Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security

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> I know of only one authority which might justify the suggested method of construction. '"When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all." ...' After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has.' I am of the opinion that they cannot, and that the case should be decided accordingly.
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> Lord Atkin, dissenting, *Liversidge v Anderson*, [1942] AC 207 at 245.

Introduction

Anti-terrorism legislation is in vogue after the terrible attacks on the United States of America in September 2001. It is not immediately clear why this should be so, even if there were a credible case to be made that the countries rushing to be fashionable are under real and novel threat. Their criminal law already makes any terrorist act a crime (with the exception perhaps of international money laundering) and a much more plausible reaction would be to devote more resources, on the international level, to understanding and dealing with the political situations in which terrorism is

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fomented and, on the domestic level, to rethinking and strengthening security and intelligence.[1]

Terrorist legislation is not only an inherent threat to civil liberties but, as the dismal history of the implementation of the legislation shows, of little use in eradicating terrorism. History teaches us that the crimes of terrorism are best dealt with by using the ordinary law of the land effectively and that those caught in the net cast by terrorism statutes are more often than not the 'other' or the 'alien' – the illegal immigrants, the refugees who had opposed the political regime of their native land, people with a different skin colour, homegrown political dissidents, or anyone else who is already marginal or whom powerful groups would prefer to be marginal.

Indeed, those who take comfort in their homogeneity – in the fact that they are not other or alien – when terrorist legislation is enacted should note what Audrey Macklin has termed 'law's role in producing the alien within'.[2] Such legislation shifts the category of alien enemy out of the legal arena in which it often goes unnoticed because we do not care much about those who have fragile legal status in our societies, or even want them out as soon as possible – refugee claimants and people subject to deportation because they are not yet citizens. It shifts the category of the 'alien' into the ordinary law of the land, where the ineliminably vague and political understandings of 'terrorist' and 'national security' give to the executive a wide scope for dealing conveniently with those it considers to be threats.

I will not try here to answer the very interesting question of why the United States of America is in the moral panic that still seems to grip that nation or why so many other countries have succumbed to that same panic. Rather, I want to deal with the lawyer's question, 'What is the proper legal response to terrorism statutes?' where 'proper' means 'in light of our commitments to the rule of law'. Since it is controversial what the content is of the rule of law, the lawyer's question is, as we will see, also the legal philosopher's question about the nature of law – how to unpack the idea of law in the phrase 'the rule of law'.

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1 On these points, see most of the essays in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001), especially the essays in the section, Criminalizing Terrorism, and on security, Mariana Valverde, 'Governing Security, Governing Through Security' 83. See also Adam Tomkins, 'Legislating Against Terror: the Anti-Terrorism, Crime and Security Act 2001' [2002] *Public Law* 205. As Tomkins notes, the United Kingdom has derogated from the European Convention on Human Rights in respect of this statute.

2 Audrey Macklin, 'Borderline Security', in Daniels, above n 1, 383 at 398.

Note that the lawyer's question might seem to be badly posed, since the proper response to terrorism is often thought to be a response outside, or largely outside, of the rule of law. The political issues involved seem outside the scope of control by law, where control means scrutiny by judges of the legality of executive decisions and action about national security. It is interesting in this regard that two of the most eminent constitutional lawyers in the USA, men who have traditionally supported Democratic civil rights causes, are reputed to have testified to legislative committees in favour of President Bush's kangaroo, military tribunals. Moreover, eminent judges in the common law world began to adopt something like this same reaction *in anticipation* of their country either getting a terrorism statute or revising the legal regime it already had for dealing with terrorism. If judges adopt such a stance in advance of any change of the law on the statute books, it will surely follow that the stance can only be invigorated after the change has been made.

There is, as we will see, one important difference between this academic response – the rule of law has no or little purchase when it comes to issues of national security – and the judicial response. Judges are unwilling to say that their role as guardians of the rule of law is either at an end or greatly reduced. Indeed, it seems impossible for them to conceive of their role other than as guardians of the rule of law and so, short of saying that they have no role to play in respect of a particular statute, they will claim that they are still upholding the rule of law.

There is, I will argue, something deeply interesting in the tension such judges experience. Once we understand that tension, we have not only a better understanding of the basis for answering the question, 'What is the rule of law?', but also a sense of how different camps in legal philosophy are helpful or unhelpful in constructing the proper, rule of law response to terrorism statutes. I will start by exploring that tension through a rather detailed analysis of two recent judicial decisions, one of the House of Lords, the other of Canada's Supreme Court. I will then explore the theoretical implications of the tension, as well as the implications of different legal theories for both its characterisation and resolution.

Since the first step requires what for many will seem a tedious wade through a tunnel of administrative law, I should say that the theoretical light I purport to find at the end has to do with the role of legal positivism. I will argue, against the main trend in contemporary legal positivism, that legal positivism is committed for political reasons to a formal conception of the separation of powers and that it is this commitment that proves unhelpful in judicial review in general, and in particular in judicial review of national security decisions.

Resiling from the Rule of Law?

In *Secretary of State v Rehman*,[3] the House of Lords dealt with the following issue. Rehman was a Pakistani national with temporary leave to stay in the United Kingdom. The security service had determined that he was involved with an Islamic terrorist organisation and that, while it was unlikely that he would ever commit acts of violence in the United Kingdom, his activities were intended to further the cause of a terrorist organisation abroad. On that basis, the Secretary of State ordered that Rehman be deported.

In terms of Section 15(3) of the *Immigration Act* 1971, Rehman was deprived of any right to appeal against such an order because the 'ground of the decision was that his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for reasons of a political nature.' Prior to 1997, there had existed what Lord Woolf in the Court of Appeal described as a 'non-statutory advisory procedure', which allowed the deportee to appear before 'three advisors' to make representations to them and the three then advised the Secretary of State as to whether he should adhere to his decision.[4]

In *Chahal v UK*,[5] the European Court of Human Rights held that the advisory panel did not give an 'effective remedy' in terms of article 13 of the *European Convention of Human Rights and Fundamental Freedoms* as it was not a 'court'. The government responded with a statute in 1997, which established the Special Immigration Appeals Commission, a three person panel of which one member had to have held high judicial office, the second had to have been the chief adjudicator or a legally qualified member of the Immigration Appeals Tribunal, while the third would ordinarily be someone with experience of national security matters. The 1997 statute gave the individual, who would have had the right to appeal against a deportation order, but for section 15(3), a right to appeal to the Commission and the Commission itself, the authority to review the Secretary of State's decision on the law and the facts, as well as, the question whether the discretion should have been exercised differently. There was a further appeal to the Court of Appeal on 'any question of law material to' the Commission's determination. In addition, the statute provided for the appointment of a special advocate who could represent the appellant if parts of the proceedings before the Commission took place as closed sessions because it was considered necessary to keep information confidential.

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3 [2002] 1 All ER 123, hereafter *Rehman* HL.

4 [2000] 3 All ER 778 at 782, hereafter *Rehman* AC.

5 (1996) 23 EHRR 413, hereafter *Chahal*.

In Rehman's case, the Commission rejected the argument that the question of what could constitute a threat to national security was a matter for the Secretary of State to decide. It said that the definition of national security was a question of law which it had jurisdiction to decide. It then found that the Secretary of State had interpreted the phrase 'national security' too widely since, properly understood, Rehman's alleged activities did not affect the United Kingdom's national security. National security, according to the Commission, included only activity which 'targeted the United Kingdom' or United Kingdom citizens 'wherever they may be', or activities against a foreign government which 'might take reprisals' against the United Kingdom. In addition, it found that the specific allegations did not meet the test it deemed appropriate in such cases, which it termed a test of a 'high civil balance of probabilities', and it suggested that this failure occurred whether one adopted the Secretary of State's wide or its own narrow definition of national security.

In the Court of Appeal, Lord Woolf took the position on the first issue that the Secretary of State was entitled to rely on the wide definition of national security, which regards the promotion of terrorism against any state as capable of being a threat to national security. On the second, he reasoned that because the Commission had viewed the facts through the lens of its narrower definition, its approach was so different from the Secretary of State's 'correct' approach that the Commission's decision was flawed. The question of the danger posed to national security had to be treated not only as a matter of proof of individual allegations, but against the backdrop of the 'executive's policy with regard to national security'.[6] Hence he remitted the matter to the Commission for redetermination following the approach he had indicated to be correct.

The House of Lords rejected Rehman's appeal against this decision, and in so doing made more explicit the normative structure of Lord Woolf's approach. In particular, Lord Hoffmann reasoned that the Commission's approach was wrong both on constitutional grounds – the Commission had not understood what is entailed by the doctrine of the separation of powers – and because it did not understand what is involved in review of a primary decision-maker's findings of fact.

On the separation of powers, Lord Hoffmann said that what is meant by 'national security' 'is a question of construction and therefore a question of law within the jurisdiction of the Commission'. However, he also said that 'there is no difficulty about what "national security" means. It is the security of the United Kingdom and its people.' Further, the

6 *Rehman* AC, 791.

> question of whether something is "in the interests" of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.[7]

He rejected the Commission's argument that this line of reasoning would be such as to 'defeat the purpose for which the Commission was set up'. It was 'important', he said, 'neither to blur nor to exaggerate the area of responsibility entrusted to the executive.' Here he said that the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence.[8] And the limitations of the appellate process meant that the Commission was prevented from saying that although the Home Secretary's opinion that Rehman was actively supporting terrorism in Kashmir had a proper factual basis, it did not accept that this was contrary to the interests of national security.

Secondly, Lord Hoffmann said that the Commission could reject the Home Secretary's opinion on the ground that it was 'one which no reasonable minister advising the Crown could in the circumstances reasonably have held'. Thirdly, he said that an appeal to the 'Commission may turn upon issues which at no point lie within the exclusive province of the executive'. His example was the question whether deporting someone would infringe his rights under article 3 of the *European Convention of Human Rights and Fundamental Freedoms* because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. Lord Hoffmann said that the 'European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights

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7 *Rehman* HL, 139 ¶ 50. Hoffmann had set the stage for his judgment in *Rehman* in 'A Sense of Proportion' in M Andenas and F Jacobs (eds), *European Community Law in the English Courts* (1998) 149. See, especially, 153, the unjustified claim that 'In the hierarchy of values which the courts apply, the security of the State always wins'; and see also 158-9.

8 *Rehman* HL, 140 ¶ 54. He relied on Lord Scarman's analysis (by reference to *Chandler v DPP* [1962] 3 All ER 142, [1964] AC 763) in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 406; hereafter *GCHQ*. At 406-7, Scarman said that once the factual basis of a claim about national security is established by evidence, the courts will accept the opinion of the government as to what is required to meet it, unless the opinion is one which 'no reasonable minister advising the Crown could in the circumstances reasonably have held'. He also claimed that this test did not demonstrate an 'abdication of the judicial function', but rather respected a limitation entirely consistent with the general 'development of the modern case law of judicial review'. Lord Steyn seemed a little ambivalent on this point in *Rehman* HL – see his oblique comment about *Chandler* at 134-5 ¶ 31.

under article 3. If there is a danger of torture, the Government must find some other way of dealing with a threat to national security. Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative.'[9]

Lord Hoffmann closed his judgment with this remarkable passage:

> *Postscript* – I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.[10]

In a similar vein, Lord Steyn said that the 'dynamics of the role of the Secretary of State, charged with the power and duty to consider deportation on grounds of national security, irresistibly supports this analysis. While I came to this conclusion by the end of the hearing of the appeal, the tragic events of 11 September 2001 in New York reinforce compellingly that no other approach is possible.'[11]

However, there is another approach possible and the question is why the House of Lords and the Court of Appeal did not adopt it. This other approach would take seriously the fact that Parliament has set up a Commission, with review authority over both facts and law, staffed by a panel with expertise in law, immigration and national security and that the legislation responded to the fact that the prior statutory regime violated the human rights of individuals subject to decisions under its authority, in particular because the statute deprived individuals of an 'effective remedy'.

Rather than take seriously the legislative message in its context, the Courts chose to treat the new regime as a window dressing. Indeed, Lord Hoffmann used the fact of legislative response to the decision in *Chahal* to undermine the message, by relying on a syllogism whose major and minor premises are strikingly flawed. He reasoned, first, that courts generally had no business reviewing national security decisions, and second, that the

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9 *Rehman* HL, 140 ¶ 54.

10 Ibid 142 ¶ 62.

11 Ibid 133 ¶ 29.

Commission was such a court because it had been created in response to the criticism in *Chahal* that deportees required an adjudication of their case before a 'court'. Thus he concluded that the Commission did not have the authority the statute seemed to give it.[12]

But not only is it far from clear why courts inherently lack authority to review national security decisions, but the Commission was not composed of generalist judges. Rather, it was composed of one such judge and two experts, to whom one might argue a generalist court should consider deferring. Surely, the point of the new scheme was not to establish an ineffective body, a 'court' with no real review authority, but to set up a body capable of delivering an 'effective remedy'.

The question why this alternative approach was not adopted becomes even more pressing when one notes that Lord Steyn and Lord Hoffmann are two of the judges responsible for articulating the principle of legality which lies behind that other approach, a principle which, in their view, requires that all executive acts be demonstrated to be justifiable in law, where law is assumed to include fundamental values. Thus in *R v Secretary of State for the Home Department, ex p Pierson*, Lord Steyn said that 'Parliament does not legislate in a vacuum' but 'for a European liberal democracy founded on the principles and traditions of the common law'.[13] And in *R v Secretary of State, ex p Simms*, Lord Hoffmann said that while Parliament can override fundamental rights, the principle of legality means that 'Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'[14] The puzzle is then why these two judges find that in some cases that they are driven to constitutional bedrock, which they find to be full of values and principles, while in others they find that the constitution amounts only to a very formal understanding of the separation of powers.

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12 Ibid 139 ¶ 49.

13 [1997] 3 WLR 492 at 518.

14 [1999] 3 All ER 400 at 412.

One response to this puzzle would be to point out that in the cases where the principle of legality was articulated, the people affected by the decisions were citizens of the United Kingdom whose fundamental rights – liberty, freedom of expression, and access to the courts – were affected by the executive decisions. But as Lord Slynn recognised in *Rehman*, Rehman's liberty was at stake and he had family in the United Kingdom.[15] Moreover, the argument about national security cannot be confined to the situation of someone who has not yet received resident or citizen status.

Suppose that argument is right and legislation is enacted that says that 'If the Secretary of State has reasonable cause to believe any person to be of hostile origins or associations or to have been recently concerned in acts prejudicial to public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.'

This statute reproduces the infamous wartime regulation 18B considered in the equally infamous decision of the majority of the House of Lords in *Liversidge v Anderson*.[16] The only protection detainees had was that they could make representations to an advisory committee, whose chairman had to inform them of the grounds of their detentions, so that they could make a case to the committee. The Home Secretary could decline to follow the advice but had to report monthly to Parliament about the orders he had made and about whether he had declined to follow advice.

In *Liversidge*, the issue was whether a court could require particulars about the grounds of a detention in order to test its validity and the majority held it could not despite the fact that the phrase 'reasonable cause' had been substituted for the 'if satisfied that' of the original regulations in order to head off a revolt in Parliament.[17] In the majority's view, if the minister

15 *Rehman* HL, 131 ¶ 22.

16 [1942] AC 207, hereafter *Liversidge*.

17 Liversidge's lawyer, D N Pritt, recounts in his memoirs that he brought an action for false imprisonment in order to test the ministerial practice of responding to Habeas Corpus applications by swearing an affidavit which simply asserted that the minister had reasonable grounds for his belief. That is, the plaintiff alleged that the defendant has without justification imprisoned him and so the defendant bore the onus of justifying the detention. Pritt says that the point was to get the minister to see that he could not 'slide out' by an affidavit, and therefore he would have to 'face up to the case, give his reasons, and let the Court judge of their reasonability.' 'At worst', the Court would clarify the matter by deciding that the words 'reasonable cause' did not 'carry the meaning they had hitherto carried'. He confidently expected a decision in his favour. D N Pritt, *The Autobiography of DN Pritt: Part One; From Right to Left* (1965) 304-7. See further A W B Simpson, *In the Highest Degree Odious: Detention Without Trial in*

produced an authenticated detention order, the detainee had the onus of establishing that the order was invalid or defective, basically showing that the minister had not acted in good faith.

Perhaps the House of Lords would today differ from the majority in *Liversidge* by holding that, in the absence of any explicit statutory indication to the contrary, a detainee is entitled to a hearing at which he can contest the grounds for his detention and perhaps even to reasons for a decision to continue to detain him. But unless the grounds revealed at the hearing or the reasons given disclosed that either the policy or the decisions in terms of that policy are perverse, 'one which no reasonable minister advising the Crown could in the circumstances reasonably have held', the Court, as the House of Lords in *Rehman* tells us, would not review.

The perversity test is the test of *Wednesbury* unreasonablenesss, articulated by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation.*[18] Lord Greene said that discretions were reviewable when unreasonably exercised, where unreasonableness means that the act is 'so absurd that no sensible person could ever dream that it lay within the powers of the authority.' To illustrate what he meant by absurdity, Lord Greene adopted the example of the 'red-haired teacher, dismissed because she has red hair'.[19]

Now, *Wednesbury* unreasonableness is often thought of as an important step in the development of the modern law judicial review because it suggested that there were controls on discretionary authority. But, as Stephen Sedley has pointed out, we should not regard *Wednesbury* as a 'sudden flash of light' representing the 'modern sea change in public law', but as of a piece with the majority in *Liversidge*, and thus exemplifying 'the state of torpor into which English public law had descended by 1948.'[20]

Put only slightly less politely, *Wednesbury* unreasonableness is a judicial cop-out, something illustrated not only by the facts of *Wednesbury* itself, where the judges did not find that the perversity test was met although the facts cried out for review,[21] but also by the allegedly important restatement of the test by Lord Diplock almost 40 years later, in *GCHQ*,[22] as well as by almost every important decision on security issues since Word War II.

Wartime Britain (1994) ch 17.

18 [1948] 1 KB 223, hereafter *Wednesbury*.

19 Ibid 228-9.

20 'The Common Law and the Constitution', in Lord Nolan and Sir Stephen Sedley, *The Making & Remaking of the British Constitution* (1997) 19; and for the point about *Liversidge*, see 20.

21 The defendants had barred entry to the cinema of children under 15 on

For in these decisions, the judges claim that they do have a review authority and so they do not take refuge in claims about non-justiciability. But they say that they will not exercise their authority because the facts do not require this, either because the decision is not perverse enough or because the minister's say-so is enough. And when they take the second option, they show themselves unperturbed by Lord Atkin's sarcasm in *Liversidge* about judicial Humpty Dumptyism. This keeping-one's-powder-dry approach, one day but not today, is often indicated by the double negation which judges resort to as they proclaim their commitment to upholding the rule of law at the same time as they fail to find constraints on executive action – 'it is not that we will never come to your aid'. Moreover, it is not clear that they even think that what they would be doing on the day is upholding the rule of law. The perversity test is not, Lord Diplock said in *GCHQ*, to be understood as a test for illegality.[23]

In sum, even if there is a hearing in which the government has to meet a duty to give reasons, unless the court will evaluate the reasons on a test more exacting than a perversity test, the duty to give reasons will turn into something like a charade, especially if the government's say-so about policy determines what will count as a reason. So Lord Woolf was right that the two issues – policy about national security and decisions about what fell within the scope of that policy are intimately connected. But the Commission was right that this line of reasoning made little sense of the elaborate statutory response by Parliament to the European Court's decision in *Chahal*. The majority's reasoning in *Liversidge* continues then to dominate the House of Lords and the Court of Appeal when national security is in issue.

The same tendency has manifested itself in the Canadian Supreme Court. In *Baker v Canada*[24] the Supreme Court held, relying on the common law of judicial review, that an act of discretion that would in the past have been thought by many judges and administrative lawyers to be

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Sundays, purporting to act in terms of a statute which empowered local authorities to license cinemas for Sunday performances.

22 Above n 8, 410-11. The minister had banned national unions from operating at GCHQ – part of the United Kingdom's security apparatus. Review was sought on the basis that the unions had not been given a hearing prior to the decision. The government argued that this decision was not reviewable, because the source of the minister's authority was not a statute, but the prerogative. The judges disagreed, holding that the exercise of the prerogative power is in principle reviewable. But they then went on to hold that all the minister had to do to demonstrate that there were national security considerations sufficient to justify his decision was to say that in his view this was the case.

23 Ibid 410-11.

24 (1999) 2 SCR 817, hereafter *Baker*.

pretty much 'unfettered' by rule of law considerations was subject to the rule of law. Here the authority under review was one to stay a deportation order if, in the discretion of the official, this stay was required on 'humanitarian and compassionate' grounds.

The Court said that:

> [D]iscretion must ... be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v Duplessis*, [1959] SCR 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian Charter of Rights and Freedoms (*Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038).[25]

In addition, the Court established a common law duty to give reasons for decisions whenever an official decision affected important interests, so that the onus fell on the official who made the decision to show he or she had taken rule of law values as well the statutory considerations properly into account and made it clear that where important rights and interests were at stake, it would not be sufficient for the official to show that attention had been given to the interests; the reasons had to demonstrate that appropriate weight had been given.

Finally, the Court stated that it was high time for judges to regard review of discretionary authority in the same light as review of administrative interpretations of the law – the regime of legality which governs the administration is the same. The standard of review the Court found to be appropriate in this case was that of 'reasonableness *simpliciter*' – a standard more intrusive than the Canadian equivalent of *Wednesbury* unreasonableness (patent or manifest unreasonableness). In this regard, the majority of the Court, two judges dissenting, held that in determining what was reasonable the Court could legitimately have regard to the values of unincorporated though ratified human rights conventions and it seemed that the special contribution the convention made – the *Convention on the Rights of the Child* – was in regard to how the official had weighed various factors in refusing the stay.

However, in *Suresh v Canada (Minister of Citizenship and Immigration)*,[26] the Court seems to have retreated from its position. Here the review was of the Minister of Immigration's decision to deport a Convention refugee when he had been determined to be a danger to the security of Canada because of his membership of a terrorist organisation, despite the fact that he faced a substantial risk of torture on his return to his native country – Sri Lanka. Canada's terrorism bill – its own panic-driven

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25 Ibid 853-4.

26 (2001) SCC 1, hereafter *Suresh*.

reaction to 11 September 2001 and to American pressure – was at the time hotly being debated and the Court took the opportunity to state its recognition of the legitimacy of a new legislative response to terrorism. It also wanted to state its fidelity to the rule of law, saying that it would be a 'Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to values that are fundamental to our democratic society – liberty, the rule of law, and the principles of fundamental justice – values that lie at the heart of our Canadian constitutional order and the international instruments that Canada has signed.'[27]

But the Court's allegiance to the rule of law is manifested only in that it imposed a duty to give reasons and to allow a hearing. In other respects, *Baker's* jurisprudence is undermined because the Court explicitly adopted Lord Hoffmann's claim in *Rehman* that 11 September underlined the need to give ministers an unfettered discretion when it comes to the determination of national security.[28] The Court thus held, contrary to the majority's reasoning in *Baker*, that L'Heureux-Dubé J, who wrote that judgment, had left the issue of the weight to be accorded to the legally relevant factors entirely to the minister. *Suresh* puts forward an understanding of weight and the role of the courts on review that is driven explicitly by the same formal understanding of the separation of powers expressed by Hoffmann in *Rehman* and which had driven the partial dissent in *Baker*.[29]

The charge that the House of Lords and the Supreme Court of Canada have resiled from the rule of law presupposes an understanding of the rule of law in which the law that rules is not just positive law; the law includes values and principles to do with human dignity and freedom. It also presupposes that judges are the ultimate guardians of those values. These presuppositions are controversial both because the claim that law necessarily has a content of this kind has been resisted by legal positivists from Thomas Hobbes[30] through to H L A Hart and because, on certain formal conceptions of democracy, this conception of judicial role is illegitimate since it is a license for judicial usurpation of legislative authority.

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27 Ibid ¶ 4.

28 Ibid ¶ 33.

29 The Court differed from the House of Lords in its holding that the decision about risk of torture is subject to no greater scrutiny than the decision about risk to security. This holding makes its reasoning both more consistent and worse.

30 In David Dyzenhaus, 'Hobbes and the Legitimacy of Law' (2001) 20 *Law and Philosophy* 461, I argue that this understanding of Hobbes requires significant qualification.

Recall, however, that it is not controversial among many contemporary judges, at least when they are not involved in review of national security. Controversial for them, as we have seen, is only that that conception of the rule of law operates in the national security context, although it is important to note that there was a time, and perhaps that time has returned, when exactly the same thoughts were expressed by judges about the immigration and refugee context and that *Baker* was seen as an important decision in part because it made it clear that those with fragile legal status are right-bearing individuals, with a claim to the protection of the rule of law.[31] I will now argue that we can sort out these issues in descending order, that is, by starting at the level of legal theory and finishing with the issue of what the rule of law requires when it comes to judicial review of national security.

Legal Theory and the Rule of Law

Most contemporary legal positivists writing today put forward a thesis with which I have to mention before my argument can get started. I call this the 'practical irrelevance' thesis, since its consequence is that legal positivism's understanding of the nature of law is irrelevant to any practical issue that might face a judge or any individual who is concerned to work out what their legal duties are and how to resolve any conflict that might arise between those and other duties within their moral horizon. The practical irrelevance thesis follows from these positivists' main thesis about the nature of law, which is a 'sources thesis' – whether a law is a valid law of a particular legal system depends on its sources, not its merits.

But, or so the position states, this sources thesis does not make any claims about the correct lines of separation between the powers, it does not give rise to any prescriptions about adjudication, it does not rule out claims about necessary connections between law and morality, it is perfectly consistent with a theory of the rule of law that claims that the law that rules is chock-full of value and with theories of adjudication that say that when judges decide hard cases by reference to these values that their value-based decisions are fully determined by law.

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31 See, for example, Richardson J in *Ashby v Minister of Immigration* (1981) 1 NZLR 222 at 231: 'Immigration policy is a sensitive and often controversial issue. The national interest does not readily lend itself to compartmentalisation of the amalgam of considerations involved, and the isolation of particular aspects of foreign and/or domestic policies as obligatory considerations which may properly but need not be taken into account. It may be due to considerations of this kind that Parliament elected to confer the discretion under s 14 in the widest terms.'

Now why anyone should bother with a doctrine about the nature of law of no use to anyone concerned with the role of law in our lives is a mystery and one which is not solved by vague and wholly unsubstantiated references to social science, as in recent work by Jules Coleman,[32] or by such dark pronouncements as that recently made by John Gardner: 'To be exact, legal positivism explains what it takes to be legally valid in the thin *lex* sense, such that the question arises of whether it is also legally valid in the thicker *ius* sense, i.e., morally binding *qua* law.'[33]

Indeed, if we accepted Gardner's recent restatement of legal positivism, we would have to conclude that H L A Hart, one of the most careful philosophers of law when it came to language, was under some kind of delusion in the opening pages of 'Positivism and the Separation of Law and Morals', when he said that the distinction between law as it is and law as it ought to be is the central idea in the history of legal positivism and one worth holding onto if we want to pluck the natural law mask of mystery from the law so as to enable the good citizen and the good judge to make better decisions.[34]

We would have, moreover, to forget that positivism has a history, so that it is irrelevant to legal positivism that some legal positivists – 'one thinks particularly of Bentham' – 'happen to be enthusiasts for limiting the role of judges in developing the law'.[35] Similarly, one has to forget that Austin quite deliberately departed from Hobbes's and Bentham's attempt to construct understandings of legal order and the rule of law in accordance with a formal doctrine of the separation of powers for political reasons. Austin, that is, sought to reconcile legal positivism with a legislative power in the judiciary, because he was disillusioned with the capacity of the multitude to be instructed in 'political science', and so wanted the check of

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32 Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (2001) 200-1.

33 John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199, 227.

34 H L A Hart, 'Positivism and the Separation of Law and Morals', in Hart, *Essays in Jurisprudence and Philosophy* (1983) 49, esp. 50-6, 67-8, 74-5. Gardner's claim at 205-6, above n 33, that Hart recognised a necessary connection between law and morality in the requirement of legality that like cases be treated alike is a rather too quick reading of Hart's comments at 80-1 of the essay and I suspect of H L A Hart, *The Concept of Law* (1961), ch 8. While Hart is not unambiguous at these points, his main claim seems to be that the requirement is only a moral one if the precedent is a morally good one, since to repeat a moral mistake is generally to make things worse. In other words, the like cases alike requirement in and of itself is not intrinsically moral. For further evidence, see Hart's critique of Dworkin in H L A Hart, *Essays in Jurisprudence and Philosophy* (1983).

35 Gardner, above n 33, 213.

a judicial elite on the legislature.[36] However, all I can do is mention this camp in legal positivism. There is no way of engaging productively with its claims other than by pointing out that, to the extent that it claims anything, what it claims is best explained as the pallid remainders of earlier vibrant, political projects.

So the positivism with which I will engage is one which holds that for democratic reasons legislative power should be located in the assembly of the people, and, insofar as this is possible, judges should interpret the law in accordance with the intentions of the legislature as expressed in its statutes, and the executive administration should confine its role to implementing the statutes within the legal limits set by the legislature. This kind of positivism, 'democratic legal positivism', requires that the content of law be identifiable in accordance with tests that do not rely on the interpreter's own moral sensibilities because it wants to reserve the power to make legally enforceable moral judgments to the people. In short, the formal doctrine of the separation of powers is adopted for political reasons.

The formal doctrine is not, I hasten to add, crude – a charge often levelled by contemporary positivists in the practical irrelevance camp. Democratic positivism is far from denying that – in Hobbes's words – "'All Laws, written, and unwritten, have need of Interpretation". It just attempts to minimise the occasions of interpretation and to mitigate the legal consequences of the necessity of interpretation, by, for example, not granting judicial determinations of the law any precedential effect. Indeed, it is exactly positivism in this sense – an account of a theory of law within a political tradition – that explains why the *Human Rights Act 1998 (UK)* confines judges to making a finding of incompatibility with the statute when they find that primary legislation is inconsistent with the Act, thus leaving it to the political branch to decide how to respond to such a finding.

My claim here is not that all democratic legal positivists will be happy with this device. Some democratic legal positivists, for example, Tom Campbell, James Allan and Jeremy Waldron, think that legal positivism remains in tune with its democratic commitments only if it advocates against any legislative incorporation of moral values and principles which might invite judges to test the validity of law against such values. Such incorporation, in their view, is an abdication of the right of the people and so should not be undertaken for the same reasons that one should not exercise one's liberty to make choices about how best to live by selling oneself into slavery. Others, most notably Jeffrey Goldsworthy, do not find judicial review on the basis of values explicitly incorporated into

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36 For discussion, see David Dyzenhaus, *Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991) 228-36.

law by statute a complete anathema, as long as the last word is reserved to the people.[37]

I will return to this division within the democratic legal positivist camp later, as I want for the moment to focus on the problems encountered by judges of democratic legal positivist bent[38] by the fact that their legal order contains legal resources – repositories of legal value – beyond statutes, because it has not been reformed in the radical fashion envisaged by Bentham.

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37 See Jeffrey Goldsworthy, 'Judicial Review, Legislative Override, and Democracy', forthcoming in Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone (eds) *Protecting Human Rights: Instruments and Institutions* (2003). This debate is a highly interesting one in contrast to its poor relation in the practical irrelevance camp between so-called hard and soft positivists.

38 I do not mean to suggest that judges of this bent are democrats by conviction. While some of them may well be, what judges of this bent share is the view that in their legal order the basis of judicial review is the monopoly Parliament has on making law, a monopoly which exists for democratic reasons, whether or not the judges themselves endorse such reasons. The view cashes out in a positivistic understanding of authority, which requires that law be interpreted without regard to moral values other than those expressly incorporated by the law-making authority. Since this understanding of law not only can operate, but is supposed to operate, in a way that is detached from any normative basis, including the normative basis of legal order, it can operate just as well in undemocratic legal orders, for example, apartheid South Africa – Dyzenhaus, above n 36. Indeed, such judges are better described collectively as formalist or positivist, since what unites them is the thought about Parliament's monopoly on making law, rather than their endorsement of a particular set of reasons for holding that view of the constitution of legal authority, legal positivists in the practical irrelevance camp are unperturbed by the fact that practising lawyers commonly describe as positivist the style of judicial reasoning which the majority of judges of apartheid South Africa took over explicitly from the majority in *Liversidge* for the adjudication of security matters, since they hold, as we have seen, that positivism gives rise to no particular theory of adjudication – see Gardner, above n 33, 211-14. But this claim, like others made by positivists in this camp, sits uneasily together with the claim they also make that they are making sense of the concept of law presupposed by its practitioners. However, it is important to note that these positivists, especially those who adopt a 'hard' or 'exclusive' position in regard to whether value-based conclusions about the law are authentically determined by law, preserve an understanding of the role of law which floats free of democratic commitments. They thus preserve an understanding which has an interesting affinity with the understanding deployed by positivistic judges in undemocratic legal orders, despite the fact that they would attempt to disown such judges on the basis that legal positivism has no theory of adjudication.

Suppose that there is no general statutory invitation to judges of such bent to test either legislation or executive action against moral values, so that the formal tests for the validity of statutes are simply criteria of manner and form and for the validity of executive action just those criteria explicitly stated in the particular statute. Suppose also that these judges operate within a legal order where their legislature, although it has achieved supremacy some centuries back, has not done away with the common law resting, as it were, content with the thought that lawyers and judges accept that any statute that is valid according to the formal criteria of validity overrides any judicial decision about the requirements of the common law.

Such judges will adopt the familiar canon of statutory interpretation that when the legislature expresses itself clearly on a topic, judges must implement its will, but when there is ambiguity, they may – perhaps are even under a duty – to clarify that ambiguity by resort to other sources of legal value, for example, the common law.[39] And as the history of judicial review attests, statutory grants of discretion, especially if they were couched subjectively – 'if the minister is satisfied that ...' – were held to be unambiguous. Unless the statute expressly prescribed controlling criteria, the minister was a 'law unto himself'.

Democratic legal positivism, in other words, leads in these circumstances to the position known as dualism, where it is acknowledged that there are other sources of legal value besides statute law, the common law, international law, and so on, but these sources play a subsidiary role in statutory interpretation. And it leads to this position not only because of the happenstance that even in the heyday of legislative supremacy – the rule of the as uncommanded as possible commander – legislatures in the common law world did not eradicate the common law or other sources of law. It leads to this position by necessity, first, as positivists have to concede, because a staff of officials is required to perform the task of interpretation, and, second, because those officials regard their interpretations as legitimate only if these are firmly based in the law, which is to say, only if an argument can be made, no matter how controversial, in which all the reasons are legal reasons – reasons derived from legal materials including but by no means confined to statutes.[40]

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39 Such judges equivocate about whether ambiguity presents an opportunity to resort to the other legal resources or whether they are under a legal duty so to resort. The equivocation might well come about because the latter attitude seems a further step down the slippery slope to the idea of interpretative obligation described below.

40 For a long time the common law failed to require that judges give reasons for their decisions, a rather large anomaly. But the common law tradition always adopted the fiction that judges do not make law, so it assumed not only that judges had reasons, but also that these were fully determined by

Democratic legal positivists should not, however, want to account for this second feature of legal order – the requirement of reasoned justification according to law– because, from their perspective, to the extent that resolution of ambiguity is necessary, it matters more that it is resolved than how it is resolved.[41] It is not that the content of what the judge decides is unimportant, but whether the judge arrives at the result by purporting to find complete support in legal materials or not is irrelevant to evaluation of the result. Indeed, democratic legal positivists should want to resist the judicial claim – the 'childish fiction' – that judges' interpretations are fully determined by law, since that claim contains the seeds of judicial usurpation of the legislative role, of judges' asserting that their interpretation should prevail even when absent the common law, international law, the human rights statute, or whatever other legal resource they appeal to, they would have reached a different conclusion. And it is the concern about usurpation that led Bentham in his mature work to struggle to find a constitutional mechanism that would both strip judicial decisions of legal force beyond the parties, thus allowing the judges to do justice in the particular case in accordance with their perception of the utilities without affecting the law, and provide the judges with the resources to bring to the legislature's attention defects in the law. That is, Bentham and Hobbes before him were fully aware that the integrity of positivistically conceived legal order requires a conception of judicial role in which the judicial role is little if at all different from the role ascribed to administrative officials by formal accounts of the separation of powers.[42] It might even be more accurate to say that a positivistic – and truly formal – account of the separation of powers should make space for only two powers – the law-making authority and the staff of officials who implement the law. For the addition of the extra power in an independent staff of judges – independent from both the legislature and the administration – makes sense only if one supposes that judges have a role in enforcing legality – the rule of law – that goes beyond the application of statutes.

For this reason, section 3(1) of the *Human Rights Act* should be resisted by democratic legal positivists, as it requires judges to interpret legislation '[so] far as it is possible to do so ... in a way which is compatible with Convention rights'. For the section imposes an interpretative obligation on judges – it requires them to interpret in the light

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the law.

41 The practical irrelevance camp have no such qualms, because for them, anything goes.

42 See Gerald J Postema, *Bentham and the Common Law Tradition* (1986), ch 12, including the Appendix at 434-9. As Postema argues, Bentham's requirement of publicity and transparency of judicial reasoning would likely result in the decisions becoming a source of law despite the formal requirements to the contrary.

of their understanding of the *European Convention of Human Rights and Fundamental Freedoms*, which might result in very different interpretations from those they would have reached in the absence of this requirement.

The move from the position that non-statutory repositories of legal values might play a role in resolving ambiguity to the position that there is an interpretative obligation to try – 'so far as it is possible to do so' – to interpret statutes in light of such values is immensely important.[43] To quote again from Stephen Sedley, it adopts the 'postulate' that there is a 'total legal order of which Parliament is only a part', and thus takes a 'giant step' towards a system in which 'Parliament is not the donor but the trustee' of 'fundamental freedoms'.[44] Legal positivism's compromise through dualism with the common law and other legal resources, a compromise produced by the failure of Bentham's total project, is rejected together with the formal doctrine of the separation of powers.

Now Sedley mentions in support of these claims important articles by Lord Woolf and Sir John Laws.[45] And this returns me to the puzzle posed earlier, since it was, recall, Lord Woolf who gave the Court of Appeal's judgment in *Rehman*.

The point here is not that the mere existence of formally peremptory sources of legal value other than the particular statute which the judge has to interpret by itself gets rid of dualism. The jurisprudence of the former Chief Justice of Canada, Antonio Lamer, and of the dissenting judges in *Baker*, shows that dualist judges will try to deal with legislative constitutionalisation of values by limiting the scope of their application and then finding – for formalist separation of powers reasons – that the values have no role to play outside those limits unless there are ambiguities that have to be resolved.[46] But for judges like Woolf, Steyn and Hoffmann, the legislative constitutionalisation of values is only a step that makes explicit what was already implicit in the common law – a moment when the legislature recognises that it is but part of legal order with a bedrock of values and principles. And it is that same idea which underpins the conclusion the Supreme Court reached in *Baker* that discretionary grants of authority are subject to the law, to the rule of law, where the rule of law includes fundamental values.

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43 See Murray Hunt, *Using Human Rights Law in English Courts* (1997), esp, chs 1 and 8.

44 Sir Stephen Sedley, 'The Constitution in the Twenty-First Century', in Nolan and Sedley, above n 20, 79 at 85.

45 Ibid, note 21, referring to Lord Woolf, '*Droit public* – English Style' [1995] *Public Law* 57, Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72. Note that Laws concurred with Woolf in *Rehman* AC.

46 See David Dyzenhaus, 'Constituting the Rule of Law: Fundamental Values in Administrative Law' (2002) 27 *Queen's Law Journal* 445.

It was of course never the case that judges said that discretionary authority was without legal limits. Such authority was a law unto itself only within a certain scope. Moreover, they were, as we have seen, given to announcing that they would come to the aid of an individual when the decision was truly perverse or not in good faith, etc. But absent a duty to give reasons, and with the onus on the individual to show, for example, that the reason for her dismissal was her hair colour, these constraints were largely illusory and it was unclear what their basis was. In my view, *Wednesbury* unreasonableness – and any other perversity test[47] – is evidence of the fact that while judges are discomforted by their sense that the rule of law does not control a range of decisions, they are still unwilling to overcome their constitutional, separation of powers driven, formal instinct against asserting the postulate that Parliament is but part of a total legal order.

And that discomfort is made even deeper by the fact that for a democratic legal positivist, the twentieth century seems in retrospect hardly the triumph of democratic politics. For these positivists, the legitimacy of law comes from the fact that its content is hammered out on the anvil of public opinion, with the hammers wielded by the people's representatives to whom government is accountable. But instead what we have is the growth of governmental power, so that law becomes the vehicle by which the government delegates back to itself the power to make policy for which it will be accountable only at the next election. Rather than legislative supremacy, we have executive supremacy.

Still when judges reduce themselves, in Stable J's memorable words on the judicial reaction to Regulation 18B, to 'mice squeaking under a chair in the Home Office',[48] they say 'don't worry, democracy will take care of any problems'. Recall here Lord Hoffmann's words: 'such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.'

It was precisely because judges came to realise both that most of the legal action in society – the place where the citizen bumped against the law – happened in citizen's interactions with administrative officials rather than with courts, and that accountability of these officials to Parliament was largely a myth, that they began to craft the modern common law of judicial

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47 For example, the 'puke test' – 'I'll only review if the decision makes me want to puke' – attributed to Oliver Wendell Holmes.

48 Stable J, quoted in RVF Heuston, '*Liversidge v. Anderson* in Retrospect' (1970) 86 *Law Quarterly Review* 33 at 51.

review. But the idea that politics happened appropriately elsewhere than in courts is a tenacious one, and so where judges could not claim that they were engaged in an ordinary exercise of interpretation of the law, they imposed controls that they understood as procedural rather than substantive in nature.

At one level, imposing such controls, for example the *Ridge* v *Baldwin*[49] idea that all administrative officials must act fairly even when the statute is silent, is against the spirit of democratic legal positivism. For that position holds that when an official is delegated discretionary authority, the only controls appropriate on discretion are those expressly stated by the legislature. At another level, these controls can be justified as democratic in nature, since they both permit participation in the decision by the individual affected by it and make the official accountable. But for democratic legal positivists, the second level is prohibited terrain. Judges are not supposed to reach beyond the statute to their sense of the democratic values that legitimate statutes in order that they might give expression to those values.[50] Thus the judges of the same bent try to manage the tension they experience in this regard by relying on a distinction between process and substance, one which holds that procedural controls are fine because they control the way in which decisions are made, while leaving the content of the decisions entirely to the discretion of the official who has authority.

It is not, then, that the process/substance distinction is consistent with democratic legal positivism, but that, like dualism, it is not too inconsistent; it permits judges to keep a grip on their sense that they are leaving political decisions to be made in the proper forums, either by Parliament or by Parliament's delegates. *Wednesbury* unreasonableness is, I think, the product of the same sorts of factors. And this is so even when the test operates in a context in which there is a legal duty to give reasons, or where the courts find that certain factors, though not specified by the statute, are mandatory relevant factors – ones which have to be demonstrably taken into account on pain of invalidity. For *Wednesbury* unreasonableness at its most powerful amounts to a kind of check list of factors; as long as the official's reasons tick each box the court will not review, since to go further would be to interfere in substance. It turns what appears at first sight to be a

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49 [1964] AC 40.

50 It is only, I think, this political prohibition that can make sense of the otherwise very puzzling doctrine of authority developed by Joseph Raz. Raz's doctrine of authority is an elaborate conceptual defence of Hobbes's distinction between command and advice, but the conceptual defence makes sense only when it is located within a political theory which, whether for Hobbesian or Benthamite reasons, stipulates that one of the marks of authority is that the content of an authoritative directive can be worked out without engaging in moral argument.

substantive, legal limit on abuse of discretionary authority into something much more procedural in nature – as long the minister goes through the motions, the decision stands.[51]

Any invitation to engage in more intrusive review will, so democratic legal positivists think, lead judges inexorably into reviewing substance, which is why, in *R v Home Secretary, ex p Brind*, Lord Lowry said that the reason for common law judges to reject the proportionality doctrine developed by the European Court of Human Rights is that 'there can be very little room for judges to operate an independent judicial review proportionality doctrine which is left between the conventional judicial review doctrine and the admittedly forbidden appellate approach. To introduce an intermediate area of deliberation for the court seems scarcely a practical approach.'[52] And it is exactly this aversion to substance that initially led the Court of Appeal to describe Sedley J's venture into the protection of substantive legitimate expectations as 'heresy',[53] though it has now accepted his position in a pathbreaking judgment of Lord Woolf's, which – to recall the puzzle I am addressing – is reported in the same volume of the *All England Reports* as his decision in *Rehman*.[54]

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51 For analysis, see Jeffrey Jowell and Anthony Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] *Public Law* 368. In recent work, Jowell argues that 'process' (the way decisions are justified) should be distinguished from 'procedure' (mechanisms of participation) – Jeffrey Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review', in Christopher Forsyth (ed) *Judicial Review & the Constitution* (2000) 327. But what they have in common if substance is on the other side of either term is the claim that what the judges are doing is avoiding meddling in substance. I suspect that Trevor Allan is right that Jowell's more recent work signifies a rather formalistic retreat from his earlier position – see T R S Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry? (2002) 61 *Cambridge Law Journal* 87, 93-5; and for evidence that Allan is right, see Jeffrey Jowell, 'Administrative Justice and the New Constitutionalism in the United Kingdom', in Hugh Corder and Linda Van De Vijver (eds), *Realising Administrative Justice* (2002) 78, where at 92 he expresses his agreement with Lord Hoffman's judgment in *Rehman* HL.

52 [1991] 1 AC 696 at 767.

53 *R v Home Secretary, ex p Hargreaves* [1997] 1 WLR 906 at 921, reacting to *R v Minister of Agriculture, Fisheries and Foods, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714.

54 *R v North and East Devon Health Authority, ex p Coughlan* [2000] 3 All ER 850.

Normalising the Exception

The factor that explains this puzzle has, in my view, a lot to do with the idea of the prerogative as not only a legally uncontrolled area of pure politics, but a legally uncontrollable or non-justiciable area. It is no accident that Lord Hoffmann in *Rehman* seemed at one point to suggest that when it comes to decisions about national security, the executive has a 'constitutional prerogative'.[55] And one can find similar pronouncements by judges about the control of immigration, in the face of the creation of elaborate legal machinery by parliaments and the ministries to deal with the range of decisions on this topic. The thought here is that a very wide discretionary authority is naturally apt for matters of high political importance, especially where the official directly responsible for the decision is the relevant cabinet minister. It is that thought that animates the majority in *Liversidge* when they discount the fact that the regulation said 'reasonable grounds', a replacement for 'if satisfied that ...'. And it is that thought that leads the Court of Appeal and the House of Lords in *Rehman* to read down the explicit statutory mandate given to the Commission.

Contrast in this regard L'Heureux-Dubé J, dissenting in the Supreme Court of Canada, in a case where the issue was whether the 'recommendations' made by a committee to a minister were binding, when the committee was put in place by statute to review decisions about security risks taken by Canada's security establishment:

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.
>
> The ... Review Committee was established for various reasons. Its most important role is probably that of a watchdog agency over the Service, and its reports serve to alert the public of ... misdoings and errors. But the Committee also functions as the *only* means of redress available to a candidate whose employment has been blocked by a flawed ... report. It is doubtful that Parliament would

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55 See *Rehman* HL, the text quoted above n 9. In fact, Lord Hoffman said that when it comes to decisions about risk of torture, the executive 'enjoys no constitutional prerogative', but by direct implication he must have thought that in respect of national security, the executive does have such a prerogative.

> have set up this elaborate structure for review if a deputy minister could lightly disregard its findings and rely upon the original and mistaken ... report to make his or her decision.[56]

There is a profound point to her dissent in this case, which is an important precursor to her reasoning for the majority in *Baker*. It is that the modern law of judicial review is explainable as the control of power which in general was thought to be legally uncontrollable. One only has to recall here the days when judges would not review most acts of discretion on any grounds, because these were deemed to be on the administrative side of a distinction between quasi-judicial and administrative decisions.

During this time, discretionary authority was viewed by judges in much the same way as they viewed the prerogative, as a normative void, an exception, as Carl Schmitt, the authoritarian legal philosopher would have termed it – a moment of pure politics, either uncontrolled or largely uncontrolled by the rule of law.[57] When the discretionary authority was to make decisions which were not only previously made in exercise of the prerogative prior to their legislative capture, but were matters of high constitutional prerogative, judges had an extra reason for considering such authority uncontrolled and uncontrollable.

In other words, judges of a democratic legal positivist bent had an *a fortiori* argument for not imposing the rule of law on such decisions. They would not do so even if the decisions were altogether ordinary, but here they were about high politics. Nevertheless, the category of the truly exceptional only came properly into view when the ordinary exceptions were brought within the range of the normal. And this tells us why the judgments of the majority in *Liversidge* are of a piece with Lord Greene's judgment in *Wednesbury*. Hence, even when the class of the ordinary exception becomes controlled by the rule of law, and even when the prerogative is said to be so controllable despite the fact that there is no statute in sight, the class of the truly exceptional remains such, even in the face of explicit legislative indications to the contrary. Recall that the achievement of the European Court of Human Rights's decision in *Chahal* was to prompt Parliament to bring the kind of backroom advisory committee in play in respect of Regulation 18B and in respect of deportations on national security grounds – an equivalent of the absolute monarch's secret advisors – into the democratic, legislatively controlled, open.

This judicial process of normalising the ordinary exception did not always or perhaps even often happen in the course of a struggle with the

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56 *Thompson v Canada* (1992) 1 SCR 385, 418, her emphasis.

57 See David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (1997), ch 2.

legislature. In countries like apartheid South Africa, when the higher courts did not keep rule of law-minded judges of first instance in check, the legislature could be relied on to declare that the rule of law did not apply.[58] But in more benign places, legislatures have either failed to respond negatively or have even taken the process of increasing the scope of rule of law controls further. Indeed, as has been pointed out, there is a basis for saying that in the case of the duty to give reasons, it is the justice of the legislatures that has filled the silences of the common law.[59]

Moreover, if anything until 11 September 2001, the trend in countries experimenting with both democracy and constitutionalism for the first time was to give courts and other tribunals ever more say in the control of the conditions under which a state of emergency can be declared, and in the appropriateness of measures taken to deal with the emergencies, as well as decisions taken in furtherance of those measures. And that trend came about precisely because of the dismal first-hand experience of what happens when the executive uses the legislature to give itself a free hand in the suppression of political opposition.

In sum, the creation of tribunals like the United Kingdom's Special Immigration Appeals Commission is part of a general process of normalising the exception, of subjecting politics to the norms of the rule of law. While this process was generally initiated by judges, legislatures have often joined in, sometimes perhaps in order to try to wrest control over the administration back from judges, at other times because of the sense of a need to respond either to growing public concern about unconstrained executive power or to the successful activism of human rights groups. But whichever is the case, it is important to note that if publicity and transparency are considered to be democratic virtues, these legislative responses can be seen as belated attempts to reinvigorate the democratic ideal that underpins legal positivism, at least in its Benthamite form. Moreover, it is an invigoration that takes account of the changes in legal ordering brought about by creation of the administrative state.

Conclusion

The judicial tension I referred to at the beginning comes about when judges are torn between two conceptions of their role. On the one hand, they recognise that their role in legal order is to uphold the rule of law, where law includes more than statute law. On the other hand, they still cling to a formal conception of the separation of powers which deprives them of the

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58 For details, see Dyzenhaus, above n 36.

59 See J M Evans, H N Janisch, D J Mullan and R C B Risk, *Administrative Law: Cases, Text, and Materials* (4th ed, 1995), 502.

resources to uphold the rule of law. They resolve this tension by claiming that they are upholding the rule of law, at the same time as they tell the executive that it is a law unto itself. Even Lord Atkin's dissent in *Liversidge* can be seen as little more than an attempt by judges to shore up their institutional place in legal order as upholders of the rule of law without giving any real content to that role and so are little different in substance from the majority.[60] That is, had Lord Atkin's judgment attracted majority support, all the Home Secretary would have to do in response would be to offer bare reasons which the courts would be bound to accept and he could also withhold information on the basis that, in his opinion, it should remain secret. Given this, even absurd or perverse detentions like Liversidge's could survive judicial scrutiny, even in the face of a duty to give reasons, perhaps even in the face of a strict standard of judicial scrutiny if the reasons are both sparse and all that the judges can compel.[61]

A rather different perspective, however, opens up if one sees judges as involved in a process of giving substance or content to the rule of law in which the judiciary is but one of the drivers of the process. Even if the most that the judiciary could do is to require reasons and to evaluate them on a stricter standard than *Wednesbury* unreasonableness, and even if this would not by itself do away with perverse decisions when national security is the issue, things look a lot different when the legislature starts to cooperate in promoting the rule of law. So, once the legislature not only puts in place an expert tribunal, with panel members qualified to be a check on executive policy determinations, but also provides mechanisms for testing executive claims based on information which the executive says has to be kept confidential, judges are enabled to enforce the rule of law.

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60 Here I respond to Simpson's powerful argument, above n 17, that Atkin's judgment, and similar judgments in the lower courts, were hypocritical – the product of judges who cared about their place in legal order but not about liberty; see 330-1, 376-80, and especially, 418-22.

61 Liversidge was detained because he had lied about his background in order to join the RAF – his date and place of birth. He wanted to surmount the obstacle that a police file had been opened on him as a result of his business connection in 1928 with two brothers who were tried on a charge of conspiracy to defraud. See ibid 333-37. Simpson demonstrates that Liversidge's patriotic motives were impeccable as was his service before detention. But as his account also shows, Liversidge's business activities just prior to the war involved contacts with foreigners 'and no doubt some were dubious people'; in addition, he seemed to have some connection with British intelligence, passing information to them which he had gleaned in the course of his dealings (ibid, 335). It would thus have been open, I think, to the Home Secretary to give very bare particulars of the grounds for suspicion in regard to Liversidge's 'hostile associations' even though, as Simpson points out, the detention order for Liversidge was as close to an example of a detention in bad faith as one could find; ibid 421.

At least things look very different unless one is a democratic legal positivist of the sort who wants to resist legislative incorporation of values as a basis for judicial review, or a judge who regards it as antithetical to the judicial role for judges to meddle in politics on the basis of their sense of the constraints which fundamental, rule of law values should place on politics. If one takes that stance, the result might well follow that judges should and will read down the legislative invitation to engage in value-based review, when the review is of highly political decisions. In this case, judges decline the legislative invitation because to take it up would be to adopt a role which undermines their understanding of the proper arrangement of the separation of powers.

The problem is that legislatures are now retreating from the position of extending rule of law invitations and so we have to ask what the judicial reaction should be. When judges are faced with a terrorism statute, they confront a legislative attempt to achieve what was well-described by two academics critical of apartheid's security statutes as the 'permanence of the temporary'.[62] It is an attempt to bring the most exceptional exception – the state of emergency which temporally suspends the operation of ordinary law – into the stable framework of law and order. The governments that initiate such legislation might hope that judges will respond by taking a hands-off approach on review when they are confronted by these pockets of lawlessness. But, in light of the general normalisation of the exception, such governments will attempt to dress the introduction of the exception in the clothes of the rule of law, either because of their own commitments to the rule of law or for the cynical reasons that the more clothes one drapes on the exception, the less likely judges are to feel obliged to do something about it.

The very fact that the exception is brought within the law makes it susceptible to the rule of law – it gives to judges, *minded to do so*, the opportunity to impose the values of the rule of law on the administration. And that then puts the ball in the government's court – it can choose either to respond legislatively by saying explicitly that rule of law controls do not apply, or it can abide by the controls it assented to in choosing to govern through law.

However, the judges I've described as democratic legal positivists are not so minded.

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62 A S Mathews and R C Albino, 'The Permanence of the Temporary: An Examination of the 90- and 180- Day Detention Laws', (1966) 3 *South African Law Journal* 16. I deal in detail with their argument in 'The Permanence of the Temporary: Can Emergency Powers be Normalized?' in Daniels, above n 1, 21.

Moreover, as we saw with *Rehman*, judges whom one would have thought to be so minded seem to lapse into the formalism of democratic legal positivism when the legislature, far from indicating that the rule of law was not to apply, had constructed a sophisticated rule of law regime. Hence, enthusiasts of the rule of law should be fearful of what the same judges will do once they are in the business of interpreting the terrorism statutes of the new order. Here *Suresh* is probably a significant and depressing portent.

There are, in my view, two compelling reasons for judges to seek to maintain the rule of law in respect of national security, even in the face of legislative indications to the contrary. They have both already been mentioned. One is the rotten history that is the product of government decisions on such issues outside of the fabric of the rule of law assisted by judicial willingness to say that these decisions are in fact governed by law. The other is that one cannot, as Carl Schmitt rightly argued, confine the exception. If it is introduced into legal order and treated as such, it will spread. If the minister is a law unto himself in respect of national security, there is no principled reason to hold that anyone has a legitimate expectation, procedural or substantive, or for that matter to retain any of the entitlements that judges have crafted in putting together the modern law of judicial review.

I might of course be wrong that bad history repeats itself. Perhaps President Bush's understanding of global terrorism is right and we should step outside of the rule of law to deal with this threat, attacking it from the safety of our dejuridified laagers. But even if I am wrong on these points, judges remain under a duty to maintain the rule of law until their legislatures tell them explicitly that certain executive decisions are uncontrolled by law. Judges can then decide what they should do about an attempt by a highly constrained legislature, one that is but part of a total legal order, to create through law a pocket of lawlessness – a kind of legal void. Democratic legal positivism can offer no principled help to such judges. Even worse, its formal understanding of the separation of powers provides a highly convenient line of retreat for judges, one which permits them to maintain their sense of institutional role, even as they empty it of content.[63]

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63 Take for example recent work by Adam Tomkins. In Tomkins, above n 1, he provides an incisive and devastating critique of the illiberal face of the Blair government. Yet in 'Defining and Delimiting National Security' (2002) 118 *Law Quarterly Review* 196 he suggests that Lord Hoffmann's judgment in *Rehman* is fine despite the fact that its effect is that there is 'no review at all' because not only will the judges not review, but Parliamentary scrutiny is 'meagre'; 200-3. Indeed, he comes to this conclusion despite his claim in the first article that the decision by the House of Lords imposed 'further constraints' on the body Parliament had set up to supervise deportation

decisions on national security grounds, that is, constraints beyond any imposed by statute; see Tomkins, above n 1, note 62 at 218.

In a third piece, 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 157, Tomkins argues against a (strawman) target of 'liberal legalism', one which is 'atomistic' and supposes that all political problems can be solved by law, that politics should be 'celebrated': 'For politics is what makes us free. Indeed, politics is what makes us human', 172. Having relegated most of humankind to sub-human status, Tomkins then turns out to be a liberal legalist after all – the courts can play a valuable role he says as long as we see that the role of law is less embracing than (strawman) liberal legalism supposes, 174. What this role should be is far from clear, though, especially given his apparent approval of *Rehman*.