Hanneke van Schooten and James A. Sweeney[*]

DOMESTIC JUDICIAL DEFERENCE AND THE ECHR IN THE UK AND NETHERLANDS

INTRODUCTION

This article explores the interrelationship of domestic and international human rights law in the Netherlands and the United Kingdom, with reference to the European Convention on Human Rights (ECHR). The two jurisdictions offer a valuable comparison, in that the UK's dualist approach to international law has meant that it is only very recently that the ECHR has been directly enforceable in UK domestic law.[1] The Netherlands, meanwhile, appears to the English lawyer to present a completely different approach to international law, being based as it is upon a form of monism.

This comparative article explores the similarities between the Dutch and English systems, dispelling some of the myths surrounding their differences. In each system a nebulous notion that the courts ought not to interfere in broadly policy oriented quasi-legislative decisions is apparent, though the judicial approach to its outer limits is markedly different. In other words whilst the two systems appear opposed in logic because of their dualist and monist bases, they in fact have much to learn from each other.

The article begins by introducing the logic of dualism in the English constitution and identifies its source as respect for the legislative supremacy of Parliament. This has ramifications in respect of the extent to which, under the HRA 1998, judges have shown deference towards executive decisions rooted in long-term policies and the balancing of social values. In this regard the concept

[*] Hanneke van Schooten is senior researcher at the Centre for Legislative Studies, Tilburg University. James Sweeney is "City Solicitors' Educational Trust Fund Lecturer in Human Rights Law", Newcastle Law School, University of Newcastle (UK). James Sweeney gratefully acknowledges support from Newcastle University's "Arts and Humanities Research Fund" in conducting this collaborative work. Elements of an earlier draft of this paper were delivered at the Socio Legal Studies Association annual conference in Aberystwyth in April 2002.

[1] The situation of Scotland is slightly different to that in England and Wales due to the arrangements for devolution. *See* the Scotland Act 1998. This article will concentrate on the law of England and Wales.

of "proportionality" is discussed to highlight the difficulties faced by the judiciary in guaranteeing the standards of the Convention whilst remaining within their lawful province.

It is demonstrated that from their differing constitutional perspectives the two legal systems examined both struggle to delimit the precise stage at which it is defensible for judges to interfere with executive decisions or parliamentary rulemaking. Since there are similarities between the Dutch and English dilemmas, the English law can no longer blame its idiosyncratic constitutional heritage for the problems it faces. This frees the English judiciary to some extent, and thus in finally ensuring that European human rights are protected as a matter of domestic law lessons can be learnt from other European jurisdictions.

1 HUMAN RIGHTS AND DUALISM, AND THE ROLE OF THE JUDICIARY IN THE UK

This section of the article explains the dilemma of the judiciary in the UK when it comes to fully protecting European human rights in domestic law. Despite starting from a different position to the monist Netherlands, the English approach has similar drawbacks. Primarily, it has set the threshold for judicial intervention too high in human rights cases. The recent development in Dutch law (discussed below) that focuses upon whether the application of an international treaty to the case at hand is outside the judge's "lawmaking task" is comparable to the English judiciary's attempts to preserve the separation of powers in human rights cases shown here.

A pivotal example of UK's approach to protecting human rights since the enactment of the HRA 1998 is the controversial debate about the principle of "proportionality". Generations of English lawyers have perceived that the danger of using a proportionality test is that it draws the judiciary far too close to the *merits* of decision making, whereas in exercising its function of judicial review the courts should only be concerned with the *legality* of decision making. The ideological justification for this derives from the Bill of Rights 1689. The Glorious Revolution was earlier than most of the continental revolutions and did not have as profound an effect. The resulting Bill of Rights for the UK is not so much a matter of human rights but rather details the respective roles of the Crown and Parliament. The Bill of Rights set the ultimate law-making power in the UK in Westminster, and reduced the role of the monarch. In other words it secured the supremacy of Parliament. From a democratic perspective it is perceived that balancing the social importance of the object to be achieved and the burdens imposed by the means chosen to protect it ought to be carried out by representatives in Parliament or by the Executive.

This brief digression into constitutional history is important for two related reasons. Firstly, it explains why the dualist view of international law sits comfortably in the UK. Parliament, and *only* Parliament, has the power to make or unmake any law.[2] With respect to making law, in order for international treaties (which are signed by the executive under prerogative powers) to have domestic effect in the UK they must be transformed into domestic law by Parliament. This preserves the legislative supremacy of Parliament. Hence the European Communities Act 1972 was needed to give effect to EC law and the HRA 1998 was needed to give effect to the ECHR. With regard to unmaking law, respect for the sovereignty of Parliament explains why even under the HRA 1998 the courts are not empowered to strike down legislation, but can only declare it incompatible with the European Convention.[3]

The second point about constitutional history returns to the ideas of proportionality and judicial review. Since Parliament is supreme, the courts' role in the *Trias Politica* is to uphold its intent. In doing so they must not take their interpretative function so far as become creators of law, because to do so would usurp Parliament's legislative role. Thus far the situation is comparable to that in the Netherlands. Traditionally, however, judicial review in the UK has been limited to ascertaining whether the actions of administrative bodies have been exercised within the powers conferred by Parliament; that they have acted *intra vires* and not *ultra vires*. The moment a body acts *ultra vires* it has illegally conferred upon itself authority that Parliament did not explicitly approve. Thus it has attempted to circumvent the supremacy of Parliament.

The famous *Wednesbury* "reasonableness" principle can be seen as a logical extension of this. The Courts will normally only intervene where an administrative body has acted so unreasonably that no reasonable authority could have come to the same decision.[4] This is to insert an implied term into the powers conferred by Parliament; that the powers will not be exercised unreasonably. Where a body acts unreasonably, it takes itself beyond the powers conferred by Parliament and therefore renders its actions *ultra vires*.

The *Wednesbury* test is a strict one, and is broadly value neutral or legally positivistic in its application. The Courts should not be concerned with the policy objectives of a particular administrative act, only whether it has been authorised by Parliament. Lord Cooke has recently commented that he:

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2 *See* the famous statement by A. V. DICEY, THE LAW OF THE CONSTITUTION (10th Ed.), (1959) Macmillan: London, p. 39; for a general introduction to the supremacy of Parliament *see* Bradley, *The sovereignty of Parliament in* Jowell & Oliver (eds.), THE CHANGING CONSTITUTION (4th Ed.), (2000) OUP: Oxford.

3 S4 HRA 1998.

4 Associated Provincial Picture Houses v Wednesbury Corporation [1947] 2 All ER 680, [1948] 1 KB 223, CA.

> "[thinks] that the day will come when it will be more widely recognised that [the *Wednesbury* decision] was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation".[5]

It is generally understood therefore that the proportionality principle goes much further than the *Wednesbury* test, requiring that public bodies only carry out their activities in such a way that the interests of citizens are affected proportionately. It requires more in the way of justification from the state to prove that it *did* act proportionality than that it *did not* act unreasonably. For this reason, it has been long suggested that principle of proportionality, firstly, requires a higher standard for the legality of official action and, secondly, is alien to the system of judicial review applied in the UK.[6]

The dualist approach to international law and the suspicion of proportionality are derived from the same source; the concept of Parliamentary supremacy. However since suspicion of proportionality is based upon preserving the separation of powers, such concerns should not be seen as unique to the UK system. The HRA requires that the English courts "must take into account" the judgments, decisions, declarations and advisory opinions of the European Court and also the products of the former Commission.[7] Thus it is logical to assume that the HRA has given the European test of proportionality a statutory footing, and that the test's application should be no more difficult in the UK than in other systems that respect the separation of powers. However the courts in the UK are not strictly bound by the Strasbourg jurisprudence - recall that they must only take it "into account". There is therefore some scope to modify the reasoning of the European Court into more traditional English public law, whilst still allegedly fully protecting Convention rights. It is argued here that by allowing the proportionality test to become confused with the *Wednesbury* test the judiciary of England and Wales has demonstrated its difficulties in coming to terms with the modification of judicial reasoning that is demanded by incorporation of the ECHR. Historical respect for parliamentary supremacy has slowed the speed by which the judiciary can fully respect human rights. It is not necessary that the robust protection of human rights unduly threatens the separation of powers.

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5 R (Daly) v Secretary of State for the Home Department [2001] HRLR 49, *para*. 32.

6 *See* Jowell, *Is Proportionality an alien concept* (1996) 2 EPL 401.

7 S2 HRA 1998.

1.1 Proportionality – the first wave of human rights cases

It must be recalled that in applying the proportionality test, a reviewing court must assess not whether the decision was within a reasonable range of responses, but whether the balance struck actually was or was not proportionate to the aim pursued. In this sense we must be careful about applying the label of 'proportionality' too easily. There are older English cases such as *ex parte Hook*[8] that can be explained as containing elements of the proportionality test within them. In this case a market trader had his licence to trade revoked for a minor offence. Having thus been deprived effectively of his livelihood, the reviewing court found that the sanction was too onerous. In other words, the sanction was disproportionate to the offence committed. However the test applied in the case was the *Wednesbury* test. This is not the same as actually applying a proportionality test as it is explained here.

The first wave of recent human rights and proportionality cases pre-dates the HRA and its apparent statutory recommendation to use the test. In these cases the *Wednesbury* test was gradually modified such that it allowed greater judicial intervention in cases where human rights were at stake. For example in *ex parte Smith*[9] Sir Thomas Bingham MR agreed with counsel that that the more substantial the interference with a human right, the more the reviewing court will demand by way of justification from the public body before it is satisfied that the decision is reasonable.[10]

Shortly after *ex parte Smith* was decided, the HRA came into effect, but the proportionality test it required was applied in a very similar way to the recently heightened *Wednesbury* test rather than in the manner used by the European Court of Human Rights itself. The *Kebilene*[11] case was influential on the first wave of proportionality cases. In *Kebilene* it was noted that there are some circumstances in which the reviewing court should recognise that,

> "there is an area of judgment within which the judiciary will defer, on democratic grounds, the considered opinion of the elected body or official whose act or decision is said to be incompatible with the Convention".[12]

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8 R v Barnsley MBC ex parte Hook (CA) [1976] 1 WLR 1052.

9 R v MOD *ex parte* Smith [1996] QB 517. The case concerned the dismissal of homosexual service personnel from the armed forces. Despite the Court's evident sympathy with the applicants, they lost their case. The same facts gave rise to the *Smith and Grady v UK* case before the European Court of Human Rights, discussed below.

10 *Ibid.*, at 554.

11 R v DPP, *ex parte* Kebilene[2000] 2 AC 326.

12 *Ibid.*, at 381.

This is the area that has become known as the "discretionary area of judgment". It was (and still is) necessary to respect elected decision makers' discretionary area of judgment whilst maintaining the protection of human rights, even where proportionality is the applicable standard of review. This is similar to the recognition in Dutch law that social rights expressed as an "obligation to fulfil" and "promote" may require decisions about long-term planning, general policy and the allocation of resources. Since these are not matters upon which the courts are well qualified to pronounce, and which are rightly in the province of the legislature and executive, the courts in the UK and the Netherlands recognise that courts should not intrude into such matters.

Unfortunate ramifications of this approach were seen in the *Mahmood*[13] case. The case concerned a foreign national who had been refused leave to remain in the UK after marrying a British citizen. The couple subsequently had a child, and argued that the Home Secretary's failure to change his decision as a result of this development was "unreasonable" in the *Wednesbury* sense. Moreover there was a clear interference with Article 8 ECHR. The applicant lost his case, but the test applied became very influential. The key feature of the test applied was that, if an interference existed,[14] a "substantial objective justification" was required in order to demonstrate that it was permissible.[15] The more serious the impact is upon human rights, the more substantial was the justification required. However, the test as applied also acknowledged the Home Secretary's "discretionary area of judgment". Mahmood lost his case because the reviewing court saw the Home Secretary's decision as lying within his discretionary area of judgment. The Home Secretary's decision fell within the range of *reasonable* responses open to him.

It must also be noted at this point that many judges and academics in the UK have now established that the European Court's doctrine of the "margin of appreciation" is not applicable to the domestic context anyway, even if the similar phrases of "discretionary area of judgment" or "margin of discretion" are accepted.[16] A margin of appreciation is inherent in the European Court's definition of "necessity", but even a restriction that is necessary must also be "proportionate". Even if the discretionary area of judgment is used by domestic courts to express deference for a public authority's democratic credentials or factual expertise, they must also enquire into any measure's proportionality.

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13 R (Mahmood) v SOS HD (2001) 1 WLR 840 (CA).

14 Of course, rather than justify the interference the government could also argue that the action in question did not constitute an interference with a Convention right.

15 R (Mahmood) v SOS HD *op. cit.*, *supra para.* 16.

16 Pannick, *Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment*, 1998 (Winter) PUBLIC LAW 545; Craig, *The Courts, the Human Rights Act and Judicial Review*, (2001) 117 LAW QUARTERLY REVIEW 589.

1.2 The second wave of proportionality cases

In more recent human rights cases, since the HRA 1998 came into effect, the courts in the UK have at least identified that they ought to apply the proportionality test rather than a test based upon the common law *Wednesbury* doctrine. One of the key factors in this has been the European Court's decision in *Smith and Grady v UK*,[17] which was the "sequel" to the domestic case of *ex parte Smith*, discussed above. In *Smith and Grady* the European Court held that, in the circumstances of the applicants, judicial review did not provide an effective remedy within the meaning of Article 13 ECHR because the threshold for judicial intervention was set far too high:

> "[T]he threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued [...]".[18]

However the test for determining the violation of a Convention right as currently applied still departs from that used by the European Court. Primary amongst the reasons for this trend is that the English courts have spent so long denying that they explicitly refer to the European Convention in deciding cases. Now, even when they are constitutionally enabled to refer to the Convention and the case law of the European Court, they still attempt to square such references with the common law tradition. It must be noted that the European Court of Human Rights itself does not always use the same precise test of proportionality. What is important is the range of factors it regularly considers. The test applied in the *Kebilene* and *Mahmood* concentrated on establishing "a substantial objective justification", which, in ECHR terms, is the supply of relevant and sufficient reasons. However the first wave of cases did not identify the precise legitimate aim invoked by the state (which will surely affect the level of deference allowed to elected decision makers) nor question whether there were less restrictive means of protecting the public interest.

It now falls to contrast both the first wave of proportionality cases and the ECHR approach with the test most commonly used in the second wave

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17 Smith and Grady v UK [2000] 29 EHRR 493.

18 Smith and Grady v UK, *op. cit., supra., para.* 138.

cases. The new test was discussed in detail in the case of *Daly*,[19] but is itself borrowed from the Privy Council case of *De Freitas*.[20] The guiding question in the new test is whether a restriction on human rights is "reasonably justifiable in a democratic society".

Thus far, the *Kebilene / Mahmood* approach seems compatible with the *De Freitas* test. The notion of "reasonably justifiable" does indeed suggest that the absence of a substantial objective justification could be solid ground for vitiating a decision. Arguably however, even at this stage, the differences between what is "reasonably justifiable" in a democratic society and what is "necessary" (as the ECHR requires) should be borne in mind. A true assessment of whether a measure or decision is proportionate would enquire not whether the impugned was "reasonably justifiable", but whether it was *actually* justifiable.

However, the *De Freitas* test of "reasonable justification" goes much further than simply the provision of relevant and sufficient reasons. Principally, it involves asking whether the intrusion upon a human right is "arbitrary and excessive". Again, from the outset there are some problems with this approach. What about a decision that is excessive but *not* arbitrary? To require that to be unlawful the decision is both excessive *and* arbitrary is to ask too much, and raises the threshold for intervention. A properly applied test of proportionality would be able to identify instances where the government did not act in an arbitrary or irrational manner, but nevertheless imposed excessive burdens upon particular individuals.

The question of whether the interference is "arbitrary and excessive" is refined still further in the *De Freitas* case. It is these questions that form the core of decisions under the *De Freitas* test. The following 3 questions are asked:

i) **Is the legislative object important enough that a fundamental right be limited?**

This test however seems slightly weaker than that under the ECHR, because of Lord Clyde's suggestion in *De Freitas* itself that the judiciary will not often decide this question. A test of reasonableness finds its way into this limb of the test, inasmuch as the reviewing court will only inquire whether, for example, a reasonable minister could so believe that the interference was important.

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19 R (Daly) v SSHD *op. cit., supra.*

20 De Freitas v Permanent Secretary of the Ministry of Agriculture [1999] AC 69, as applied in, *e.g.* R v A (no. 2) [2001] WLR 1546. In the *De Freitas* case, in reference from the Supreme Court of Barbados & Antigua, a civil servant had been part of demonstration against government corruption. He was prosecuted under legislation that prohibited civil servants from making public statements on controversial or national security issues. The question in the case was whether that form of restriction was compatible with the Constitution of Barbados & Antigua.

The real difference with the ECHR test is that only objectives that conform to one of the "legitimate aims" listed in the limiting paragraphs of Articles 8-11 ECHR can ever be a important enough objective to limit a fundamental right. Only one when one of these aims is identified can some discretion be allowed as to whether a "pressing social need" exists.

It should also be recalled that Article 17 ECHR expressly prohibits the limitation of Convention rights "to a greater extent than is provided for in the Convention". Any limitation allowed under the HRA that was not clearly identified as being capable of justification under the European Convention itself would automatically give rise to a breach of the ECHR.

ii) Are the measures designed to achieve an aim rationally connected to them?

This derives from Canadian case law.[21] It could also be seen as a remnant from *Wednesbury* and *Mahmood*. If it is, the "*rationally* connected" criterion seems like one which would set the threshold of judicial intervention quite high. Words like "rationality" suggest that only extreme forms of response would fail the test because, *ipso facto*, the minister would have to have acted *ir*rationally. English public law has already defined this in such a way to necessitate that decision maker must made a decision that was "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it".[22]

iii) Are the means used to impair the right no more than is necessary to accomplish the objective?

This is an enquiry into proportionality "for real". Significantly, this seems to include what in the Canadian jurisprudence is another step entirely - whether the "least drastic means" have been used.

This three stage proportionality test has become the standard one used in domestic proceedings under the HRA 1998, clearly replacing the *Mahmood* test. A recent case on "carrier sanctions" for truck drivers found to be (even accidentally) carrying illegal immigrants suggests a fourth aspect of the test. In

21 *See* R v Oakes [1986] 1 SCR 103.

22 CCSU v Minister for the Civil Service [1985] AC 374, 410, per Lord Diplock.

International Transport Roth[23] the reviewing court also enquired whether the restriction upon human rights imposed "undue burdens" on the individual. This addition to the *De Freitas* test is welcome, but not always present.

1.4 Assessment of the De Freitas test

It could be argued in defence of the approach taken in the second wave of cases that the use of established forms of review and comparative common law enhances the legitimacy of the decisions in their UK context. They were made in familiar terms, without apparently any need to justify an invasion of the elected decision maker's discretionary area of judgment in "alien" European language.

However the main problem with the *De Freitas* test is not so much that the language used by the European Court is not adopted wholesale, but that in still allowing elements of "reasonableness" to creep into the proportionality test the real issue is obscured. The argument against proportionality is that it gives undue weight to the views of (unelected) judges. Where the balancing of complex social values is required, it should be for democratically accountable decision-makers only. In this way it is tempting to allow respect for the "discretionary area of judgment" to affect the standard of review from the outset, encouraging a narrow *Wednesbury* style of reasoning. However this approach fails to recognise that the proportionality test, whilst still requiring a higher standard of official conduct, is perfectly suited to drawing the line between areas in which the judges should and should not intrude due to policy decisions. There is no need to cloak its application in common law respect for the sovereignty of Parliament. Respect for something like the "discretionary area" is capable and desirable in any legal system, in the Netherlands as much as in the UK. The danger is that the courts in the UK are too wary of the supremacy of Parliament. As a result of their deference to the legislature and executive then in the Trias Politica the UK courts run the risk of playing a weaker, unequal, role in the Trias Politica.

2 THE DUTCH CONSTITUTION, INTERNATIONAL LAW, AND THE SEPARATION OF POWERS

2.1 Background

The Trias Politica plays an important role in the Dutch legal order, just as it does in the UK. Over time, the idea of the separation of powers has been transformed

[23] International Transport Roth Gmbh v Secretary of State for the Home Department [2002] EWCA CIV 158.

in Dutch law into a practical system of checks and balances. The legislative, executive and judicial powers together form a balanced system of mutual control and participation. In this legal system, the supremacy of the democratic legislator is evident. Legislation is a product of government *and* parliament. Article 81 of the Dutch Constitution states that "Acts of Parliament shall be passed jointly by the Government and the Parliament."

Article 120 of the Constitution prohibits the judiciary from testing an Act against the Constitution. In the Constitution of 1848 this prohibition was formulated strictly: "The law (the Acts of Parliament) is inviolable".[24] However the judiciary in the Netherlands has allowed itself, by way of several methods, to give a broad interpretation of the law. Formulations and terms in the law can be interpreted in such a extensive way that their meaning changes considerably. For example in the *Maring Assuradeuren* case the Supreme Court of the Netherlands even decided *contra legem*: a provision in an Act of Parliament was suspended, a custom, developed in practice, had supremacy over the law.[25] In the Netherlands, the giving of assistance in committing suicide is prohibited by criminal law.[26] Nevertheless, in case law, a set of conditions has been developed under which euthanasia is permitted. Despite these examples, the supremacy of the legislator is generally assumed in Dutch law, based on the argument of the democratic way of enacting the laws and the (legal) policy of the government.

2.2 Monism in case law

The development of (and the confusion about) the monistic system in the Netherlands must be placed against the following background. From the 19th century until the beginning of the 20th century, the question of which system was observed in the relationship between national and international law - a transformation system, on the one hand, or an adoption system, on the other hand - was discussed in the Netherlands. The central question in the discussion was: do treaties have direct and automatic effect in the national legal order in the Netherlands or not?

In May 1905, the government proposed that it give priority to the system of transformation (dualism) with respect to treaties. Half a year later - at the end of 1905 and after the forming of a new cabinet (after a new election) - this standpoint had been reversed into its opposite. The government gave priority to the adoption system (monism).[27] In 1906, Parliament consented to the monistic

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24 The then Article 115 of the Constitution. The present Article 120 states, 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.'

25 HR 3 March 1972, NJ 1973, 339 (Maring-Assuradeuren).

26 Article 294 Penal Code.

27 The terms adoption/monism and transformation/dualism were discussed at length. Whether or not these terms are actually synonymous is expounded in the book DE GRONDWET (The

view: a treaty that is legally correct in its enactment is binding on all citizens and all institutions of the government. Treaties have direct binding power; transformation into national legislation is not necessary.[28]

In 1841 the courts accepted that treaties have binding power without the necessity of national governmental actions.[29] During the debates in the legal literature about the controversy regarding monism and dualism, in 1919, the Supreme Court continued the line that was set out in 1841[30] with the by now classical case, *Grenstractaat Aken* (Border Treaty Aken), in which the Supreme Court accepted monism.[31] This case left no doubt over which system should be adopted in the Netherlands - monism or dualism. In the *Grenstractaat Aken* case, the judge chose explicitly for the monistic system; the automatically direct binding force of international law in the Dutch legal order. For that reason it is usually denoted as "case law monism".[32]

2.3 Article 93 of the Dutch Constitution

During the revision of the Constitution in 1953, the discussion was revived and new questions arose. In that year, case law monism was codified in Article 66 of the Constitution (the equivalent provision of the present Article 93). Article 66 of the Constitution suggested that the monistic system is codified in a restricted way; that is, only "provisions of *treaties* which may be *binding on all persons* by virtue of their contents" shall become directly binding in the Dutch legal order, after publishing.

This interpretation seems to be incorrect, inasmuch as it refers to only one narrow category of international law. It was already established that, (i) provisions of treaties *not binding on all persons*, and (ii) *customary international law*, had and have an internal binding force in the Dutch legal order, without

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Constitution). Full consideration of the discussion is beyond the scope of this article. Hereafter this article uses the terms 'monism' and 'dualism'. *See* DE GRONDWET (The Constitution), A.K. KOEKKOEK (ed.), Deventer 2000, pp. 456 ff.

28 Parliamentary Documents II 1905-1906, p. 1874.

29 HR 22 September 1841, W 1841, 221.

30 HR 25 May 1906, W 1906, 8383.

31 HR 3 March 1919, NJ 1919, 371. HR: 'the treaty of 3 March 1816 (...) had a double binding effect, (...) that The Netherlands were bound to foreign powers, (...) and that the owner, too, can rely on the right to transport freely the goods he owns, (...).'

32 H.R.B.M. Kummeling, *Internationaal recht in de Nederlandse rechtsorde. Over een onduidelijke grondwet(gever) en verwarrende jurisprudentie*, (International Law in the Dutch Legal System. About the Ambagious Constitution and Confusing Case Law) *in*: J.B.J.M. ten Berge, a.o. (eds.), DE GRONDWET ALS VOORWERP VAN AANHOUDENDE ZORG (The Constitution as a Subject of Continuous Concern), BURKENSBUNDEL, Zwolle1995, pp. 369-385.

transformation into Dutch law.[33] The narrow viewpoint of former Article 66 was explicitly reaffirmed in the parliamentary proceedings during the revision of the Constitution in 1983.[34] The current Article 93 states,

> Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.

It is generally recognized that the function of Article 93 is not the constitutional codification of the monistic system. Departing from the viewpoint of the adopted "case law monism", Article 93 states that a certain type of provision of treaties, that is, provisions "binding on all persons by virtue of their content", shall have binding force after publishing.[35] This restriction of monism means that citizens cannot be bound to this type of provision - the provision cannot be invoked against them - except after publishing. In this sense, Article 93 shows a dualistic feature: publishing is required for the applicability to and the confrontation of citizens with such provisions.[36]

2.4 Article 94 of the Dutch Constitution

The Dutch courts are obliged to test the applicability of national rules against provisions of treaties that are binding on all persons by virtue of their contents. This is the essence of Article 94 of the Dutch Constitution. Article 94 states,

> Statutory regulations in force within the Kingdom [of the Netherlands] shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

A national rule is thus not applicable if it is incompatible with the provisions of treaties that are "binding on all persons". Therefore a judge is obliged to set aside national rules in case of conflict with, and in favour of, provisions of treaties indeed "binding on all persons". Such a situation may occur especially when a citizen attempts to invoke articles of a human rights treaty against the

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33 C.A.J.M. KORTMANN, CONSTITUTIONEEL RECHT (Constitutional Law), Deventer 2001, pp. 173 ff.

34 Parliamentary Documents II 1977-1978, 125 049 (R1100), nr. 6 p. 14; Parliamentary Documents II 1977-1978, 15 049 (R1100), nr. 3 p. 12.

35 KORTMANN (2001), p. 174.

36 KORTMANN (2001), p. 174.

State of the Netherlands, where there is potential for conflicting legislation to be rendered inoperative.

2.5 "Binding on all persons" - the key to the judicial role in human rights cases

It is not always easy for a judge, who is confronted with citizens who rely upon the recognition of a human right, to determine if the treaty provision is or is not "binding on all persons". Thus, despite the suggestion that, unlike in the UK, the Courts are constitutionally empowered to give preference to international human rights law over domestic law, there are limits to this power. The Supreme Court has formulated a distinguishing criterion in this regard. Although this case concerned a provision of the European Social Charter (ESC), the formulated criterion was, and is in general, applicable. The Supreme Court stated that the question of whether the parties to a treaty did or did not intend to give Article 6 of the ESC direct binding force was not significant, when it could not be concluded from either the text of the Article, or the background of the treaty's realization whether the parties had agreed that Article 6(4) was not excluded from this effect. Considering this state of affairs, in the Dutch legal order, the Supreme Court stated that only the *content* of the provision was decisive.[37]

The question now is when does the content of a provision in international law entail binding or non-binding force? The criterion here is does the (treaty) provision require the national legislator to make national rules with a specific content or purport, or is the provision formulated in such a way that it can function directly as legislation in the national legal order without transformation? In other words, the treaty provision will bind if it is "self-executing". If the provision is not self-executing and thus further legislation is necessary, then provision is said not be not "binding on all persons". This was the decision of the Supreme Court in the case with respect to Article 13 ECHR. The Court decided that Article 13 ECHR only imposes,

> an obligation to the contracting countries to organize (arrange) national legislation in such a way that the mentioned Article 13 is in its nature not suitable for direct application by the judge, and therefore (accordingly) does not include 'provisions of treaties, binding on all persons by virtue of their content'.[38]

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37 HR 30 May1986, NJ 1986, 699.

38 HR 30 May1986, NJ 1986, 688.

In general, standard provisions of treaties concerning (i) classical rights are binding, and provisions concerning (ii) social rights are not binding on all persons. In this way, the judge regards, for instance, the right to freedom from interference with family and home life in Article 8 ECHR as a self-executing provision binding on all persons. By contrast the right to education in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICSCR) is considered to be non-binding. The latter is related to the fact that social rights need positive government action. This does not mean, however, that claims based on social rights are never binding on all persons. Their essential character is that of stand-still provisions; government is not allowed to go below certain minimum social benefits.[39]

2.6 The Dutch judiciary and the ECHR

Following the ratification of the ECHR in 1950, the Dutch judiciary adopted a highly reserved attitude. During the first twenty-five years of its existence, the European Convention had no noticeable effect on the Dutch legal order. In a well-known anecdote, the story is told of a judge before whom the Convention had been invoked. He took the view that he could not apply the Convention because he had not been able to find it in his library. In another anecdote, a lawyer said that it was not recommendable to invoke the Convention before the court since such an argument would not make the court believe that one had a bad case.[40]

This reserve has not disappeared completely. The sovereignty of the legislator in the Dutch legal order and the supremacy of the Acts of Parliament play an important role here. As mentioned above, in the Netherlands, the prohibition for the judiciary to test an Act against the Constitution is constitutionalised in Article 120: Acts of Parliament are inviolable. However, Article 94 of the Constitution, instructs judges to test national legislation against treaty provisions that are binding on all persons. In case of a conflict between the national and the international rules, the judge must refuse the application of the national rule. The requirements in Article 120 and Article 94 are thus inconsistent. For what is the relevance of the prohibition of the testing of Acts against the Constitution if the judge is *obliged* to test Acts against binding international provisions implying human rights? This inconsistency is the subject of many debates and is a cause of disagreement between the two powers; the legislator and the judiciary.

[39] M.C. BURKENS a.o. (eds.), BEGINSELEN VAN DE DEMOCRATISCHE RECHTSSTAAT (Principles of the Democratic Rechtsstaat), Deventer 2001, p. 339.

[40] Y. Klerk and E. Janse de Jonge, *The Netherlands*, *in* C.A. Gearty (ed.), EUROPEAN CIVIL LIBERTIES AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Deventer 1997, p. 114.

The mentioned inconsistency in the Constitution places the Supreme Court in a dilemma. This dilemma is expressed in formulations of the Supreme Court, such as "it will be left aside" whether or not a right is violated, because providing a solution "falls beyond the competence of the judiciary."[41] In 1994, for instance, the Supreme Court left aside the question of whether or not the impossibility of a mother to refuse to recognize the legal paternity of her husband concerning a child born during marriage was a violation of Article 8 ECHR.[42]

In 1999, the formulation of the Supreme Court was accentuated. With respect to Article 14 ECHR, the Supreme Court stated clearly that, in this case, the legislator had violated human rights. However, providing a solution was not within the competence of the judge; it would be outside "the lawmaking task" of the judiciary. Only if the legislator fails can the judge abandon his reserve.[43]

The Supreme Court will not always focus on the limitations to its lawmaking[44] capabilities and thus is not consistently deferential to the legislature. The Judicial Division of the Council of State, for instance, has concluded twice that, in a specific case, the relevant Act of Parliament did not meet the (formal) requirements prescribed for the enactment of the "law". Because of this, the conditions of Article 8(2) ECHR were not met and Article 8 was violated. Therefore, the judge did not need to address the question of whether the restriction was necessary in a democratic society.[45]

2.7 Classical rights versus social rights; Revision of the classification?

Judges are obliged to test national legislation against "treaty provisions that are binding on all persons". As indicated above, the content of the provision is decisive for whether or not the provision is self-executing and thus directly binding on all Dutch citizens. For that, the general rule is that treaty provisions concerning *classical* fundamental rights are *binding*, and treaty provisions concerning *social* fundamental rights are *not binding* on all persons. This rule is related to the fact that social rights are perceived to require an active role for the government. As soon as citizens invoke (the violation of) a social right, the judge will adopt a deferential attitude to the legislator.

However, the conventional classification (i) *classical* fundamental rights versus (ii) *social* rights, as (i) *the obligation to respect*, which prescribes the

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41 HR 12 Oktober 1984, NJ 1985, 30 (Optie Nederlanderschap). This case concentrated on Article 26 of the ICCPR. Later, the same formulation was used in a verdict with respect to the ECHR.

42 HR 4 November 1994, NJ 1995, 249.

43 HR 12 May 1999, BNB 1999, 271.

44 HR 1 December 2000, RvdW 2000, 240C.

45 Abr 9 June 1994, AB 1995, 238; Abr 23 August 1995, AB 1996, 347.

State to *abstain* from doing anything that violates the integrity of the individual or infringes on her or his freedom,[46] versus (ii) the *obligation to fulfil*, i.e., an obligation that orders the State to *create* active conditions aimed at the achievement of a certain result in the form of a (more) effective realization of recognized rights and freedoms,[47] is questionable.

Classical human rights can include elements of the obligation to fulfil, and social human rights can include elements of the obligation to respect.[48] The classical human rights, as laid down in the ECHR, have traditionally been regarded as obligations to respect, but nowadays they can also include the obligation to fulfil. The latter obligation can be divided into (a) the obligation to ensure, (b) the obligation to promote.[49]

Articles 2, 3, and 8 of the ECHR and Article 1 of the First Protocol ECHR, for instance, include procedural obligations to fulfil. This means that government plays an active role with respect to the interests of citizens that arise from human rights. In this case, the obligation to ensure (ii.a) is at stake, which comes into being as soon as the obligation to respect is violated.[50]

Therefore, the obligation to respect and the obligation to fulfil are not separate from each other. The obligation to respect forms the basis for the obligation to fulfil.[51]This conclusion is important, since reliance upon one of the human rights of the ECHR often includes an obligation to fulfil, and will result in a reluctant attitude on the part of the judge.

Since the 1980s, the European Court adopted the viewpoint that in most classical human rights (often regarded as obligations to respect) obligations to fulfil are included. Articles 6, 10, and 11 of the ECHR and Article 3 of the First Protocol are relevant here. Article 8 of the ECHR was also subject to an important change in case law. During the last 20 years, the European Court has adopted obligations to fulfil with respect to, among other things, unmarried motherhood,[52] family reunification, change of sex, and access to documents. The first is considered to be the case in which the doctrine of the obligation to

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46 U.N. report *Right to adequate food as a human right*, HUMAN RIGHTS STUDY SERIES No. 1, New York 1989, p. 14.

47 G.J.H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, *in* P. Alston and K. Tomasevski (eds.), THE RIGHT TO FOOD, Den Haag 1984, p. 106.

48 F. VLEMMINX, EEN NIEUW PROFIEL VAN DE GRONDRECHTEN (A New Profile of Human Rights), Den Haag 2002, pp. 49-58.

49 Vlemminx's classification of human rights follows the traditional separation between (i) the *obligation to respect* versus (ii) the *obligation to fulfil*. The latter is sub-divided into (a) the *obligation to ensure*, (b) the *obligation to promote*, and (c) the *obligation to protect*. VLEMMINX (2002), chapter 3.

50 VLEMMINX (2002), 107.

51 VLEMMINX (2002), 107.

52 ECHR 13 June 1979, NJ 1980, 462 (Marckx).

fulfil with respect to Article 8 of the ECHR was introduced by the European Court.[53] Nowadays, the Court interprets Article 2 of the ECHR in such a way that several obligations to fulfil have been formulated, such as the obligation to take preventative measures, and the obligation to protect citizens against criminality.[54] Within the limits of Article 3 of the ECHR, the European Court has also adopted the view that obligations to fulfil are included, for instance, to discover the true facts of the matter.[55]

It is clear that the European Court, to a large extent, interprets several rights of the ECHR as including obligations to fulfil. Obligations to fulfil are traditionally understood as deriving from economic, social, and cultural rights, over which judicial control is not possible. However, the case law of the European Court shows that this argument is not always automatically correct.

Vlemminx states that the argument and the classification need a thorough examination and modification.[56] He concludes that in the division of the obligation to fulfil into the obligation to *promote* and the obligation to *ensure*, only the latter is legally enforceable in court. The obligation to promote can be defined as an obligation of the government to achieve a certain result, progressively, in the long term. These aims are often vaguely formulated, and are subject to the policy-making and discretionary power of the government. The judiciary has to abstain from decisions at this point. The separation of powers between the legislator and the judiciary results in the absence of judicial control on decisions of government aimed at policy-making. The problem attached to this viewpoint can be formulated as follows:

> "It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competence of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also

53 VLEMMINX (2002), p.43.

54 ECHR 28 Oktober 1998, JB 1999, 25 (Osman).

55 ECHR 6 April 2000, ECHR 2000, 44 (Labita).

56 VLEMMINX (2002), p. 45.

> drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."[57]

2.8 Supreme Court of the Netherlands

It is generally recognized that the judicial interpretation of classical fundamental rights as an obligation upon the State for positive action has considerably increased. Legal doctrine has formulated a term for this phenomenon: "socializing interpretation".[58] In an overview of classical rights that are interpreted as being obligations to fulfil (i.e., they include a social right, requiring an active government), Vlemminx shows that the essential classical rights of the Dutch Constitution, such as the freedom of religion (Article 6), freedom of the press (Article 7(1)), freedom of assembly (Article 9), and the integrity of the body (Article 11), have all been interpreted in this way.[59] This leads to the viewpoint that

> In general it can be concluded that, where explicit obligations to fulfil are adopted, appeal to the court will not be easy, whereas, if such is not the case, nothing is standing in between to enforce the State to active fulfilment.[60]

In accordance with this viewpoint, the Supreme Court of the Netherlands has become surprisingly inventive and developed several methods in order to permit Dutch legislation to remain operative in cases of conflict with international law.

The Supreme Court can, for instance, interpret a certain rule in accordance with the treaty, or it can apply analogous rules. The first method was used in a case in which a transsexual person demanded that data concerning a former marriage be removed from the municipal register, based on Article 8 of the ECHR, in spite of the prohibition in the Municipal Database Act.[61]

The second method was used in a case in which, based upon Article 8 of the ECHR, parents demanded that they both become curator of their mentally handicapped son, in spite of Article 1:383 of the Netherlands Civil Code, which declared this construction impossible. The Supreme Court declared the articles of the Civil Code that provide for joint guardianship applicable.[62]

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57 General Comment 9, p. 10.

58 KORTMANN (2001), p. 383-386.

59 VLEMMINX (2002), p. 29.

60 Tj. Gerbranda and M. Kroes, *Grondrechten evaluatie-onderzoek, Eindrapport*, (Fundamental Rights Evaluation-Research. Final Report) Leiden 1993, p. 333.

61 HR 28 February 1997, RvdW 1997, 59.

62 HR 1 December 2000, RvdW 2000, 240c.

In cases in which the obligation to fulfil comes into play, it is beyond the competence of the judiciary and its very limited "lawmaking" task to pronounce a judgment. In this case, the issue is left in the hands of the legislator. Over a long period of time, the Supreme Court offered no opinion on the question of whether or not Convention rights were violated in these circumstances.[63]

The Supreme Court introduced the formula "lawmaking task" within the scope of Article 26 ICCPR,[64] and, later, the term was used in cases relying on the principle of non-discrimination in Article 14 ECHR. The formulation was also used in the appeal to the Crown concerning the question of whether the possibility for a mother to deny the paternity of her husband with respect to a child born during their marriage, was a violation of Article 8 ECHR.[65] The judge left the question of whether or not this was a violation aside. The European Court concluded later that this was a violation of Article 8 ECHR.

This (and other matters of) discrepancy in case law between the Supreme Court of the Netherlands and the European Court was troublesome and, therefore, the Supreme Court changed course recently. The change became explicit in a case in 1999, concerning Article 14 ECHR and Article 26 ICCPR: unequal treatment in the field of tax deduction. The Supreme Court concluded frankly in another case, a year before the *Arbeidskostenforfait* case (Tax Deduction case), that

> "(...) the legislator could not reasonably come to the conclusion that this was a matter of unequal casus, or that the unequal treatment of these cases was justified."[66]

The provisions mentioned in this case were considered to be violated. Subsequently, the Supreme Court argued that to declare the rule of tax deduction inoperative does not benefit the citizen concerned: a lacuna in legislation has to be filled in, and the judge is not allowed to do this, because such a decision speaks against the fact "that in the existing constitutional relations the judiciary in such cases has to adopt a reluctant attitude."

Further, the Supreme Court determined under which conditions the lawmaking task constitutes an obstacle for the judge. This is the case, when "different decisions are possible and the choice between them also depends on general considerations of governmental policy-making" or when "important choices of legal political nature have to be made".[67]

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[63] VLEMMINX (2002), p. 210.

[64] HR 12 Oktober 1984, NJ 1985, 30.

[65] HR 16 November 1990, NJ 1991, 475.

[66] HR 12 May 1999, BNB 1999, 271.

[67] HR 12 May 1999, BNB 1999, 271.

The argumentation of the Supreme Court in the Tax Deduction case (*Arbeidskostenforfait*)[68] with respect to the (beyond its competence) law-creating task of the judiciary, is unfortunately tailored to this specific case: a citizen thinks he has a legitimate claim, based upon the principle of equality, with respect to (increased) tax deduction. Legislation has not provided for this, resulting in the existence of a - in the words of the Supreme Court - "lacuna in the law". It should be noted that such a lacuna in the law can also arise when a legal rule is declared inapplicable due to inconsistency with an international (classical) human right expressing an obligation to respect. The question remains whether or not judge-made law is allowed.

Article 94 of the Dutch Constitution is a peremptory rule that prescribes the inapplicability of national legislation in case of inconsistency with a treaty provision. The article leaves no room for exceptions, even if the inapplicability of the rule results in a lacuna in legislation. Moreover, violation of classical human rights can stem from the legal restriction clause and its conditions; difficult questions can also arise with respect to government decisions not in accordance with the restriction clause. Here, too, the question can be posed: should the judge decide that further interference must be discontinued? Should the legal rule be adapted? If so, in what way? In all these cases, too, "general considerations of governmental policy-making" have to be made and "important choices of a legal political nature" can arise.

CONCLUSIONS ON HUMAN RIGHTS, MONISM AND THE ROLE OF THE JUDICIARY IN THE NETHERLANDS

The Netherlands practices a moderate monistic system. This monistic system is fully recognized in case law and is restricted by Article 93 and 94 of the Constitution. Only provisions of treaties that are "binding on all persons" have direct effect in the national legal system. Article 94 forces the judge to test the national rules against this type of treaty provision and, in cases of conflict, he must put aside the national rule. It is generally recognized that classical fundamental rights can function as criterion for the testing of national decisions, and that social rights can not. This is related to the fact that social rights require an active role of the government. However, during the last twenty years, the European Court has increasingly interpreted the classical fundamental rights (obligations to respect) in such a way that they also include elements of social rights (obligations to fulfil). This causes a dilemma for the Dutch judiciary.

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[68] HR 5 December 1999, BNB 1999, 271 (Arbeidskostenforfait). *See* S.K. Martens, *De grenzen van de rechtsvormende taak van de rechter* (The Limits of the Law Creating Task of the Judge), NJB 2000, pp. 747-758.

The obligation to fulfil can be further divided into the "obligation to ensure" and the "obligation to promote". Only the obligation to ensure can function as a criterion for testing Dutch legislation. The obligation to promote involves governmental decisions on policy-making in the long term. The legislator, not the judge, is competent in these cases. The problems resulting from the issue of the competence of the judiciary leave the judge little room to make decisions. However, in cases in which he is competent to decide, he often uses interpretation methods aimed at avoiding suspension of Dutch rules. This is related to the difficult position of the judiciary in its task of controlling governmental decisions in accordance with international human rights, on the one hand, and the strict requirement to abstain from law-making activities, an exclusive competence of the legislator, on the other hand. Considering this, we may conclude that, although it is generally recognized that the Netherlands has a monistic system with respect to international law, the number of cases in which the judge can actually declare a national rule not applicable, because of conflict with an international human right is small.

GENERAL CONCLUSION

The two halves of this article have discussed important issues relating to the domestic judicial enforcement of the ECHR in the UK and the Netherlands. The linking factor has been the identification of similar ideas about the correct role of judges in a democratic society.

In the UK it is clear that Parliamentary supremacy is preserved insomuch as the HRA 1998 was needed in order to give effect to the ECHR. This is a bi-product of the UK's dualism. However from the HRA 1998 coming into effect in October 2000 onwards the ECHR was enforceable in the UK and judges do not need to enquire in each case whether each and every Article of the Convention is self-executing. Human rights law has always, however, recognised the need for the separation of powers. It would be a mistake to see the HRA 1998 as upsetting the balance of the *Trias Politica* in favour of the judiciary. Thus the Courts in the UK must carefully respect the "discretionary area of judgment" even as they apply the proportionality test to official action. In the UK system, therefore, the ability of the courts to refer to the ECHR depends upon the circumstances of the case, and not on the terms of the Convention itself.

In the Netherlands, by comparison, the deference of judges to the executive and legislature is not expressed in terms of the standard of review (e.g. the British choice between proportionality and *Wednesbury*) but instead in terms of whether the relevant treaty article is "binding on all persons" and thus self-executing. In English law the judiciary are more comfortable intervening in a

decision where it deals with relatively objective matters that do not impact upon long-term policy decisions. Likewise the Dutch judiciary have found it easier to give overriding domestic effect to treaty articles that concern classical fundamental rights precisely because they are essentially negative in character and do not require further elaboration. It was nevertheless argued above that such an approach may not fully protect the rights guaranteed in the European Convention, especially since the Convention has been interpreted to enshrine some positive obligations upon the state even in respect of classical civil rights.

However for the English lawyer it is important to recognise that, despite the Netherlands' monism, the supremacy of the legislature is consciously maintained.

It can be tentatively concluded therefore that the Dutch approach to the "essence" of each human right might be usefully employed by the judiciary in the UK, so long as it did not result in the rigid formalism mentioned above. In particular this would allow the judiciary in the UK to focus upon exactly why they ought to defer to the executive in certain situations, explicitly identifying differences between broadly positive and negative rights and their immediate enforceability. Such an approach, expressed by careful use of a high standard of review based upon proportionality, could more openly delimit the discretionary area of judgment than resorting to the inherently opaque *Wednesbury* test that has hitherto dominated the review of official action in the UK.