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EC LAW, UK PUBLIC LAW AND THE HUMAN RIGHTS ACT 1998: A NEW INTEGRATIVE DYNAMIC?

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I. Introduction

The process of European legal integration has long been understood to engage the workings of domestic legal orders, EC law and, to a lesser extent, the law of the ECHR.[1] In general terms, the relationship between these bodies of law has been characterised as involving the direct and indirect interchange of principle and practice across jurisdictions. An example of direct interchange is found in the EC law requirement that national courts give effect to rules emanating from the EC legal order in all cases raising EC law issues.[2] The indirect form occurs in disputes which do not raise EC law issues but which see national courts voluntarily borrow from their experience within the EC legal order by way of developing the domestic legal system.[3] Likewise, national courts and the European Court of Justice have relied

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[1] See Cappelletti, M. (ed.), *New Perspectives for a Common Law of Europe* (EUI, Florence, 1978); Markesinis, B. S., (ed.) *The Gradual Convergence* (Oxford, Clarendon Press, 1994); Beatson, J. and Tridimas, T. (eds.), *New Directions in European Public Law* (Oxford, Hart Publishing, 1998); and Anthony, G., *UK Public Law and European Law: The Dynamics of Legal Integration* (Oxford, Hart Publishing, 2000).

[2] See Temple-Lang, J., "The Duties of National Courts under Community Constitutional Law" 22 (1997) *ELRev*, 3.

[3] See Fernandez Esteban, M. L., "National Judges and Community Law: The Paradox of the Two Paradigms of Law" 4 (1997) *MJ*, 143. It should be noted that there has also been a process of indirect interchange whereby the ECJ has borrowed principle and practice from national legal orders. See Koopmans, T., "The Birth of European Law at the Cross-roads of Legal Traditions" 39 (1991) *AJCL*, 493.

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upon the law of the ECHR, a "foreign" body of rules, in developing their respective legal orders.[4]

These phenomena have given rise to an active academic debate about the proper parameters of the process of European legal integration.[5] At a theoretical level, some commentators have expressed concern at the suggestion that principle and practice emanating from one legal system may successfully be "transplanted" into the specific institutional conditions of another legal system.[6] Similarly, the debate about "borrowing" has also sought to gauge how far national legal considerations and preferences might be said to mediate the process of European legal integration. From a supranational and international law perspective, for example, it might be expected that EC law and the law of the ECHR will, by virtue of their assumed comparative superiority, often lead national courts to modify and adapt domestic law.[7] The willingness, however, of domestic courts to adapt local law has frequently been structured around national legal preferences and traditions.[8] Accordingly, the process of European legal integration might be said to impact in different ways and at different speeds in different national jurisdictions.

This article examines more closely the dynamics of the process whereby United Kingdom courts borrow principle and practice from EC law and the law of the ECHR. In particular, it seeks to examine the impact which the *Human Rights* Act 1998 might be expected to have on the participation of United Kingdom public law in the process of European legal integration. The *Human Rights* Act, as is well-known, incorporates in domestic law

[4] On the role of the ECHR relative to the development of the ECJ's jurisprudence, see, e.g., Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651. And see also Opinion 2/94 on *Accession by the Community to the ECHR* [1996] ECR I–1759 and Articles 6 & 7 (ex F1 & 2) TEU. On the role of the ECHR in the development of domestic legal orders see Schwarze, J., "The Convergence of the Administrative Laws of the EU Member States" 4 (1998) *EPL*, 191, 200–203. On the related question of how national legal traditions have influenced the ECHR see Leonardi, D. A., "The Strasbourg System of Human Rights Protection: 'Europeanisation' of the Law through the Confluence of the Western Legal Traditions" 8 (1996) *ERPL*, 1139.

[5] See, e.g., Harlow, C., "Francovich and the Problem of the Disobedient State" 2 (1996) *ELJ*, 199 and Teubner, G., "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" 61 (1998) *MLR*, 11.

[6] See, e.g., Legrand, P., "The Impossibility of Legal Transplants" (1997) *MJ*, 111.

[7] This is certainly the understanding which seems to inform the work of Jurgen Schwarze, at least insofar as relates to the relationship between EC law and the various domestic orders of the Member States: "Community law has now started to exercise an influence upon national legal systems and, as a medium and catalyst, it is beginning to contribute to a convergence and approximation of administrative laws in Europe." See *European Administrative Law* (London, Sweet and Maxwell, 1992), 1465.

[8] On how far the different national systems of the EU Member States might be said lend themselves to European legal integration see the contributions in Schwarze, J. (ed.) *Administrative Law under European Influence* (Baden-Baden, Nomos, 1996).

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most of the ECHR,[9] thereby finally furnishing that body of law with a channel into the domestic legal order.[10] As such, it will be argued that the *Human Rights* Act should significantly change the approach of United Kingdom courts to the process of European legal integration. Prior experience has often seen dualist constitutional traditions, which pervade United Kingdom Law, militating against the fluid interaction of national, supranational and international legal standards.[11] It is the core contention of this article that the *Human Rights* Act 1998 should fundamentally recast the relationship which United Kingdom public law has with EC law and the law of the ECHR.

The theoretical debate about European legal integration will first be addressed, in order to establish a conceptual framework in which to place the relationship between United Kingdom public law, EC law and the law of the ECHR. Thereafter, a brief retrospective account will be provided of the United Kingdom courts' approach to borrowing from EC law and the law of the ECHR. This will reveal, on the one hand, how United Kingdom courts have, on balance, been cautious about using European law[12] for purposes of elaborating domestic principle and practice. On the other hand, however, this account will also reveal why it might be expected that the *Human Rights* Act will effect significant change in the domestic courts' approach to the process of European legal integration. Specifically, it will be seen that there exists a line of jurisprudence in which UK courts have developed a much more assertive institutional role relative to the protection of fundamental

[9] Specifically, Articles 2–12 & 14 ECHR, Articles 1–3 of the First Protocol to the ECHR, and Articles 1 & 2 of the Sixth Protocol, as read with Articles 16–18 ECHR. It should be noted, however, that it has been doubted whether the HRA goes so far as formally to incorporate these provisions in domestic law. See, e.g., Coppel, J., *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (Chichester, Wiley, 1998) at 4. On the HRA see further Wadham, J. and Mountfield, H., *Blackstone's Guide to the Human Rights Act 1998* (London, Blackstone, 1999).

[10] On the ECHR's role prior to incorporation, see, e.g., *R* v. *Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi* [1976] 3 All ER 843 (as an aid to statutory interpretation in the event that a domestic statute is ambiguous); *Attorney-General* v. *Guardian Newspapers* [1987] 1 WLR 1248 (to guide exercises of judicial discretion); *Derbyshire County Council* v. *Times Newspapers Ltd* [1992] QB 770 (to help to establish the scope of the common law); and *R* v. *Secretary of State for the Home Department, ex parte McQuillan* [1995] 4 All ER 400 (as an equivalent of the common law and as part of EC law).

[11] See Ward, I., "Dualism and the Limits of European Integration" 17 (1995) *Liverpool LR*, 29. See further *R* v. *Secretary of State for the Home Department, ex parte Brind* [1991] 2 WLR 588; *R* v. *Ministry of Agriculture, Fisheries and Food, ex parte First City Trading* [1997] 1 CMLR 250; and *R* v. *Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 All ER 397.

[12] But see exceptionally *Woolwich Equitable Building Society* v. *Inland Revenue Commissioners (No 2)* [1992] 3 WLR 366; *M* v. *Home Office* [1993] 3 WLR 433; and *R* v. *Ministry of Agriculture, Fisheries and Food, ex parte Hamble Fisheries* [1995] 2 All ER 714.

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rights.[13] Given that this jurisprudence has tended to arise in cases which will in future be governed by the *Human Rights* Act, it is argued that it should, in the first instance, occasion an increased process of borrowing from the law of the ECHR.

Finally, this article considers the potential which the *Human Rights* Act holds for the emergence of a new integrative dynamic engaging EC law as well as the law of the ECHR. Here, it is argued that it will become increasingly difficult, and perhaps even fallacious, for the domestic courts to differentiate between the respective spheres of influence of domestic law, EC law and the law of the ECHR. The ECHR does, for example, already inform the workings of the body of EC law which feeds into the United Kingdom legal order,[14] and there further exists the possibility that some *Human Rights* Act cases will raise issues which are governed by both common law rules and EC principles.[15] Consequently, while deeper enmeshing of domestic, supranational and international standards may not always be desirable,[16] or appropriate,[17] it is suggested that the *Human Rights* Act should, as a minimum expectation, render United Kingdom public law more open to European legal integration.

II. UK Public Law and the Language of European Legal Integration

Academic opinion is divided among those scholars who consider that borrowing of legal norms between jurisdictions is possible; those who consider that borrowing is not possible; and those who consider that borrowing might be possible subject to various institutional considerations being afforded due regard. The point of division within these schools of thought has tended to concern the imagery and viability of the "transplantation" of legal standards. Although legal transplantation can assume many forms,[18] it is, at its

[13] See, e.g., *Raymond* v. *Honey* [1983] 1 AC 1; *R* v. *Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514; *M* v. *Home Office* [1993] 3 WLR 433; *R* v. *Home Secretary, ex parte Leech* [1994] QB 198; *R* v. *Ministry of Defence, ex parte Smith* [1995] 4 All ER 427; *R* v. *Cambridge Health Authority, ex parte Child B* [1995] 25 BMLR 5; and *R* v. *Lord Chancellor, ex parte Witham* [1997] 2 All ER 778.

[14] See note 4 above. But see also Coppel, J. and O'Neill, A., "The European Court of Justice: Taking Rights Seriously?" 29 (1992) 29 *CMLRev*, 669.

[15] See, e.g., *R* v. *Secretary of State for the Home Department, ex parte McQuillan* [1995] 4 All ER 400.

[16] For a critical analysis of EC law see Harlow, C., "European Administrative Law and the Global Challenge" in Craig, P. and de Búrca, G. (eds), *The Evolution of EU Law* (Oxford, OUP, 1999), 261. On the ECHR see Oliver, D., "A Negative Aspect to Legitimate Expectations" [1998] *PL*, 558.

[17] See, e.g., Dehousse, R., "Comparing National and EC Law: The Problem of the Level of Analysis" 42 (1994) *AJCL*, 761.

[18] See further Ajani, G., "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe" 43 (1995) *AJCL* 93.

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most basic, a concept and process which involves "the transposition of a doctrine from one jurisdiction to another".[19] Accordingly, while some commentators consider such transplantation and borrowing to be relatively unproblematic,[20] others are much more circumspect: "Anyone who takes the view that 'the law' or 'the rules of the law' travel across jurisdictions must have in mind that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage".[21]

The strand of academic opinion which is to be found in between these positions attempts to harness the respective strengths and weaknesses of the competing contributions to the transplantation debate. In an essay published in 1998, John Bell emphasised that legal borrowing is possible, but only if that process fully takes into account the legal characteristics of any receiving legal order.[22] As such, Bell simultaneously sought to infuse the debate about legal borrowing with more flexible imagery than that of legal transplantation. For Bell, the process of legal borrowing can be better understood and justified if conceived of in terms of legal "cross-fertilisation". Thus, while legal transplantation is suggestive of a rigid and potentially problematic process, legal cross-fertilisation implies:

> ". . . A different, more indirect process. It implies that an external stimulus promotes an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive . . . product of that system rather than a bolt-on".[23]

In abstract terms, the imagery of legal cross-fertilisation might be said to be particularly appropriate in the context of the United Kingdom legal order's relationship with EC law and the law of the ECHR.[24] Certainly, in relation to the United Kingdom dualist constitutional tradition, EC law and the ECHR can be described as "external stimuli" which enjoy a direct

[19] Bell, J., "Mechanisms for Cross-fertilisation of Administrative Law in Europe" in Beatson, and Tridimas, above n 1 at 147.

[20] For explicit endorsement of the viability of legal transplantation as a general process see, e.g., Watson, A., *Legal Transplants: An Approach to Comparative Law* 2nd ed. (Georgia, Univ. of Georgia Press, 1993). For implicit endorsement of transplantation in the context of European legal integration see, e.g., Schwarze above n 4.

[21] Legrand, above n 6 at 114. See further Legrand, P., "European Legal Systems are not Converging" 45 (1996) *ICLQ*, 52.

[22] Above n 19. For an earlier contribution which pursues roughly similar themes see Kahn-Freund, O., "On Uses and Misuses of Comparative Law" 37 (1974) *MLR*, 1.

[23] Bell, *Ibid*.

[24] It should be noted that the central thrust of Bell's contribution concerns the process of interaction and integration between national legal orders. However, he does acknowledge that there can be a process of legal cross-fertilisation whereby domestic courts borrow from EC law: "Such national developments illustrate the way in which cross-fertilisation takes place . . . The national legal order tries to find the most appropriate way to accommodate the new insight into its own conceptual structure and legal culture. As a result, the national solutions are not identical in form, even if they may be broadly similar in result". Bell, *Ibid* at 161.

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channel into the domestic order by virtue of the *European Communities* Act 1972 and the *Human Rights* Act 1998. Furthermore, and thus incorporated, EC law and the ECHR may, on occasion, oblige the courts to apply legal standards which are different from those of domestic law. Consequently, should it be perceived that EC law and the law of the ECHR represent a superior standard of law to that of the domestic order, the judiciary may feel compelled, or at least desire, to adapt the domestic system. Indeed, this "correctional" development of the law has already been alluded to by other commentators, with Paul Craig, for example, referring to the "spill-over" of EC standards into the domestic order.[25]

One problem with invoking the imagery of legal cross-fertilisation in the context of the United Kingdom legal order, however, concerns the question of which domestic legal considerations must be taken into account when gauging the limits to any process of successful integration. John Allison, in an essay which broadly endorses John Bell's contribution, states forcefully that successful borrowing between legal systems requires those who control that process to give full effect to various established doctrinal, institutional and theoretical understandings.[26] Previously, the nature of the doctrinal, institutional and theoretical understandings which could be expected to determine how far external norms could be imported into the United Kingdom legal order were readily identifiable: United Kingdom administrative law was predicated upon the logic of the *ultra vires* paradigm, and there existed a series of related principles of administrative law which reflected one accepted understanding of the proper institutional role of the courts.[27]

In recent years, however, some of the fundamental understandings of the United Kingdom legal order have been strained by a series of cases which have seen the courts begin to redefine their institutional role. These cases have typically concerned the liberalisation of the rules governing standing to bring an application for judicial review;[28] the expansion of the scope of the

[25] See, e.g., "Once More Unto the Breach: The Community, The State and Damages Liability" (1997) *LQR*, 67. See also Anthony, G., "Community Law and the Development of United Kingdom Administrative Law: Delimiting the 'Spill-over' Effect" 4 (1998) *EPL*, 253. But see Allison, A., "Transplantation and Cross-fertilisation" in Beatson and Tridimas above n 1 at 169.

[26] *Ibid*. Although this article considers the manner in which the United Kingdom courts govern the process of European legal integration, it should be noted that the process of integration and harmonisation also engages the activities of national legislatures and administrations. See, e.g., Evans, A., "Voluntary Harmonisation in Integration between the European Community and Eastern Europe" 22 (1997) *ELRev*, 201 and Harmsen, R., "The Europeanization of National Administrations: A Comparative Study of France and the Netherlands" 12 (1999) *Governance*, 81.

[27] In particular, *Wednesbury* unreasonableness. See *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1948] 1 KB 223.

[28] See, e.g., *R* v. *Secretary of State for Foreign Affairs and Commonwealth Affairs, ex parte Rees-Mogg* [1994] 1 All ER 457; *R* v. *Inspectorate of Pollution, ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 328; *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte*

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courts' supervisory jurisdiction;[29] and the assertion of a much more pronounced judicial role relative to the protection of the fundamental rights of individuals.[30] Although these cases may not necessarily be representative of a new orthodoxy, they are nevertheless indicative of the institutional tensions which can increasingly be seen to underpin the workings of United Kingdom public law.[31] In terms of the logic and limits of legal cross-fertilisation, then, the problem for any process of borrowing becomes apparent: if there are within the United Kingdom legal order competing institutional understandings of the proper role of the courts and domestic public law, which of these institutional understandings should be emphasised in any process of borrowing from EC law and the ECHR?

III. EC Law, UK Public Law and the Practice of European Legal Integration

The increase in competing understandings of the proper institutional role of the courts can be easily illustrated by reference to existing jurisprudence on the borrowing of principles of administrative law from the EC legal order. This is particularly true of the proportionality principle.[32] Here, the debate has concerned the question of how proportionality's emergence in the domestic order might be reconciled with the standard of *Wednesbury* review.[33] The standard of *Wednesbury* review is famously predicated upon an understanding that the courts should impugn only those administrative decisions which are "so outrageous in (their) defiance of logic or of accepted

World Development Movement Ltd [1995] 1 WLR 386; and *R* v. *Secretary of State for the Home Department, ex parte Fire Brigade's Union* [1995] 2 WLR 275.

[29] See, e.g., with regard to the review of exercises of the royal prerogative, *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] 1 AC 374; *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 All ER 655; *R* v. *Secretary of State for the Home Department, ex parte Bentley* [1993] 4 All ER 443; and *R* v. *Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 WLR 646. See further the extension of the courts' supervisory jurisdiction to non-statutory bodies, e.g., *R* v. *Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815.

[30] See above n 13.

[31] Compare, for example, Lord Irvine of Lairg's contribution in "Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review" [1996] *PL*, 59 with the opinions of other leading members of the UK judiciary, e.g., Lord Woolf, "Droit Public—English Style" [1995] *PL*, 57; Sir John Laws, "Law and Democracy" [1995] *PL*, 72; and Sir Stephen Sedley, "Human Rights: A Twenty-First Century Agenda" [1995] *PL*, 386.

[32] On proportionality in EC law see de Búrca, G., "Proportionality in EC Law" 13 (1993) *YEL*, 105. On the obligation befalling national courts with regard to giving effect to the proportionality in cases which raise issues of EC law see Case C-237/82, *Jongeneel Kaas* v. *Netherlands* [1984] ECR 483, 520–522, AG Mancini.

[33] See further de Búrca, G., "Proportionality and *Wednesbury* Unreasonableness: The Influence of European Legal Concepts on United Kingdom Law" 3 (1997) *EPL*, 561.

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moral standards that no sensible person who had applied his mind to the question could have arrived at (them)".[34] The European proportionality principle, meanwhile, is understood to lessen the threshold point at which courts scrutinise administrative decisions, by requiring them to balance the respective interests of public authorities and any persons affected by particular decisions.[35] The issue for the courts, therefore, has been to decide how far they wish to be seen to be more closely reviewing the merits of administrative decisions which are taken in areas falling beyond the scope of application of the *European Communities* Act 1972.[36]

The United Kingdom courts' approach to this issue has alternated between preserving the language of *Wednesbury* orthodoxy and occasionally modifying *Wednesbury's* practical application when certain questions of law are raised in court. The seminal case on the enduring relevance of *Wednesbury* is *R* v. *Secretary of State for the Home Department, ex parte Brind*.[37] In this case, a group of journalists sought judicial review of the Home Secretary's decision to introduce a ban on the broadcast of interviews with the political representatives of certain illegal organisations in Northern Ireland.[38] The application was based on various grounds, one of which was

[34] *Per* Lord Diplock in *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374, 410. For an endorsement of *Wednesbury*, see Lairg above n 31. But see Jowell, J. and Lester, A., "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] *PL*, 368.

[35] The proportionality principle has been defined by the Council of Europe Committee of Ministers as requiring public bodies to "maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose it pursues". See R(80)2, II 4. It should be noted, however, that the jurisprudence of the ECJ would suggest that there is sufficient flexibility within the proportionality principle to allow courts to decide how closely they should involve themselves in reviewing decisions taken in certain policy areas. See further de Búrca above n 32 and Tridimas, T., "Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny" in Ellis, E. (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart Publishing, 1999), 65.

[36] It should be noted, however, that United Kingdom courts have, on occasion, had difficulties applying the proportionality principle in EC law cases. See, e.g., *Stoke-on-Trent CC and Norwich CC* v. *B & Q plc* [1991] Ch 48, 69 (Hoffman J.) and compare and contrast the approaches of the Divisional Court and the Court of Appeal in *R* v. *Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* ([1995] 4 All ER 364 (DC) and [1997] 2 All ER 65 (CA)).

[37] [1991] 2 WLR 588. It should be noted that the version of proportionality raised in the *Brind* case would likely have been that which is more readily associated with the workings of the ECHR. Nevertheless, the fact that argument was presented to the court on the basis of the *GCHQ* case (wherein Lord Diplock referred to the proportionality principle which operates in the broader EC context) suggests that the pressure for the development of a domestic proportionality principle arose, at least in part, because of the domestic courts' experience with the EC legal order (Lord Diplock's reference to proportionality in *GCHQ* can be found at *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] 1 AC 374, 510–511).

[38] Introduced pursuant to section 29(3) of the Broadcasting Act 1981. See also clause 13 of the licence and agreement governing the broadcasting activities of the BBC.

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that the Home Secretary's initiative represented a disproportionate means to achieve the particular end pursued.[39] The House of Lords unanimously dismissed the application, however, rejecting the argument that the proportionality principle had any role to play in the instant case: "It . . . occurs to me that there can be very little room for judges to operate an independent judicial review proportionality doctrine in the space which is left between the conventional judicial review doctrine and the admittedly forbidden appellate approach".[40]

At one level, this decision might be said to encapsulate the essence of the domestic dualist constitutional tradition. Ian Ward has commented that dualism requires that external norms be conceived of as " . . . component(s), or sub-species of our legal order",[41] and the *Brind* ruling *prima facie* leans towards an understanding that external norms should be seen as entirely distinct from those which exist within the domestic order. Indeed, the core logic of dualism has also been apparent in other cases, with the courts sometimes forcefully denying that general principles of EC law should have any impact in those cases which do not fall directly within the terms of reference of the *European Communities* Act 1972.[42] Consequently, while the courts will seek to give effect to the proportionality principle in EC law cases, it might be suggested there exists no expectation, as in *Brind*, that the principle will inform the development of national law.

One aspect of the *Brind* ruling which runs contrary to such an absolute assessment, however, is the fact that there were, within each of their Lordships judgments, variable understandings of why the proportionality principle could not be of relevance in the instant case. At one extreme, there was the orthodox opinion which queried whether proportionality could ever have any role to play in domestic administrative law.[43] But beyond this orthodox stance, two of their Lordships inferred that the emergence of a domestic proportionality principle was likely at some stage in the future. Lord Roskill, for example, suggested that one reason why the proportionality principle could not be developed in the *Brind* case was because the facts of that case

[39] The applicants further argued that the Home Secretary's decision was contrary to certain provisions of the ECHR (principally Articles 10 & 13). On *Brind* see further Thompson, B., "Broadcasting and Terrorism in the House of Lords" [1991] *PL*, 346 and Halliwell, M., "Judicial Review and Broadcasting Freedom: The Route to Europe" 42 (1991) *NILQ*, 246.

[40] *Per* Lord Lowry, [1991] 2 WLR 588, 610. For comparable understandings of the courts' role in review proceedings see, e.g., *R* v. *Secretary of State for the Environment, ex parte NALGO* [1993] Admin LR 785; *R* v. *Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 All ER 397; and *R* v. *Radio Authority, ex parte Bull* [1997] 2 All ER 561.

[41] Ward above n 11 at 36.

[42] See, e.g., *R* v. *Ministry of Agriculture, Fisheries and Food, ex parte First City Trading Limited* [1997] 1 CMLR 250 (Laws J). The principle at issue in this case was the equality principle.

[43] See, e.g., Lord Lowry's judgment at [1991] 2 WLR 588, 606–610.

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did not lend themselves to such development of the law.[44] Lord Ackner, meanwhile, was more specific about how and when he considered that the proportionality principle might emerge in domestic law: "Unless and until Parliament incorporates the Convention into domestic law, a course which it is well known has a strong body of support, there appears to me to be no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country".[45]

Perhaps the most interesting judgment in *Brind*, however, was that delivered by Lord Bridge. In the first instance, his Lordship was careful to approach the application made to the House on the basis of domestic orthodoxy. Yet, within this framework, Lord Bridge suggested *obiter* that he would be willing to modify the standard of *Wednesbury* review whenever fundamental rights are in issue. Specifically, his Lordship stated that when the exercise of administrative discretion impacts upon the fundamental rights of an individual (in this case freedom of expression), the courts are ". . . perfectly entitled to start from the premise that any restriction . . . requires to be justified and nothing less than an important competing public interest will be sufficient to justify it".[46] As such, this *dictum* reflected comments made previously by Lord Bridge,[47] and it is an approach which has since been endorsed by other judges in cases concerning public order,[48] sexual orientation,[49] and the allocation of health care resources.[50] In *R* v. *Cambridge Health Authority, ex parte B*,[51] for example, the father of a 10 year-old cancer patient applied for a judicial review of a decision of Cambridge Health Authority that further treatment would not be in his child's best interests. The application was heard in the High Court by Laws J. who considered that the Health Authority's decision interfered with child B's "fundamental right to life".[52] Given this, Laws J. stated that it was incumbent upon the Health Authority to provide a sufficient public interest justification for its decision. In this regard, the Health Authority had been arguing that the heavy expense of the proposed treatment had to be balanced against the interests of other patients (both present and future), particularly in light

[44] See [1991] 2 WLR 588, 593–594.

[45] See [1991] 2 WLR 588, 606.

[46] [1991] 2 WLR 588, 592–593.

[47] See *R* v. *Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514, 531.

[48] *R* v. *Coventry Airport, ex p. Phoenix Aviation* [1995] 3 All ER 37, 62 (Simon Brown LJ).

[49] *R* v. *Ministry of Defence, ex p. Smith* [1995] 4 All ER 427, 445 (Simon Brown LJ). But see also the judgment of the European Court of Human Rights in *Smith and Grady* v. *United Kingdom* (2000) 29 EHRR 493.

[50] *R* v. *Cambridge Health Authority, ex parte B* [1995] 25 BMLR 5.

[51] *Ibid*. On *B* see James, R. and Longley, D., "Judicial review and tragic choices: *Ex Parte B*" *PL* [1995], 367.

[52] The "right to life" identified by Laws J. was that based in the common law. On Laws J.'s wider approach to fundamental rights in the common law see, e.g., "Is the High Court the Guardian of Fundamental Rights?" [1993] *PL*, 59.

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of child B's marginal chances of recovery. Laws J., however, was not convinced that financial constraints necessarily should trump child B's right to life. Accordingly, an order of *certiorari* was granted.

Laws J.'s approach in *B* clearly approximated the kind of balancing exercise ordinarily associated with the proportionality principle.[53] It was, however, an approach which was subsequently criticised by the Court of Appeal.[54] In short, the Court of Appeal considered that Laws J. had gone too far in requiring the Health Authority to justify its use of resources. Sir Thomas Bingham MR, who delivered the lead judgment of the Court, started by restating the *Wednesbury* understanding that the courts in a review case are concerned only with the legality of a decision and not its merits. Thereafter, Sir Thomas Bingham MR forwarded some practical objections to the approach adopted by Laws J., before ruling that Laws J.'s approach had been errant: "While I have . . . every possible sympathy with B, I feel bound to regard this as an attempt, wholly understandable but none the less misguided, to involve the court in a field of activity where it is not fitted to make any decision favourable to the patient".[55]

IV. The Human Rights Act 1998 and European Legal Integration

The existence of pre-existing agitation for the adoption of a more interventionist judicial role in the field of fundamental rights is central to the argument that the *Human Rights* Act 1998 might be expected to cause significant realignment within domestic public law.[56] Indeed, aside from the pressure emanating from domestic jurisprudence, the very structure of the *Human Rights* Act seems to be predicated upon an understanding that the courts will perform an enhanced institutional role in certain areas.[57] The courts are, for example, required by the *Human Rights* Act to develop an expansive

[53] It should be noted, however, that Laws J. has written (extra-curially) that he considers the distinction between *Wednesbury* and proportionality to be one which fails to appreciate the qualities which inhere within *Wednesbury*. In short, Laws J. has argued that *Wednesbury* is fully equipped to perform the function ordinarily associated with proportionality. See Sir John Laws, "Wednesbury" in Forsyth, C. and Hare, I. (eds), *The Golden Metwand and the Crooked Cord* (Oxford, Clarendon Press, 1998), 185. For a criticism of the language of *Wednesbury* see Jowell and Lester above n 34.

[54] [1995] 2 All ER 129.

[55] *Ibid* at 138.

[56] At the time of writing it is expected that the *Human Rights* Act 1998 will not become effective until October 2000. But see s. 107 of the *Government of Wales* Act 1998; ss. 6 & 24 of the *Northern Ireland* Act 1998; and ss. 29 & 57 of the Scotland Act 1998.

[57] A similar understanding might be said to inhere in each of the devolution Acts (see note 56 above). See further Reed, R., "Devolution and the Judiciary" in the University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford, Hart Publishing, 1998), 21.

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approach to the interpretation of national legislation relative to the terms of the ECHR;[58] to make declarations that domestic legislation is contrary to the terms of the ECHR in the event that such legislation cannot be construed in accordance with the ECHR;[59] and to scrutinise each of the actions of public authorities for compatibility with the terms of the ECHR.[60] Consequently, there is, as Lord Browne-Wilkinson has suggested, a very real possibility that domestic law will acquire ". . . a code of morals reflecting the input of many different viewpoints . . . the introduction of the Convention . . . will require . . . the English courts to approach constitutional issues on a proper constitutional basis."[61]

The most important provision of the *Human Rights* Act, in the present context, is section 2. It requires domestic courts to "take into account" all relevant ECHR jurisprudence when hearing cases which raise *Human Rights* Act issues.[62] As such, this provision clearly has the potential to recast the pre-existing debate about the relationship between *Wednesbury* unreasonableness and the proportionality principle (albeit initially in fundamental rights cases). Although the proportionality principle is not specifically mentioned in the text of the ECHR, it is, nevertheless, central to much of the jurisprudence of the European Court of Human Rights.[63] Given Lord Ackner's previous understanding that the ECHR's incorporation in domestic law might facilitate the

[58] S. 3. See further, Lester, A., "The Art of the Possible—Interpreting Statutes under the Human Rights Act" (1998) *EHRLR*, 665.

[59] S. 4. It should be noted that a declaration that primary legislation is contrary to the ECHR does not affect the continuing validity of the legislation in question (ss. 4(2) and 4(6)), although it is envisaged that a declaration of incompatibility will lead to appropriate amendment (s. 10). Secondary legislation which is contrary to the terms of the ECHR, meanwhile, is void (subject to s. 4(4)). See further Bamforth, N., "Parliamentary Sovereignty and the Human Rights Act 1998" [1998] *PL*, 572.

[60] S. 6. On the question of what is a public authority for purposes of the Act see Sherlock, A., "The Applicability of the United Kingdom's Human Rights Bill: Identifying Public Functions" 4 (1998) *EPL*, 593 and Bamforth, N., "The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies" 58 (1999) *CLJ*, 159.

[61] See, "The Impact on Judicial Reasoning" in Markesinis, B. (ed.), *The Impact of the Human Rights Bill on English Law* (Oxford, Clarendon Press, 1998), 21, 22. It should be noted, however, that there exists some doubt that all provisions of the *Human Rights* Act 1998 will allow the judiciary to build upon previous developments in the domestic order. See, in particular, the s. 7 standing requirement as relates to the cases cited at note 28 above. See further Marriott, J. and Nicol, D., "The Human Rights Act, Representative Standing and the Victim Culture" [1998] *EHRLR*, 730.

[62] S. 2 reads: "A court or tribunal determining a question which has arisen under this Act in connection with a Convention right must take into account any—(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights . . . whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen".

[63] See further Eissen, M. A., "The Principle of Proportionality in the Case-Law of the European Court of Human Rights" in Macdonald, R. St. J. *et al* (eds.), *The European System for the Protection of Human Rights* (The Hague, Martinus Nijhoff, 1993), 125 and McBride, J. "Proportionality and the European Convention on Human Rights" in Ellis above n 35.

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development of a domestic proportionality principle,[64] it is probable that the courts will begin to be much more explicit in their consideration of the respective merits of proportionality and *Wednesbury* in *Human Rights* Act cases.[65] Accordingly, the issue in future years may no longer be one of whether there exists in domestic law a proportionality principle, but rather one of where any domestic proportionality principle sits relative to *Wednesbury* unreasonableness.[66] Will proportionality be subsumed within *Wednesbury*, or will proportionality supersede *Wednesbury*? Will the operation of the proportionality principle be limited to fundamental rights cases, or will it extend to other cases, including those which raise socio-economic issues?

The proportionality principle which functions in ECHR jurisprudence is typically concerned with the need to balance individual interests against the broader public interest in permitting derogation from the terms of the ECHR. Jason Coppel has written that the ECHR proportionality principle "requires that the restrictive effects of a measure are strictly in proportion to its legitimate aims and objectives".[67] On this basis, Coppel has further identified a series of related tests which have emerged from within the proportionality principle.[68] These tests include: the "balancing" test whereby "a measure is disproportionate if it imposes restrictions which are not justified in the light of the objectives which it seeks to achieve";[69] the "relevant and sufficient reasons" test whereby "a measure will be held disproportionate if it is not supported by relevant and sufficient reasons";[70] the test of "careful design" whereby a restriction will be disproportionate if it is "over-broad and covers a wider range of situations than is justifiable";[71] the "essence of the right" test whereby a restriction "will always be disproportionate where its impairs the very essence of the right";[72] and the "evidential" test whereby the State is required "to produce satisfactory evidence of the pressing social need which its restriction seeks to address".[73]

[64] See above n 45 and corresponding text.

[65] An understanding which seemingly is shared by the Government. See, *Rights Brought Home: The Human Rights Bill*, Cmnd 3782, para. 2.5: ". . . Our courts will be required to balance the protection of individuals' fundamental rights against the demands of the general interest of the community".

[66] See, e.g., *Abdadou* v. *Home Secretary* [1998] SC 504, 518–9 (Lord Eassie).

[67] Coppel above n 9 at 160.

[68] *Ibid* at 161–164.

[69] Cases cited by Coppel include, *Young, James and Webster* v. *United Kingdom*, A/44 [1982] 4 EHRR 38; *Dudgeon* v. *United Kingdom*, A/45, [1982] 4 EHRR 149; *F* v. *Switzerland*, A/128, [1988] 10 EHRR 411; and *Nasri* v. *France*, A/324, [1996] 21 EHRR 458.

[70] Cases cited by Coppel include, *Goodwin* v. *United Kingdom*, Appl. No. 17488/90, [1996] 22 EHRR 123 and *Vogt* v. *Germany*, A/323, [1996] 21 EHRR 205.

[71] In this regard Coppel cites, *Open Door Counselling and Dublin Well Woman* v. *Ireland*, A/246, [1993] 15 EHRR 244.

[72] In this regard Coppel cites, *F* v. *Switzerland*, A/128, [1988] 10 EHRR 411.

[73] Cases cited by Coppel include, *Kokkinakis* v. *Greece*, A/260–A, [1994] 17 EHRR 397; and *Socialist Party* v. *Turkey*, A/919, decision of 25 May 1998.

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The fact that the proportionality principle can give rise to, and underpin, this series of tests and standards is of fundamental importance to understanding how the proportionality principle could, potentially, further Europeanise domestic administrative law. As a preliminary development, of course, any increased process of Europeanisation likely would require free-standing status in *Human Rights* Act case law for the proportionality principle. There does, for example, presently exist some judicial opinion which holds that the elements of the proportionality principle can be seen to inhere in *Wednesbury*,[74] and it might be argued that this understanding would serve to constrain the development of the domestic legal order. Stated alternatively, the problem with a "proportionality within *Wednesbury*" approach is that it denies, at least by implication, that the proportionality principle pertains to its own dynamics, expectations and standards.[75] The realisation of a more active process of Europeanisation, therefore, would seem to depend upon proportionality emerging as a distinct and free-standing principle of administrative law.

One of the best indicators that there are significant differences between proportionality and *Wednesbury* can be found in the aforementioned fact that a proportionality test will often demand that courts involve themselves more closely in a review process than they would when conducting a *Wednesbury* inquiry. David Feldman has suggested that this is true both of the core question which is asked in proportionality and *Wednesbury* inquiries (i.e. balance v. irrationality) and of the intensity of any related questions:[76] "The proportionality test may go slightly further than the other related tests under *Wednesbury* . . . An unfair balance may be struck even after all the relevant interests have been considered, irrelevant ones ignored, and the proper purpose of the power borne clearly in mind."[77] Accordingly, Feldman concludes that a proportionality inquiry, properly conducted, will often demand that a reviewing court "direct attention not only to the interests or considerations weighed against each other, but also to the relative weights which the primary decision-maker attached to the various interests or considerations".[78]

The impact which a free-standing proportionality principle might be expected to have on the domestic legal order, then, is two-fold. First, a domestic proportionality principle would likely displace the standard of

[74] See, e.g., *R* v. *Secretary of State for Health, ex p. US Tobacco International Inc.*, [1992] 1 All ER 212, 221 (Taylor LJ). See also Sir John Laws, above n 53 and Lord Hoffman, "The Influence of the European Principle of Proportionality upon United Kingdom Law" in Ellis above n 35 at 107.

[75] Although it is interesting to note that that Lord Slynn has suggested that the differences between proportionality and *Wednesbury* may, on occasion, be over-stated. See *R* v. *Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1998] 3 WLR 1260, 1277.

[76] See, "Proportionality and the Human Rights Act" in Ellis above n 35 at 117.

[77] *Ibid* at 128.

[78] *Ibid*.

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Wednesbury review whenever ECHR issues are raised in court. This does not necessarily mean that *Wednesbury* would be rendered redundant in cases which do not involve ECHR issues, but it might, as is further suggested below, serve to raise questions about the desirability of retaining, for some cases, a standard which has been deemed unsuitable to the resolution of others. Second, and by displacing *Wednesbury* in *Human Rights* Act cases, the proportionality principle might then be expected to provide the core standard against which other principles of domestic administrative law must be set. Paul Craig has noted that: "... the adoption of proportionality may well require us to think again about ... the unwillingness to accord discovery in review actions, and more generally about the way in which we regard reasons and evidence in such cases".[79] It could be argued, therefore, that the proportionality principle would allow the courts to begin developing, in domestic law, some of the other tests which inhere in the European Court of Human Rights' broader approach to the proportionality principle. Consequently, the duty to give reasons, while already being developed in domestic law,[80] might in future come to be seen as a minimum standard in *Human Rights* Act cases rather than something to be gauged on a case-by-case basis.[81] Likewise, it might be expected that the future protection of substantive legitimate expectations in domestic fundamental rights cases will also be achieved by reference to the proportionality principle and related standards.[82]

V. The Human Rights Act 1998: A New integrative Dynamic?

The argument that the *Human Rights* Act 1998 might forge the kind of domestic circumstances which will accelerate a process of legal cross-fertilisation is, of course, one which must be closely qualified. First, an explanation is required for the assumption that any process of borrowing from the law of the ECHR should be expected to occur relatively freely: if the United

[79] See, "Unreasonableness and Proportionality in United Kingdom Law" in Ellis above n 35 at 85 and 106.

[80] See, e.g., *R* v. *Civil Service Appeal Board, ex p. Cunningham* [1991] 4 All ER 310; *R* v. *Home Secretary, ex parte Doody* [1994] 1 AC 531; *R* v. *Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 All ER 651; *R* v. *City of London Corporation, ex parte Matson* [1997] 1 WLR 765; and *R* v. *Secretary of State for the Home Department, ex parte Fayed* [1997] 1 All ER 228. See also the Freedom of Information Bill.

[81] The extent to which domestic law's emphasis on fairness lends itself to variable standards with regard to the giving of reasons is evident in Sedley J.'s judgment in *R* v. *Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 All ER 651.

[82] On the domestic approach, see, e.g., *R* v. *Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 All ER 397. But see also *R* v. *North and East Devon Health Authority, ex p. Coughlan*, [1999] LGR 703.

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Kingdom courts have, on balance, been reluctant to borrow principle and practice from the EC legal order, then why might their approach to the law of the ECHR be markedly different? Second, and at a more abstract level, there is the question of why ECHR jurisprudence should be necessarily considered readily "transplantable" into the domestic legal order. Renaud Dehousse, for example, has cautioned that any comparison between bodies of domestic law and supranational/international law should take close cognisance of the contrasting functional perspectives of different bodies of law.[83] The inference which may be drawn, therefore, is that variable functional perspectives should logically act to limit any process of legal assimilation and integration. Finally, there also remains the question of what role EC law may play in any deeper process of the Europeanisation of United Kingdom public law.

The initial matter of why any process of borrowing from the ECHR might be expected to occur relatively freely can be easily resolved by reference to some of the features of the *Human Rights* Act 1998 which set it apart from the *European Communities* Act 1972. At a preliminary level it is clear from section 2 of the *Human Rights* Act that it is expected that borrowing will occur in domestic cases which concern fundamental rights. As such, this point of focus contrasts sharply with the point of focus of the corresponding provisions of the *European Communities* Act 1972.[84] In short, the primary purpose of the *European Communities* Act 1972 is not to enable the courts to use EC law to develop domestic law, but rather to ensure that the courts give effect to EC law only insofar as is required to ensure that the United Kingdom properly discharges its EC and related Treaty obligations.[85] Stated alternatively, the focus of the *European Communities* Act 1972 is largely external insofar as EC law is to be considered only in those cases which concern issues relevant to the integrative process. The focus of the *Human Rights* Act, however, is decidedly internal in that it requires the courts to have regard for ECHR jurisprudence when reviewing all daily activities of public authorities which are argued to contravene the fundamental rights of individuals. Consequently, and by providing for the much deeper permeation of ECHR jurisprudence into the domestic legal order, the *Human Rights* Act 1998 might be described as a domestic Act proper.

[83] Above n 17. It should be noted that, although Dehousse's work focuses on differences between EC law and national law, many of the points made are of equal relevance as regards the law of the ECHR and national law.

[84] Ss. 2–3.

[85] See, most famously, *R* v. *Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 All ER 70 and *Equal Opportunities Commission and Another* v. *Secretary of State for Employment* [1994] 1 All ER 910. But see also the point of linkage between *Factortame (No 2)* and the domestic decision in *M* v. *Home Office* [1993] 3 WLR 433. And see further the consideration given to EC law in *Woolwich Building Society* v. *Inland Revenue Commissioners (No 2)* [1992] 3 WLR 366, 395–396 (Lord Goff).

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The more abstract issue of how far a body of domestic law may borrow from the principle and practice of international law, without disruption within the receiving order, might also be resolved by reference to section 2 of the *Human Rights* Act. The wording of section 2, it will be recalled, requires that the courts "take into account" such ECHR jurisprudence as is considered relevant to a particular case. Although it is unclear how exacting this requirement is, the Lord Chancellor has suggested that section 2 is intended to afford the courts a wide discretion with regard to the use of ECHR jurisprudence.[86] The fact that the question of borrowing is to be answered by recourse to judicial discretion, therefore, would suggest that the courts should be able to minimise the potentially damaging effects of the law and practice of the ECHR. Thus, the courts may, on the one hand, consider that a particular aspect of ECHR jurisprudence would be ill-suited to the domestic legal order in its original form,[87] with the result that they may retain the essential features of the domestic standard and adapt them to reflect the essential logic of the broader ECHR approach. On the other hand, the courts might equally adopt particular aspects of ECHR jurisprudence and refashion it to fit more readily within the framework of domestic law. Either way, the initial development of UK fundamental rights law might be expected to be subtle, and primarily designed with emerging domestic legal considerations in mind.

The extent to which the *Human Rights* Act might serve as a catalyst for an increased process of adoption of norms from EC law, meanwhile, will obviously depend on the willingness of judges to develop their enhanced institutional role outside the parameters of fundamental rights cases. The courts may, for example, consider it entirely appropriate to limit any development of the domestic order to fundamental rights cases as defined by the *Human Rights* Act.[88] Indeed, the pattern of United Kingdom case law in favour of developing a proportionality principle has clearly been confined to cases concerning the kind of fundamental rights listed in the ECHR. Accordingly, it might be expected that that the courts will initially prove

[86] "We believe that (section) 2 gets it right in requiring domestic courts to take into account judgments of the European Court but not making them binding . . . The (Act will) of course permit United Kingdom courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so and it is possible they might give a successful lead to Strasbourg." See 583 HL 514, 515.

[87] See, e.g. Oliver above n 16.

[88] On the ECHR articles incorporated by the HRA see note 9 above. These articles cover: the right to life; the prohibition of torture; the prohibition of slavery/forced labour; the right to liberty and security; the right to a fair trial; right to respect for private and family life; freedom of thought conscience and religion; freedom of expression; freedom of assembly and association; the right to marry; the prohibition of discrimination; protection of property; right to education; right to free elections; and abolition of the death penalty (which may be retained in times of war).

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reluctant to elaborate new principles of administrative law in cases concerned with, for example, more socio-economic questions.[89]

The shortcoming of such a restriction, however, is that fundamental rights cases may not always be self-contained. This may be particularly true in property cases[90] where the resolution of a fundamental rights issue might have a profound socio-economic impact.[91] In addition, the further that a fundamental rights case overlaps with socio-economic issues, the greater is the possibility that domestic law and the law of the ECHR will come into contact with EC law, thereby bringing the relationship between these three bodies of law full circle. EC law has, for example, already been developed, at least in part, by reference to the principle and practice of the ECHR,[92] so it might be argued that the *Human Rights* Act 1998 should further strengthen the domestic interaction of these bodies of law. Consequently, if the courts were latterly to decide to develop common principles of administrative law which will operate interchangeably in all cases, it may be wasteful to ignore the insight offered by EC law. The EC law principle of equality,[93] for example, is a much more sophisticated construct than the ECHR's equivalent principle of non-discrimination[94] and may, accordingly, be a more appropriate model for the emergence of any comparable standard in domestic law.[95] Likewise, the EC law principle of proportionality, while sharing many characteristics in common with the ECHR standard, might also periodically provide a more suitable model for certain domestic cases.[96]

The closest the domestic courts have come to recognising that it is both possible and desirable for domestic law, EC law and the law of the ECHR, to interact in this manner was in *R* v. *Secretary of State for the Home Department, ex parte McQuillan*.[97] The facts of this case concerned a chal-

[89] On the courts' traditional reluctance to involve themselves in the review of decisions taken in areas of economic choice and preference see, e.g., *R* v. *Secretary of State for the Environment, ex parte Nottinghamshire CC* [1986] 1 AC 240. But see also *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386.

[90] On property as a fundamental right in ECHR jurisprudence see Protocol 1, Article 1 ECHR.

[91] See, e.g., *National & Provincial Building Society* v. *United Kingdom* [1997] 25 EHRR 127.

[92] See above n 4.

[93] On the principle of equality in EC administrative law see Schwarze above n 7 at chapter 4.

[94] On the limited reach of the ECHR's non-discrimination clause see Livingstone, S., "Article 14 and the Prevention of Discrimination in the European Convention on Human Rights" (1997) *EHRLR*, 25.

[95] On the current position of the principle of equality (non-discrimination) in domestic law see Jowell, J., "Is Equality a Constitutional Principle?" 47 (1994) *CLP*, 1.

[96] On the flexibility which inheres in the EC law principle of proportionality, see above n 35.

[97] [1995] 4 All ER 400.

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lenge to the legality of an exclusion order issued against a former member of the Irish Republican Socialist Party who wished to take up residence and employment in Great Britain. Briefly stated, the applicant, who held dual British and Irish nationality, argued that, as a citizen of Ireland, Britain and the European Union, he was entitled to move freely within the European Union.[98] Furthermore, and given his political affiliations and background, the applicant argued that any derogation from his rights had to be rational, proportionate and sufficiently reasoned by reference to the risks he faced if being effectively barred from leaving Northern Ireland. The applicant's arguments which derived from the ECHR related to Article 2 (the right to life) and Article 3 (freedom from inhuman or degrading treatment).

Judgment in the High Court was delivered by Sedley J. As such, Sedley J.'s approach to the arguments presented to the Court clearly was based upon an understanding of the common law, EC law and the law of the ECHR as inextricably intertwined and mutually reinforcing. Rather than proceeding from the more familiar pre-incorporation starting point that common law standards for the protection of fundamental rights are separate from their European equivalents, Sedley J. showed himself determined to marry domestic law to the broader process of European legal integration:

> Through the jurisprudence of the Court of Justice the principles, though not the text of the Convention now inform the law of the European Union . . . the principles and standards set out in the Convention can certainly be said to be a matter of which the law of this country now takes notice in setting its own standards . . . Once it is accepted that the standards articulated in the European Convention are standards which both march with those of the common law and inform the jurisprudence of the European Union, it becomes unreal and potentially unjust to continue to develop English public law without reference to them.[99]

Murray Hunt has described this *dictum* as the "high-water mark of domestic law's permeability by the ECHR through Community law".[100] Although Sedley J. was, in the end, unable to make a ruling in favour of the applicant,[101] Hunt has suggested that the *McQuillan* ruling remains highly significant because it locates,

[98] Similar challenges to the legality of exclusion orders had previously been argued before the domestic courts. See, e.g., *R* v. *Secretary of State for the Home Department, ex parte Adams* [1995] All ER (EC) 177. See further Douglas-Scott, S. and Kimbell, J. A., "The Adams Exclusion Order Case: New Enforceable Civil Rights in the Post-Maastricht European Union" [1994] *PL*, 516.

[99] [1995] 4 All ER 400, 422. Sedley J.'s understanding of the standards articulated in international law marching with those of the common law was one which evidently borrowed heavily from the single "exception" to the United Kingdom's dualist constitutional tradition, namely the idea that principles of international law are part of the common law unless statute states otherwise. See, e.g., the *dictum* of Lord Atkin in *Chung Chi Cheung* v. *The King* [1939] AC 160, 168.

[100] *Using Human Rights Law in English Courts* (Oxford, Hart Publishing, 1997), 290.

[101] The Home Secretary stated in his affidavit evidence that the interests of national security were at stake. Sedley J., on the authority of various other cases, thereupon considered himself unable to consider the matters raised any further.

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> "the common law's development of a human rights jurisdiction in the wider context of the harmonisation of constitutional standards in an integrating Europe. It is an approach born of an appreciation of the constitutionalising effect of the integration process".[102]

Sedley J.'s general receptiveness to the influence of European legal standards has similarly been in evidence in other of his judgments.[103] Although his approach in this regard has, on occasion, been subjected to sharp rebuke in the higher courts,[104] the passage of the *Human Rights* Act now raises the question of how far the kind of integrative approach seen in *McQuillan* might, at least to some degree, increasingly be demanded of all courts. Accordingly, and despite the criticisms which may be made of it, it might be argued that judgments like *McQuillan* may, in future years, come to represent the "rule" rather than the "exception".

VI. Conclusion

This article has argued that the *Human Rights* Act 1998 should significantly change the point of focus and workings of United Kingdom public law. Specifically, it has argued that the *Human Rights* Act may render United Kingdom public law more open to a process of legal cross-fertilisation whereby United Kingdom courts borrow principle and practice from the ECHR and EC law for purposes of developing domestic law. Although the process of borrowing was identified as potentially problematic,[105] it has been argued that borrowing can now safely occur within the framework of the United Kingdom legal order. Thus, with regard to theoretical concerns about the viability of legal integration, it has been argued that the structure of the *Human Rights* Act should allow the courts closely to control any process of fusion involving national, international and supranational standards. Similarly, and with regard to the more practical question of why the United Kingdom courts might wish to borrow principle and practice, it has been argued that there has, for many years, existed judicial agitation in favour of the kind of developments now envisaged by the *Human Rights* Act.[106]

The suggestion that an increased process of borrowing and integration is now possible only because Parliament has chosen to incorporate the ECHR in domestic law might be criticised by some commentators. Indeed, the above references to Murray Hunt's work are of particular interest insofar as

[102] Hunt above n 100 at 294.

[103] See, e.g., *R* v. *Ministry of Agriculture, Fisheries and Food, ex parte Hamble Fisheries* [1995] 2 All ER 714.

[104] See the Court of Appeal's consideration of Sedley J.'s *Hamble Fisheries* ruling in *R* v. *Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 All ER 397.

[105] See, e.g., Allison above n 25.

[106] Above n 13.

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they raise the question of where the dynamic for deeper integration between UK public law and the broader European legal framework properly should be situated. Hunt has been sharply critical of the tendency for UK judges to emphasise that they will allow external standards to impact on the UK legal order only where such impact has been expressly sanctioned by Parliament.[107] This emphasis on traditional notions of dualism and Parliamentary sovereignty, Hunt argues, necessarily limits the ability of UK constitutional discourse to develop properly in response to the changing social, economic and political environment now surrounding the United Kingdom. Accordingly, Hunt suggests that the courts should be more willing to emphasise the evolutionary qualities of the common law as the basis for legal integration as this approach is flexible and ". . . does not ultimately depend on the notion of the courts as mere implementers of parliamentary will".[108] A similar argument has also been made by T. R. S. Allan.[109]

It might be best to conclude, therefore, by stating that the *Human Rights* Act may, paradoxically, serve as the medium which allows the United Kingdom courts to begin developing the kind of common law integrative jurisprudence demanded by Hunt. The United Kingdom constitution is entering a period of profound change and realignment. In addition to the *Human Rights* Act, for example, the New Labour government has introduced legislation which has devolved power to Northern Ireland, Scotland and Wales; re-established an elected authority for London; effected greater rights of freedom to information legislation; and reformed the House of Lords.[110] Although much of this legislation is couched in language which reasserts the enduring relevance of notions of domestic public law orthodoxy, it is apparent that many of the legal issues associated with this legislation will require judicial invigilation and invention.[111] Parliament has, in a sense, raised a series of constitutional and institutional questions without specifying where to find the answers. Consequently, it might be expected that the courts will increasingly make resort to the prior experience of both the common law and an integrating European legal community as they devise a body of public law suited to the emerging legal and political structures of the United Kingdom.

[107] See generally Hunt above n 100.

[108] Hunt, *ibid* at 83. It should be noted that Hunt is not suggesting that judges should seek to usurp the legislature's function. Rather, Hunt is suggesting that the courts should develop the law on the basis of the common law subject to the final understanding that Parliament may override the development of the law through express legislative enactment. A comparable understanding of the courts' role relative to Parliament can be found in, e.g., P. Craig, "Competing Models of Judicial Review" (1999) *PL*, 428.

[109] See "Parliamentary Sovereignty: Law, Politics and Revolution" (1997) 113 *LQR*, 443.

[110] See Brazier, R., "New Labour, New Constitution" 49 (1998) *NILQ*, 1 and Brazier, R., "The Constitution of the United Kingdom" 58 (1999) *CLJ*, 96.

[111] On the issues which may be raised by devolution see, e.g., Bogdanor, V., "Devolution: The Constitutional Aspects" in the University of Cambridge Centre for Public Law above n 57 at 9.

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