which gives the lecture its title: Do human rights make bad citizens?

HAS THE LANGUAGE OF RIGHTS HIJACKED THE LANGUAGE OF MORALS?

5. If the courts exercise a thoroughgoing merits judgment in human rights cases, deciding for themselves whether or not the claim of right should override the public interest, that tells us something of society's perception of such rights. It would suggest that rights are to be seen as set in opposition to the public interest for which government is responsible, or in competition with it. But I think that the delivery of rights by the State is itself an aspect of the public interest, which it is the State's duty to secure. In a wholesome polity in which power is held on trust for the people, the public interest has many aspects. They may sometimes – often – have to be compromised one in favour of another, but they are not in fundamental opposition. This is how we should look at rights: a benefit which it is the State's duty to deliver, alongside other social goods: defence, health care, education, and increasingly a clean environment. Some rights cannot be compromised, and I will refer to that. But if we approach our constitutional challenge upon the footing that the delivery of rights, being an aspect of the public interest, is a duty of the State, then we shall more easily find a principle for the distribution of power between courts and government. The fundamental idea is to perceive rights as inherent in the public interest, and not the public interest's enemy.

6. This brings me directly to the language of morals and the language of rights, and the extent to which the second has hijacked the first. The importance of this, I acknowledge, travels beyond the theme of our constitutional challenge, which is to find the principled dividing line between judicial and governmental power. It raises deep questions about the morality of our relations with one another and with the State; and that will come through in the discussion which follows. But the connecting point between this idea and the constitutional challenge, and the thrust of my argument here, is the need to see rights as an aspect of government duty. While as I have said some rights – the right not to be tortured, and the right to justice – cannot be compromised, in many fields they can and must be measured against other demands of the public interest, and thus other duties of government. This is a

necessary balance in a civilised State, and it is the necessary background to our constitutional challenge about the distribution of State power.

7. But if the currency of our moral dealings with each other and with the State is the language of rights, the balance is very much harder to achieve, and in consequence the way through the constitutional challenge becomes distorted and uncertain. To the extent that the language of rights has hijacked the language of morals, we are likely to demand and vote for sectarian government, which will nurture or encourage the vices of division and extremism. Unless we dethrone rights as primary moral values and treat them as the subject of government duty among many such duties, we will be more likely to see the courts and government as serving opposite interests, whereas in fact they should be serving distinct aspects of the same interest – the public interest. The will certainly bring them into conflict from time to time; but that is a wholesome conflict. How far, then, has the language of rights hijacked the language of morals?

8. It is beyond doubt that the idea of rights occupies a towering position in present-day legal and political thought. The vocabulary of modern liberal speech is very largely the vocabulary of rights. Since we are hardly more than two generations distant in time from the horrors of the Third Reich and the tyranny of Stalinism, we cannot be surprised that rights are both the rhetoric and rallying-cry of our repugnance to such bestial regimes, and the intellectual building blocks for the creation in their wake of free and tolerant institutions. Moreover, our seeming faith in the healing power of rights can only be strengthened when we witness, in all too many bleeding corners of the world, the awful persistence of man's inhumanity to man, often on supposedly religious grounds.

9. Our need of rights, like our need of democracy, is surely undoubted. Nothing is more obvious than that a modern civilised State ought to respect and vouchsafe individual rights. They are not, of course, a modern invention. Their force as an engine of political philosophy was in large measure forged in the Enlightenment: one has only

to think of the Constitution of the United States of America, the Declaration of Independence which preceded it, and such works as Thomas Paine's *The Rights of Man*. And we may claim a yet more ancient heritage of rights, born of such potent instruments as the *Magna Carta* and the writ of *habeas corpus*. And I cannot forebear just to give a nod to the 5th century BC law code of Gortys in Crete: inscribed in stone, it can still be seen on public view at the ancient site. It is notable that the code provided certain specific legal rights for slaves and the children of slaves.

10. Rights are a necessary ingredient in any developed system of law, and their language is inextricably woven into the fabric of the resolution of disputes between man and man or between man and State. A legal system that does not concern itself with competing claims is not a recognisable legal system. So rights are a necessary legal construct. Most acutely, legal rights, in common with democratic government, are our best protection against despotism. Without them there is no Rule of Law.

11. All this may be taken as given. But I think the primacy accorded to rights in modern constitutional and political thought represents an immature stage in the development of the good constitution. The recognition, conferment and validation of rights are a staging-post on the tortuous unsigned road from autocracy to a constitutional democracy, in which the claims of the individual and the communal interests of the citizens are in balance. But the finished product is further down the road. More acutely, the entrenchment of rights in the culture of the State carries with it a great danger. It is that rights, a necessary legal construct, come also to be seen as a necessary moral construct. Applied to the morality of individuals, this is a bad mistake.

12. Consider: to assert a right is to put the "I" before the "you". Professor Sir Kenneth Dover, a distinguished scholar of ancient Greek society and literature, best known for

his work on the comic poet Aristophanes, was also the author of *Greek Popular Morality*, published in 1974. In it he wrote[1]:

> "As states grow larger and their structure and way of life increase in complexity at a rate faster than we can adjust to, individuals, associations and areas resist integration even to the point of treating 'I have a right to...' as a synonym of 'I would like...'.

So that a desire becomes an entitlement. This is a feature of our modern society; the extent of it is no doubt beyond exact measurement, but I do not think it can be doubted that it is a mind-set of great influence.

13. Why is it so malign a force? Let me consider the nature of rights a little more closely. What am I *doing* when I state that I have a moral right – a right to do something, or a right not to have something done to me? It is not a statement that implies any virtue on my part. I am not *good* because I assert that I have a right. To claim a right involves no moral action by the claimant. There is nothing virtuous in making the claim. It is not an act of self-sacrifice or self-restraint, kindness or consideration towards anyone else; it is not other-centred; it claims what is due, or what is thought to be due. Systematically, it is a claim about how *someone else* ought to behave – or refrain from behaving. Any morality in it is the other person's morality. If it is morally justified, it is because the other party owes a *duty* – a moral duty – to make it good.

14. Thus the assertion of a right is systematically *self-centred*. When X asserts a right against Y, he is making a claim to the effect that his interests should come first (I leave aside the case where the right is claimed for the benefit of others: the self-centred claim is the paradigm case). He may be well justified; but, again, his assertion is not a moral act on his part, but an accusation that Y has behaved or threatens to behave wrongly or immorally.

[1] Pp. 157 – 158.

15. For these reasons there is I suggest no case in which the language of rights is needed to articulate a moral position for the individual. In every instance of a claim of right, the supposedly moral element is contained in the other person's duty.

16. I do not of course suggest that it would be a *misuse of language* to assert that a claim of right (or some rights) is a moral act on the part of the claimant. Nor would it be a *mistake of logic*. Although the language of rights is not (for reasons I have given) a necessary element in moral discourse, it is not self-contradictory to speak of morality in terms of rights. Thus the statement "I have a moral right to [express my opinion, worship my God]" is neither a linguistic solecism nor a self-contradiction. The position I am taking makes no such accusation. I say only that to claim a *moral* right implies an impoverished view of morals.

17. To justify that position the first point to be made is to contrast *rights* and *duties*. Too often they are said to be two sides of the same coin, as if the choice between the language of duty and the language of right were a matter of indifference. Nothing could be more misleading. *Duty* is a true moral construct. Every instance in which a so-called moral right is asserted is in truth an instance of another's duty, or what is claimed to be his duty. The performance of duty is virtuous; whereas a claim of right is only an insistence that someone else behave virtuously. And here is a deep difference: we may forego rights, but never duties. Self-sacrifice may involve an abandonment of the plainest of rights, and there will be situations in which the good person will do no less. But there is no case in which a duty may justifiably be abandoned, except in the face of conflict with a higher and inconsistent duty.

18. We can see, then, that while rights are a necessary legal construct, duties are a necessary moral construct. Just as the language of rights is inextricably woven into the fabric of the resolution of disputes between man and man or between man and State, and that is inevitably the law's business: so also the language of duty – of *obligation* – is inextricably woven into the fabric of the resolution of moral disputes, and that is self-evidently morality's business. The reason is that any moral dispute is

about what someone *ought or ought not to do*. The language of "ought" is necessarily the language of obligation, and that is the language of duty. But to claim a moral *right* implies or suggests a base and impoverished view of morals.

19. The claim of right as a moral construct treats morality as nothing more than the distribution of supposedly just deserts: it is giving Shylock his pound of flesh. Morality seen as just deserts is divisive: the grant of one man's just deserts may deny another's. And it tends towards extremism: Shylock would not have been content with half a pound. What I am suggesting is not merely a shift of language, but a particular way of perceiving the substance of the thing. If, when I seek to claim a moral "right", I can possess the discipline and imagination to see it not so much as my entitlement but as the other's obligation, my world is at once less self-centred. I am looking at it from his point of view as well as my own. I am more likely to understand the difficulties (if any) which he has to confront, and to recognise, where it may be the case, that after all he owes me no duty, or owes a higher and inconsistent duty elsewhere; or that for reasons of compassion, friendship, generosity or something else that moves me (and, maybe, *should* move me) I should forego my pound of flesh.

20. More than this. The language of rights leaves out of account all those instances of moral behaviour, of good conduct, where what is done is beyond the call of duty; and in doing so, it tends to corral virtue into a terrible straitjacket: the *mere* performance of duty, and the *mere* avoidance of vice. That is at the heart of your perception of morality, if you think of virtue as rights, and rights as virtue. This is a dreadful impoverishment. It reduces the idea of goodness to a rule-book. Goodness seen as the rule-book, the rule-book of rights, is not even *praiseworthy*. It is shut off from altruism, certainly from self-sacrifice. And because rights seen as a primary moral value are divisive, there will not even be agreement as to the contents of the rule-book. Competing, strident, claims of entitlement are a poor substitute for a shared perception of goodness.

21. The tendency of rights to put the "I" before the "You", and of individuals to treat "I have a right to..." as a synonym of "I would like...", indeed the whole impoverishment of morals if their language has been hijacked, wields its malign influence on the good constitution, and displays its relevance to our constitutional challenge through another, closely related, characteristic of rights, articulated by the great American jurist Justice Oliver Wendell Holmes in the Supreme Court of the United States in 1908 as follows[2]:

> "All rights tend to declare themselves absolute to their logical extreme."

And so, of course, they do; a right once identified is likely to be insisted on to the uttermost. It is a feature of humankind to take as much as you can get. This is the very driving force of the corruption of moral language into the language of rights. I have said that Shylock would not have been content with half a pound of flesh; all too many Shylocks would not be content with the whole pound. And it is this tendency of rights "to declare themselves absolute to their logical extreme" which brings me back to our constitutional challenge.

22. I said earlier that rights should be regarded as inherent in the public interest, and not the public interest's enemy; we need to see them as an aspect of government duty. This is a much harder undertaking if we do not challenge the hijacking of moral language by the language of rights. To understand rights as the fulfilment of duty by another fits precisely with this perception of the duty of government to discharge the public interest. Seen like this, rights should not "declare themselves absolute to their logical extreme". Their fulfilment will be in balance with all the other duties of government. The duty of government has effect through law; so that as between the citizen and the government, rights should properly be understood as a legal construct which fulfils the moral duty of the State. And it is in order to strike this balance as well as it can be struck, and to ensure the richest fulfilment of this duty, that we need

[2] *Hudson County Water Co v McCarter* 209 US 349, 355.

to fashion the principled distribution of power between courts and government. As I have said: unless we dethrone rights as primary moral values and treat them as the subject of government duty among many such duties, the right balance of power in the State will be harder to achieve, and the way through the constitutional challenge will becomes distorted and uncertain. We will be more likely to see the courts and government as serving opposite interests, whereas in fact they should be serving distinct aspects of the same interest – the public interest.

PROPORTIONALITY

23. With all this in mind I turn to the doctrine of proportionality, and its impact on our constitutional challenge. Proportionality is of course a legal test for the control of executive power by the courts. Here there is a background which I need to acknowledge. The core rights with which we are concerned in all of this are no doubt those enshrined in the European Convention. But the challenge to find a principled distribution of State power between courts and government is not by any means simply the product of the Human Rights Act or the ECHR. Rather, it has become acute because of a relatively recent development in our constitutional law which, though closely linked with the force of human rights law, may and should be expressed in broader terms. This is what I have previously called a shift from a parliamentary towards a constitutional democracy. In *International Transport Roth GmbH v Secretary of State*, reported in 2003[3], after referring to an observation of Iacobucci J in the Supreme Court of Canada[4], I said this:

> "70. Not very long ago, the British system was one of parliamentary supremacy pure and simple. Then, the very assertion of constitutional rights as such would have been something of a misnomer, for there was in general no hierarchy of rights, no distinction between 'constitutional' and other rights. Every Act of Parliament had the same standing in law as every other, and so far as rights were given by judge-made law, they could offer no competition to

[3] [2003] QB 728.
[4] In *Vriend* [1998] SCR 493 at 563.

> the status of statutes. The courts evolved rules of interpretation which favoured the protection of certain basic freedoms, but in essence Parliament legislated uninhibited by claims of fundamental rights.
>
> 71. In its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy, to use the language of the Canadian case. Parliament remains the sovereign legislature; there is no superior text to which it must defer (I leave aside the refinements flowing from our membership of the European Union); there is no statute which by law it cannot make. But at the same time, the common law has come to recognise and endorse the notion of constitutional, or fundamental rights. These are broadly the rights given expression in the European Convention on Human Rights and Fundamental Freedoms..., but their recognition in the common law is autonomous..."

24. This evolution, from a purely parliamentary towards a constitutional supremacy, has to be understood (as so often with the common law) in terms of the practical nature of the jurisdiction being exercised: here, the judicial review jurisdiction. Now, the courts' public law role in substantive (as opposed to procedural) challenges to the legality of government action was until not many years ago largely circumscribed, not by the doctrine of proportionality but by what is familiarly known as the *Wednesbury* rule: essentially a test of rationality or reasonableness. This provided the major touchstone for the dividing line between judicial and government power. The name comes from a case decided over a weekend in November 1947[5]. Though it has become a hallowed text, in it Lord Greene MR was able to state[6]:

> "This case, in my opinion, does not really require reference to authority when once the simple and well known principles are understood on which alone a court can interfere with something prima facie within the powers of the executive authority."

25. The principles which *Wednesbury* enunciates are well known and clear enough. The decision-maker must have regard to all relevant considerations and to no others, and must avoid absurdity[7]; in the updated formulation (not necessarily an improvement)

[5] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.
[6] At 231.
[7] P. 229.

given by Lord Diplock in the *CCSU* case in 1984[8], the decision must be rational. This was politically uncontroversial; no one could object to a requirement that government and other public bodies should conduct themselves rationally. But the *Wednesbury* rule as a test for the legality of government power progressively gave way: first to a refined version of itself, so that the courts came to apply a heightened scrutiny to what were increasingly seen as issues of fundamental rights. This was happening before the Human Rights Act came into force on 2 October 2000. Thus in *Ex p. Smith*, reported in 1996[9], which concerned homosexuals serving in the armed forces, Sir Thomas Bingham MR accepted counsel's submission as follows:[10]

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

26. For our purposes, this marks a shift in the constitutional dividing line between judicial and government power; and this is the very shift from a parliamentary to a constitutional democracy. But what has seemed to be a greater shift was on the way. Five years after *Smith*, in *Ex p. Daly*[11], the House of Lords was using the express language of proportionality. Lord Steyn said[12] that "there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach." For the purpose of our constitutional challenge – the principled distribution of power between courts

[8] [1985] AC 374.
[9] [1996] QB 517.
[10] At 554.
[11] [2001] 2 AC 532.
[12] At paragraph 27.

and government – we have to understand what the common law makes of the doctrine of proportionality.

27. First I should acknowledge that there is a very lively debate upon the question whether the proportionality doctrine is effectively confined to human rights cases and cases of EU law, or whether it is now spreading, or should spread, across the whole field of judicial review of administrative action[13]. Professor Paul Craig has been a notable advocate of such a development[14]. I will not take time with this issue, since the focus of this lecture is on rights claims, which are plainly located in proportionality's bailiwick. There is also a very substantial literature (judicial and otherwise) on the nature of proportionality. A simple summary was given by the Privy Council in a case cited[15] by Lord Steyn in *Ex p. Daly*[16]. Proportionality requires that the court should ask itself whether

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

There are many more formulations. I shall refer below to one other, from the CJEU. Broadly, however it is precisely articulated, the proportionality test asks two questions: (1) is the government measure, which impairs the individual's right, necessary for the achievement of a legitimate aim? (2) is it a proportionate impairment of the right, that is, is it the least intrusive means of achieving the legitimate aim?

28. Now for the purpose of our constitutional challenge, we need to consider what difference proportionality makes to *Wednesbury*. Whereas the *Wednesbury* test merely required the court to consider whether the impugned decision has been rationally arrived at having regard only to relevant considerations, proportionality is

[13] See the discussion by James Goodwin in *The Last Defence of Wednesbury* [2012] PL 445.
[14] See the 6th edition of his *Administrative Law*, Ch. 19.
[15] in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.
[16] at paragraph 27.

thought to invoke an altogether stricter standard, not merely "somewhat" more intense, as it was put by Lord Steyn. In *Daly* Lord Cooke of Thorndon went rather further than Lord Steyn[17]:

> "I think that the day will come when it will be more widely recognised that [*Wednesbury*] was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd."

29. This *dictum* has not, I think, been followed in terms, but it is of a piece with the increasingly settled view that by force of the proportionality doctrine the judicial review process has become much more akin to a judgment on the merits. This perception of the process has been particularly stark in immigration cases of the kind to which I have already referred, where for example the alien whom the Home Office seeks to remove claims a right to remain pursuant to Article 8 of the ECHR. There have indeed been notorious instances in which aliens who have committed very serious crimes here have been allowed to remain because of a judgment by the court or tribunal that the claimant's family rights – he may have children in this country who are British citizens – should prevail over the public interest in his removal or deportation. Inevitably the cry goes up: the unelected judges are frustrating the will of the people's elected representatives, and probably frustrating common sense and good morals as well. But if one sets on one side the purely populist response, there is in this a serious constitutional question: are the judges to any significant extent taking on themselves the responsibility of primary decision-making, so as to distort the separation of powers and usurp the function of the elected arms of government? And there is an associated question, with which I am directly concerned in this

[17] At paragraph 32.

lecture, and which calls up the first idea I have discussed: this a development fuelled by an increasing supremacy of the language, and therefore the culture, of rights?

30. For obvious reasons I make no comment on individual cases. One response to the charge of judicial interventionism which you will often hear is the assertion that Parliament gave us the Human Rights Act (and the Strasbourg case law), and also (relevant for some instances) our membership of the European Union; these legal materials require us to adopt the proportionality approach; and the judges, in passing judgment on the merits, are doing no more nor less than carrying out what the law requires of them, as to which they have no choice.

31. But I do not think that the doctrine of proportionality has to be seen be seen as effecting so sharp a transfer of the power of decision to the judges. It is open to us to develop the law in a way which gives proper effect to fundamental rights, but also respects the distinct constitutional territory of judges and government, and to find a principled solution to our constitutional challenge. Of course we must fulfil the task given us by the Human Rights Act and the European Communities Act, but should do so with the flavour of the common law. So much was adumbrated by Lord Cooke in *Daly*[18]; and it is important on general grounds that a major instrument of judicial review, the proportionality doctrine, should be and be seen to be inherent in our own law, and not looked at askance as an add-on from other jurisdictions.

32. We need, then, to have a clear understanding of what it is that proportionality adds to *Wednesbury*. The *Wednesbury* standard of review required public decision-makers to decide rationally and in light only of relevant considerations. But the first two requirements of proportionality as set out by the Privy Council in the passage quoted in *Daly* do much the same: "(i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it". The second of these avowedly applies a rationality test. The first implicitly does so as well, for it would plainly be irrational

[18] At paragraph 30.

to limit a fundamental right in the name of an objective which did not justify any such limitation, however minor. The same may essentially be said of the first part of the description of proportionality given by the CJEU in the leading case of *FEDESA*[19] at paragraph 13:

> "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..."

The language here is looser but reflects the same ideas as in the first two Privy Council conditions.

33. The focus of the contention that proportionality demands of the courts a judgment on the merits is very largely directed to the Privy Council's third requirement: "the means used to impair the right or freedom are no more than is necessary to accomplish the objective"; and this is the same as the last part of the *FEDESA* description: "when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued". This is the distinctive proportionality question: is the measure under challenge the least intrusive means of achieving the legitimate aim? It is here, surely, that there is room for the view that proportionality involves the judges in something much more than a test of what is reasonable or rational, or not absurd or not relevant. It is here, if anywhere, that the courts seem to be invited to judge the merits of the decision under review; and it is here that the division between judicial and government power becomes, or looks like becoming, blurred and unprincipled, under the pressure of rights which "tend to declare themselves absolute to their logical extreme".

34. But the authorities do not in my opinion demand that the court exercise a primary merits judgment as to what is the least onerous measure. As so often in the law, and especially the common law, it all depends on the subject-matter.

[19] [1990] ECR I-4023.

35. In *Ex p. Eastside Cheese* Lord Bingham, discussing proportionality, stated[20]:

> "The margin of appreciation for a decision-maker (which includes, in this context, a national legislature) may be broad or narrow. The margin is broadest when the national court is concerned with primary legislation enacted by its own legislature in an area where a general policy of the Community must be given effect in the particular economic and social circumstances of the member state in question. The margin narrows gradually rather than abruptly with changes in the character of the decision-maker and the scope of what has to be decided (not, as the secretary of state submits, only with the latter)."

36. Lord Bingham was dealing with an EU case; but these observations, save for the reference to Community policy, are surely apt to domestic judicial review. So the decision-maker – and the paradigm decision-maker is central government – possesses a variable margin of discretion, or appreciation, in judging what is the least intrusive measure by which to fulfil the legitimate aim in view. The court is therefore not the first judge of the facts and the merits. The standard of review is variable; but so it was in what may be called the intermediate stage of modern judicial review, exemplified by the case about homosexuals in the armed forces, *Ex p. Smith*.

THE PRINCIPLE OF MINIMAL INTERFERENCE

37. But this leaves open a very big question: how is this variable standard of review to be applied? How is the court to decide the width of the margin of discretion afforded to the primary decision-maker in any given case? Here, we have to understand what is the real substance added to the *Wednesbury* test by the requirement given by the test of proportionality, that the least intrusive means be adopted: as was said in *FEDESA*:

> "[w]hen there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".

[20] [1999] 3 CMLR 123 at paragraph 48.

38. I suggest that this test imports into judicial review a constitutional principle of the highest importance: what I have elsewhere called the principle of minimal interference[21]. It is the addition of this principle to the armoury of our public law that marks the real difference between *Wednesbury* and proportionality, rather than any exhortation to more intrusive review. I think this is perfectly consistent with the comment on proportionality to be found in such cases as *Daly*. What is meant by the principle of minimal interference? It means that every interference by the law with an individual's freedom of action stands in need of objective justification. Any such interference is presumed against.

39. The principle imposes an important discipline on government, which must consider its implications in every case, and seek to apply it. As for the judges, they will apply the principle through a different prism than that of the primary governmental decision-maker. They will do so insisting on the duty of government to protect fundamental constitutional – legal – rights. In a free polity access to the courts and freedom of expression are critical rights: the first for the obvious reason that the courts are the guarantors of the rule of law, the second for the no less obvious reason that free expression is the mouthpiece of free thought, and without both the people are slaves. The right of aliens to remain in this country by force of Article 8 of the ECHR is a lesser right, as regards which in Strasbourg terms the State generally enjoys a wide margin of appreciation[22]; though the right plainly gains added strength when invoked in the interests of a child or children. There is one right – the right to be protected from torture, or inhuman and degrading treatment – which by force both of the ECHR (Article 3) and the common law may not be interfered with at all.

40. The principle of minimal interference is a conceptual tool which allows the court to give effect to the relative constitutional force of these various rights. The more integral the right to the sinews of our free constitution, the narrower will be the

[21] See for example *The Constitution: Morals and Rights* [1996] PL 622, at 623 and 627.
[22] See *Abdulaziz Cabales and Balkandali v UK* (Applications 9214/80, 9473/81 and 9474/81).

margin of discretion available to government to interfere with it. All this fits exactly with a perception of rights seen as the duty of government; and that is the very means by which the language of rights is to be divorced from the language of morals.

41. And so the constitutional challenge, the search for a principled division of power between courts and government, requires a firm recognition that proportionality is not an Open Sesame to primary decision-making by judges, but an acknowledgement that judicial review in rights cases (I leave other cases for another day) must uphold the principle of minimal interference. But the endeavour will fail, and the principle of minimal interference will be corrupted into a licence for judicial supremacism, unless it is measured, case by case, by a recognition that the fulfilment of rights is a duty of government alongside other duties of government; and while the courts must protect constitutional fundamentals, such as free expression, access to the Queen's courts and fair trial, in many other instances it will be for the elected powers to have the greater voice in deciding what priority should be given to this or that government duty.

42. In all this we may, certainly, not wish to go the length of Sir Kenneth Dover's take on the ancient Greeks[23]:

> "The Greek did not regard himself as having more rights at any given time than the laws of the city into which he was born gave him at that time; these rights could be reduced, for the community was sovereign, and no rights were inalienable. The idea that parents have a *right* to educate (or fail to educate) their children in whatever way they please, or that the individual has a *right* to take drugs which may adversely affect his health and so diminish his usefulness, or a *right* to take up the time of doctors and nurses in consequence of not wearing a seat-belt, would have seemed to a Greek too laughable to be discussed. No Greek community would have recognized 'conscientious objection' to war, or to anything else."

That is, perhaps, too rich meat. But if rights are too florid, they may make bad citizens. They are given their proper place if they are seen as duties of government, with a recognition that some involve fundamental duties on whose performance the

[23] *Greek Popular Morality*, pp. 157 – 158.

courts will strictly insist. Others do not; other duties may prevail over them. And in our constitution, the common law is the arbiter of these competitions. Here, then, is the true force, for the purpose of our constitutional challenge, of the idea I discussed at first: how important it is to resist the hijacking of the language of morals by the language of rights.

43. The philosopher Kant said this[24]:

> "We must not expect a good constitution because those who make it are moral men. Rather it is because of a good constitution that we may expect a society composed of moral men".

It is an observation which recalls the dilemma in Plato's Dialogue, the *Euthyphro*: Are moral acts willed by God because they are good, or are they good because they are willed by God? But that would be another lecture altogether.

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[24] Quoted by Lon Fuller, *The Morality of Law*, Yale University Press (revised edition 1969), p. 152.