

**Lord Sumption gives the Administrative Law
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Anxious Scrutiny
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From time to time, English judges devise catch-phrases devoid of legal meaning in order to describe concepts which they are unwilling or unable to define. I would like this evening to examine one of these phrases, “Anxious scrutiny”. In particular, I want to examine the use of anxious scrutiny as a technique for reviewing the justifications put forward for a *prima facie* breach of one of the qualified provisions of the Human Rights Convention.

The idea of introducing a heightened level of scrutiny for certain categories of administrative decision was originally adopted by the courts before the Human Rights Act was passed. It was a response to the recognition that, quite apart from modern international human rights law, there were certain rights which at common law should be regarded as fundamental, and that interference with those rights should be more difficult to justify before the courts. The notion of fundamental common law rights is in fact very ancient. It was put forward by Blackstone in the first chapter of his *Commentaries* in terms which a modern human rights lawyer would recognise. The fundamental rights which Blackstone recognised included a right of personal security, a right of personal liberty and a right of private property, as well as certain ancillary rights which were necessary for their protection, such as access to justice. In its modern form, however, the concept of fundamental rights dates from the speech of Lord Scarman in *Morris v Beardmore* [1980] AC 446. The difficulty about the judicial protection of fundamental rights has always been the very limited grounds on which the common law allows a right of substantive review. Unless the decision is illegal, in the sense that some necessary jurisdictional condition has not been satisfied, substantive review has traditionally been limited to cases of irrationality

according to the *Wednesbury* test, which was notoriously difficult to satisfy.

The credit, or at any rate the responsibility, for introducing anxious scrutiny to the tool-bag of public lawyers belongs to Lord Bridge, delivering the leading speech in the House of Lords in *Bugdaycay v Secretary of State for the Home Department* [1987] 1 AC 514. The facts of the case are well known. Mr. Musisi objected to the Secretary of State's decision to refuse him leave to enter and remain in the United Kingdom. His complaint was that the decision had been made without attempting to verify his claim that if he were returned to Kenya, he would at once be removed to Uganda, where he would be killed. Upholding this complaint, Lord Bridge drew attention to the fundamental character of the applicant's right to life, and observed that the graver the issue, the more rigorously the court would examine the decision to ensure that it was in no way flawed. "When an administrative decision under challenge is said to be one which may put the applicant's life at risk," he said, "the basis of the decision must surely call for the most anxious scrutiny." I rather doubt whether Lord Bridge intended in *Bugdaycay* to invent a new technique of review which would in due course supply the headings of public law textbooks and the title of lectures like this one. But by 1991, when Lord Bridge participated in the decision in *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696, things had already moved some way in that direction. The House of Lords declined to adopt the principle of proportionality into English law, but achieved a somewhat similar result by using the idea of heightened scrutiny derived from its earlier decision in *Bugdaycay*. It is clear, in particular from the speeches of Lord Bridge and Lord Templeman, that the Committee regarded heightened scrutiny not just as more of the same thing but as a way of stretching the traditional *Wednesbury* test in cases where the rights engaged were sufficiently fundamental. This idea received its clearest expression five years later in *R v Ministry of Defence ex parte Smith* [1996] QB 517, when Lord Bingham as Master of the Rolls accepted that irrationality was the only

ground of substantive review but observed that the greater the interference with human rights the narrower the range of responses open to a rational decision-maker and the more the court would require by way of justification before it could be satisfied that the decision was rational.

A somewhat similar process occurred at much the same time and for much the same reasons in the United States. US public law also had to grapple with the problem of protecting fundamental rights by a process of substantive review which was theoretically limited to decisions that could be characterised as arbitrary or capricious. The so-called “hard look” doctrine, which operates in a very similar way to anxious scrutiny, was finally adopted by the United States Supreme Court in *Motor Vehicle Manufacturers Association v State Farm Mutual Insurance Co.* 463 US 29 (1983), some ten years after the phrase was first coined.

There is, however, something peculiarly English about the crab-like process by which this came about on this side of the Atlantic, which is characteristic of the way that English judge-made law develops. At stage 1 the court, presented with a new problem which it lacks the necessary tools to resolve, rejects a rational solution which stands outside its traditional concepts. At stage 2, it stretches an existing legal concept so as to achieve substantially the same result, while denying that it is doing any such thing. At stage 3, it throws off the mask and admits that the alien doctrine has arrived and finally calls it by its name. In the domain of private law, collectors of the genre will remember the tortured process by which the doctrine of *forum non conveniens* reached us. Proposed as a rational scheme of jurisdiction by Mr Robert Goff QC in *The Atlantic Star*, it was initially rejected as an alien concept fit only for the Scots and Americans, then stealthily applied in practice and finally recognised in terms by Lord Goff of Chieveley twelve years later.

The problem about anxious scrutiny as an approach to administrative decisions was that it was never very clear what it meant. The image of nail-biting anxiety as judges crouched in the road observing the oncoming headlights of a fundamental right was certainly calculated to show that the judiciary were on the case. But what did anxious scrutiny actually involve, and how did it differ from the presumably slapdash or casual scrutiny that was appropriate in less fundamental cases?

Anxious scrutiny was originally designed to broaden the test for substantive review at common law by importing some element of the doctrine of proportionality from the case-law of the European Court of Human Rights. However, because the concept had to be accommodated within the traditional categories of review recognised by the common law, proportionality could only be imported in a rather weak form. In *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, Lord Steyn examined the difference between anxious scrutiny and proportionality as it applied in the case-law of the Strasbourg court. He pointed out three differences. The first was that anxious scrutiny only entitled the court to determine whether the balance which the decision-maker had struck between the right and the competing interests was within the range of rational possibilities, but not whether he had got the balance right. Secondly, anxious scrutiny did not justify a court in reviewing the relative weight accorded to the competing factors. And thirdly, anxious scrutiny could not enable a court to consider whether the interference was greater than was necessary in a democratic society. These are rather substantial differences. In effect, anxious scrutiny remained a technique for evaluating the decision-making process, rather than a review of the compatibility of the result with some external standard. It could hardly have been otherwise at a time when the Human Rights Convention was not part of English domestic law, and there was therefore no external standard which could be applied.

In practice, the main impact of anxious scrutiny was on the court's approach to the factual basis of the decision under review. The burden of justifying the decision was placed firmly on the decision-maker instead of the applicant. A more comprehensive review of the facts and a higher standard of proof were expected of him before he could claim to have discharged it. But it is hard to regard this as a significant change. Courts of review have always been entitled to examine the facts if they are open to dispute, and in practice have set aside decisions for mistake of fact. In most cases where this approach was adopted, anxious scrutiny was not so much a technique employed by the court as a standard required of the decision-maker. It enabled the court to treat his fact-finding process as deficient if it was insufficiently thorough or comprehensive in its coverage. But this hardly warrants such a portentous title. Mistake of fact is in reality no more than one way in which a decision-maker may find himself taking account of irrelevant factors and failing to take account of relevant ones.

Moreover, recognising the scope for setting aside decisions on factual grounds rarely gets one very far. In a case like *R v Secretary of State for the Home Department ex parte Khawaja* [1984] AC 74, where the question was simply whether the applicant had illegally entered the United Kingdom or not, it is easy enough for a court to say that the case was not proved to the standard which was appropriate given the gravity of the allegation. But in most cases, what is in dispute is not the primary facts but the weight to be attached to them by comparison with other facts pointing, perhaps, the other way. Short of arrogating the decision-making power to itself, there is very little that the courts can do to challenge the rationality of a decision based on a judgment about the significance of undisputed facts.

In the opening years of the present century, two developments occurred which might have been expected to make the whole concept of anxious scrutiny redundant. One

was the final acceptance that a similar result could be achieved as a matter of construction of the enabling Act, if one assumed that only specific and unmistakeable language could authorise interference with a fundamental right. This simple and one would think obvious proposition, which has become a corner-stone of English public law, had been rejected at least twice by the House of Lords before it was finally adopted in *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115. The second development was of course the enactment of the Human Rights Act, which by requiring the English courts to have regard to the case-law of the Strasbourg court made it possible to apply the doctrine of proportionality directly without disguise or embarrassment.

In fact, notwithstanding these developments, anxious scrutiny is still very much with us, even in cases concerning Convention rights. A search on Westlaw, admittedly a rather crude measure, suggests that in the last ten years the concept has been deployed by judges in 598 cases. An examination of a largeish sample of these decisions suggests that the great majority of them fall into one of two categories. Most are about immigration or asylum and turn on common law principles rather than Convention rights. In those cases where the decision was quashed, it was commonly because the decision-maker's fact-finding processes were found to be deficient. These cases fit comfortably within the traditional grounds of review, without the need to invoke some special standard of scrutiny. The rest are cases like *A v Secretary of State for the Home Department* [2005] 2 AC 68, in which a heightened level of scrutiny was simply treated as part of the court's assessment of proportionality. When the courts say, as they often do, that the intensity of review varies with the context, they are usually saying no more than that the more significant the right interfered with, the more cogent will be the justification required for the interference.

So one is bound to ask whether in the current state of the law anxious scrutiny is any more than a slogan: "We try harder";

or at least “We try as hard as the context warrants.” If anxious scrutiny is simply the exercise of the degree of care appropriate to the context, what is so special about it? And what judicial exercise ever called for any other standard?

Now, I am not so austere that I would deny judges the right to use the odd slogan. But there are I think circumstances in which the use of catch-phrases like anxious scrutiny, which have little or no legal content, is positively dangerous. This is because they tend to be a substitute for analysis. They mask what the court is really doing and why. In some cases anxious scrutiny may be doing no more than justifying the quashing of decisions which the judge does not care for. In others it may divert attention from considerations which are legally a great deal more significant. In particular, I think that expressions like anxious scrutiny tend to suggest that the appropriate response to administrative interference with a Convention right or a common law fundamental right is to carry out the same kind of review as the courts have always carried out, but at a greater level of intensity. This involves tiptoeing round one of the great dilemmas of modern public law. When we review the proportionality or rationality of interfering with some human or fundamental right, are we reviewing only the decision-making process or are we reviewing its merits?

English public law has always maintained, at least in theory, the position that a court of review does not substitute its own decision for that of the primary decision-maker. It has always professed to abhor a merits review. The phrase anxious scrutiny reflects these attitudes. It perpetuates the notion that scrutiny remains the task on which the court is engaged, even when it is dealing with human or fundamental rights. In fact, although the *Wednesbury* test is a very undemanding test for administrative decision-makers, so far as it goes it necessarily involves some assessment of the merits of the decision. Proportionality, at least as applied to Convention rights, is a much more exacting test, and even more obviously involves

an examination of the merits. Where, for example, a court is considering the justification for a *prima facie* interference with the very widely framed rights under Article 8(1) or the freedom of thought, expression and assembly protected by Articles 9, 10 and 11, it is bound to consider whether the decision answers a pressing social need, whether the decision-maker's objective is important enough to justify interfering with a human or fundamental right, whether a less intrusive measure could have been used without unacceptably compromising the objective and whether, looking at matters in the round, a fair balance has been struck between the interests of the individual and the community. All of these considerations necessarily go to the merits of the decision. They do not (or at least not necessarily) go to the process by which it was made. Where the decision involved an essentially political judgment by the decision-maker, that may well at least in principle involve the court in assessing the adequacy of the political reasons for making it.

These are consequences of the way that the Convention has been framed and interpreted, which the Courts have not always been willing to recognise. In his speech in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, Lord Bingham pointed out that the Strasbourg Court applied a standard of review which was not just formal and procedural but substantive. "The focus at Strasbourg", he wrote, "is not and never has been on whether a challenged decision is the product of a defective decision-making process, but on whether in the case under consideration, the applicant's Convention rights have been violated." This (if I may interject) is because the Convention asks whether the decision was actually proportionate, and not whether the decision-maker could rationally have thought it was. Lord Bingham concluded that in dealing with questions of proportionality the court would have to go beyond the traditional approach to judicial review in a domestic setting. But the modification of the traditional domestic approach which he proposed in order to deal with the problem was only more anxious scrutiny. "There is," he said, "no shift to a merits review, but

the intensity of review is greater than was previously appropriate.” For my part, I question whether you can address the questions posed by the doctrine of proportionality without accepting some shift to a merits review. And I question whether a more intensive standard of review can ever be a sufficient response to the question what departures from Convention rights are proportionate to a legitimate objective.

More recently, in his judgment in the Divisional Court in *R (Miranda) v Secretary of State for the Home Department* [2014] 1 WLR 3140, Laws LJ referred to my summary of the criteria for the proportionality of interference with a Convention right in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700, and suggested that they came dangerously close to requiring the court to decide political questions reserved to the elected arm of government. “If it is properly within the judicial sphere,” he said, “it must be on the footing that there is a plain case.” I think that Laws LJ’s concern is entirely justified. I have myself more than once drawn attention to the propensity of judicial review of human rights to elide the boundaries of politics and law. But Laws LJ is shooting the messenger. My statement was no more than a routine summary of previous decisions of the House of Lords and the Supreme Court, which were themselves faithful reflections of the language of the Convention. But I also think that Laws LJ was right to say that a plain case is required before this can be regarded as a proper judicial function. So what are these plain cases, and on what principles are we to identify them?

We would I think find it easier to answer that question if we were clearer about the techniques that we employ for protecting human and fundamental rights against government action, while at the same time respecting the constitutional position of the primary decision-maker. This will involve recognising more openly than we presently do that in some cases the judicial assessment of proportionality does require consideration of the merits, while at the same time explaining

why in other cases it does not. It seems to me that for this purpose variable standards of review, originally devised as a way of stretching the concept of irrationality, are unhelpful, largely because they have no legal meaning. I think that the only intellectually honest way of explaining what we are doing is by reference to the decision-maker's "discretionary area of judgment". This expression was originally coined by the authors of Lester and Pannick, *Human Rights Law and Practice* (1999). I am content to use it, not least because it has been adopted judicially in successive judgments of the House of Lords and the Supreme Court from *Kebilene* in 2000 to *Axa* in 2012. But I think that the operative word is judgment rather than discretion. It refers to evaluative assessments which the executive is peculiarly qualified to make in areas where the same evidence may support a range of conclusions. This is much closer to the idea behind Strasbourg's margin of appreciation than it is to traditional notions of administrative discretion.

The idea that the executive may be peculiarly qualified to make some judgments about the justification for interfering with human or fundamental rights has not been universally welcomed by human rights lawyers. This is because it appears to involve a partial abdication of the court's function of controlling executive excesses. Part of the problem is the over-used word "deference", with its overtones of cringing abstention in the face of superior status. But the decision-maker's discretionary area of judgment is nothing to do with deference. It has two distinct sources. One is the constitutional principle of the separation of powers. The other is simply a pragmatic view of the evidential value of some judgments of the executive, in areas where their experience is entitled to weight.

The fullest judicial analysis of both sources is the speech of Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153. *Rehman* was a statutory appeal from the decision of the Home Secretary that the applicant's

presence in the United Kingdom was not conducive to the public good because of its adverse impact on national security. Lord Hoffmann considered that, provided that the decision was rational and that there was a factual base for it, the constitutional separation of powers was an absolute bar to review. The SIAC, he held, was not entitled to differ from the Secretary of State on the question what was or was not in the interests of national security. But he also held that quite apart from that consideration, an evaluative judgment by the executive of an issue such as national security should not normally be interfered with by the courts, because it was likely to be based on a range of advice and a depth of collective experience which the courts cannot match.

Rehman was not a Convention case. If it had been, the absolute bar to the judicial review of the question whether Mr Rehman was a threat to the United Kingdom's national security could not have been sustained. Any arguable allegation that a person's Convention rights have been infringed must be justiciable. The Human Rights Act says so. Both the Strasbourg court and English courts attach some weight to the constitutional functions of decision-makers who are democratically accountable. But neither jurisdiction has ever treated this as conclusive in a case engaging Convention rights. The main reason for according a discretionary margin of judgment to the executive is not constitutional. It is a matter of institutional competence. The implications of an executive decision are questions of fact. The weight to be given to the reasons for interfering with a human right is a question of judgment, informed by fact. The assessment of the executive on these matters will often be based on experience and advice which the courts do not have. It provides in itself what may be powerful, albeit not conclusive, evidence in support of the decision.

This is particularly likely to be true where the decision involves, as it often will, a predictive judgment about the consequences of the different options before the decision-

maker. The correctness of such judgments is notoriously difficult to test empirically. Anxious scrutiny is unlikely to help, because it is designed to expand the boundaries of irrationality. But, assuming that the decision-maker's objective is capable of justifying the interference with human rights, if the decision turns on a predictive judgment rationality in the unstretched *Wednesbury* sense may be the only aspect of the decision which is capable of judicial assessment. The facts will commonly lend themselves to a range of judgments which, looking forward to an obscure future, could all be made with equal propriety. In that case the law is satisfied if the decision-maker is somewhere within the range. There will not necessarily be a single "right" prediction for the court to light upon. In this area, a recognition of the special institutional competence of the executive is not only realistic. It is usually the only course consistent with the democratic values at the heart of the Convention. It reflects the expectation that in a democracy the person charged with making predictive judgments about the consequences of executive decisions will be politically responsible for them, and potentially answerable with their jobs in a way that judges never can be.

In one of his most perceptive judgments, *A v Secretary of State for the Home Department* [2005] 2 AC 68, Lord Bingham referred to the pre-eminently political character of any factual prediction of what other people may do and of the consequences if they did. "Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen."

Clearly considerations of this kind are weightier in some contexts than in others. The United Kingdom's relations with foreign states are perhaps the paradigm case where they are likely to be of decisive weight. In *R v Secretary of State for the*

Home Department ex parte Launder [1997] 1 WLR 839, 857, Lord Hope put his finger on the problem when speaking of the Home Secretary's view about how the applicant was likely to be treated by the justice system in Hong Kong after the hand-over to China. "His decision has had to be taken amidst an atmosphere of mistrust and suspicion which a court is in no position to penetrate. The visible part is the framework of law which I have described. That part can be explained and analysed. The invisible part is about the hearts and minds of those who will be responsible for the administration of justice in Hong Kong after the handover. This is not capable of analysis. It depends, in the end, upon the exercise of judgment of a kind which lies beyond the expertise of the court. That, no doubt, is why the decision whether or not to grant the warrant has been entrusted to the Secretary of State by Parliament."

Other areas where the courts have traditionally accorded the executive a broader margin of judgment are all areas in which executive decisions are inevitably based on judgments which do not lend themselves to intensive scrutiny because there are either no objective criteria by which to judge them or no agreement as to what the appropriate criteria might be: national security, broad questions of economic and social policy and issues about the allocation of finite resources are all obvious examples. Where issues of this sort arise, the executive is not immune from a successful judicial review. But, as Laws LJ put it in *Miranda*, a plain case of disproportionate interference is required.

These issues usually arise in connection with executive decisions. But they also have their proper place when the court is reviewing the compatibility of legislation with the Convention. As Lord Hope observed in *Axa General Insurance v HM Advocate* [2012] 1 AC 868, the legislature has "advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. This suggests that the

judges should intervene, if at all, only in the most exceptional circumstances.”

I have strayed some distance from my title. But I have done so for a purpose. My basic criticism of anxious or heightened scrutiny is that it does not help to resolve the problem to which it is addressed, namely how are courts of review to assess the possible justifications for executive or legislative interference with fundamental rights, particularly those derived from the Human Rights Convention. Anxious scrutiny is a way of reconciling this process with the law’s traditional reluctance to engage in a merits review. It avoids the uncomfortable truth that questions of proportionality often do involve merits review, by pretending that the court is simply performing its traditional role but more intensively. This in turn makes it more difficult to develop proper principles for deciding what the limits of merits review should be. It is incumbent on any one who says this to propose an alternative.

My alternative would be for the courts to come clean on the subject of merits review, while emphasising that up to a point the executive and the legislature are the best judges of the merits. “Up to a point” is a difficult but necessary reservation. The breadth of the decision-maker’s discretionary margin of judgment will vary with the significance of the right being interfered with and the nature of the decision. In practice, this is the approach that the courts do take, but they are chary about admitting it. It is not enough for a judge to get the answer right. He ought to get it right on purpose, and for reasons that accurately describe the analytical process involved. How many of us today would care to give the advice which Lord Mansfield gave to a friend who was leaving to become a colonial administrator in Jamaica? “My advice is, make your decrees as your head and your heart dictate,” he wrote, “but be careful not to assign your reasons, since your determinations may be substantially right but your reasons may be very bad or essentially wrong.”