OPINION

The Developing Role of Judges in Matters of Public Law

I suspect that the timing of this invitation to write an Opinion piece for *Graya* is no coincidence. I am writing it in the days following my retirement from the Court of Appeal. I am free to say things which were best left unsaid for as long as I was a serving judge, particularly as most of my judicial work for at least the last 12 years was concerned with Public Law.

The growth of Public Law since I graduated 50 years ago has been exponential. In the 1960s, law students were still being required to write essays on the question whether administrative law even existed in England and Wales. Now the question more often asked is whether judicial review of one sort or another (and I include the statutory models) has grown too much – whether 'unelected judges' have become too interventionist.

When I started to sit in the Crown Office List in about 1996 (it did not morph into the Administrative Court until October 2000), the prevailing culture of judicial review was restrained. It eschewed merits determination and it acknowledged 'no-go' areas. In the GCHQ case (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374) Lord Diplock had identified the grounds of challenge as illegality, irrationality and procedural impropriety. Although the House of Lords accepted that the exercise of powers under the Royal prerogative was in some circumstances susceptible to judicial review, other acts or omissions were simply not justiciable. Thus, Lord Roskill's non-exhaustive list of exclusions embraced the making of treaties, the defence of the realm, and other matters whose nature and subject matter were such as not to be amenable to judicial process. Although the boundaries continued to be pushed back (for example, by allowing judicial review in relation to the prerogative of mercy: *R v Home Secretary, ex parte Bentley* [1994] QB 349), any such growth was incremental and gradual.

This approach continued to inform judicial consideration of novel

claims. I was one of a three-judge Divisional Court which, in December 2002, refused an application for a declaration that the United Kingdom would be acting in breach of international law if it proceeded to take military action in Iraq without a further United Nations resolution. We dismissed the application for a number of reasons, both discretionary and, more significantly for present purposes, jurisdictional: *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Admin). In my judgment, I referred to 'forbidden areas' of judicial review, adding that 'foreign policy and the deployment of the armed forces remain non-justiciable'.

Whether or not that case would be decided the same way today, what cannot be disputed is that, in the intervening years, judges have found themselves deciding all sorts of issues in what would have been considered 'forbidden areas' only a few years earlier. The controversial question is whether this has been the result of judicial self-liberation or whether the judges have acted under legal compulsion. My view is that much the greater stimulus for the expansion has resulted from the legislature conferring new powers and duties on the judiciary at a time when external events were combining in ways which induced governments to devise control mechanisms which tested the limits of legal tolerance. Of those external events, the most obvious were 9/11 and the financial crisis which began in 2008. It is hardly surprising if governments, faced with security challenges of the kind exemplified by 9/11 and the 7/7 bombs in London, try to enact counter-terrorism legislation which is unusually restrictive of civil liberty. And it is similarly unsurprising if, faced with an overwhelming need to alleviate massive public debt, they adopt measures of unaccustomed severity.

It was adventitious that 9/11 occurred soon after the Human Rights Act 1998 had come into force in October 2000. The Blair Government had conferred upon the judiciary powers and duties which not only enabled but required judges to test counter-terrorism legislation against statutory criteria which were far more demanding than those of the common law. The unlawfulness of the indefinite detention of foreign nationals without charge or trial fell foul of articles 5 and 14 of the ECHR and the Order purporting to derogate from the Convention did not satisfy the conditions prescribed by domestic legislation, viz the Human Rights Act.

Proportionality was now well and truly on the menu and, although the majority of the Appellate Committee of the House of Lords were

content to trust the judgment of the Government and Parliament on the threshold question of whether there was 'a public emergency threatening the life of the nation' (ECHR, article 15(1)), there was to be no 'excessive deference' when considering the proportionality of detention without trial or charge. Looking back now, it is difficult to see that decision (which had been resisted by SIAC and the Court of Appeal) as anything other than the one compelled by the Human Rights Act. By the terms of that Act, Parliament had recalibrated the terms of engagement between the executive, the legislature and the courts.

When, in the next legislative phase, the discriminatory detention without trial or charge provisions gave way to new-fangled and non-discriminatory control orders, a similar conundrum arose. All day curfews bordering on house arrest might have survived common law scrutiny, but, when judged against article 5 of the ECHR as incorporated into domestic law by the Human Rights Act, they were held to amount to an unlawful deprivation of liberty. Again, the judges were carrying out precisely the task entrusted to them by Parliament – determining whether the terms of the control orders in question amounted to a deprivation and not just a restriction of liberty. In approaching this task, Parliament had required them to take account of the jurisprudence of the Strasbourg Court. That is what they did.

When one stands back, it is apparent that legislation of the detention without trial or charge and control order type was novel in two respects. First, it was drawing judges into decision-making on issues of national security which, only a few years earlier, had been a judicial no-go area. Secondly, it was requiring them to apply the provisions of the ECHR in relation to both evaluation of the facts against Convention concepts (for example, deprivation of liberty or merely restriction) and to deploy new tools of review, in particular proportionality.

Nothing illustrates the caution of the judiciary more clearly than the development of the approach to proportionality in the immigration context. Initially, courts and tribunals tended to view it through the *Wednesbury* lens: see, for example, *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979, but it was eventually appreciated that proportionality requires more of a judge than *Wednesbury* does: see *Huang v Secretary of State for the Home Department* [2007] 2 AC 167. Thus, far from judges seizing new powers by an expansionist interpretation of the Human Rights Act, in some respects it took them some time to appreciate what Parliament had gifted to them.

It is hardly surprising that, once drawn into this unfamiliar role, judges have become less conservative in cognate areas of judicial review at common law. Although not so long ago 'national security' was seen as a forbidden area, now it is terrain onto which judges have been expressly invited by Parliament. Procedures such as the special advocate system have been adapted so as to render justiciable issues which, until recently, would not have been. For example, the Prevention of Terrorism Act 2005 required a judge to review the decision of the Secretary of State that the national security criterion was satisfied.

Moreover, it is not only in relation to the headline subject of national security that Parliament has increasingly chosen to be legally prescriptive. In all sorts of areas of government business, it is becoming common to express in terms of statutory obligation what until recently would have been simply policy. For example, I have found myself grappling with legal obligations in relation to the reduction of fuel poverty; the selection of the appropriate price index for protecting public service pensions from inflation; and the basis of allocation by the government of EU funding between different regions of the United Kingdom. It is true that in some of these cases the standard of judicial review is not at the more intense end of the scale. Nevertheless, they illustrate the ever-widening subject matter of statute-driven judicial review. Judges are having to decide cases in areas into which previously they were not led and into which they were reluctant to be drawn.

My purpose in rehearsing all this is twofold. First, it is unlikely that the trend will be reversed, whatever may be the future of the Human Rights Act. It may be the most high-profile and ubiquitous statute, but it by no means stands alone in enlarging the scope of judicial review. Moreover, even if it were repealed, it does not follow that the jurisprudence of, for example, proportionality would disappear with it. Almost certainly it would not. I now view all this with equanimity. That the scope of judicial review has increased is a bonus for the Rule of Law. This should largely remain so, notwithstanding the statutory circumspection of the procedure favoured by the present Government.

Secondly, it is important that, in developing this jurisdiction, judges do not go too far. Whilst discarding the language of deference, they should strive to resist any hint of activism, especially where the subject matter is such that the view of the decision-maker deserves particular respect, either because of knowledge and expertise or because of democratic authority.

If the delicate relationship between the executive and the judiciary is to thrive, both sides must express themselves with reserve. Just as we deprecate politicians who utter abrasive criticism of judicial decisions which go against them, so it also behoves judges to say no more than they need to say in explaining their decisions. Sometimes they go too far. For example, although the language of most of the speeches in the Belmarsh case (viz *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68) was measured and unimpeachable, I respectfully question whether it was wise of Lord Hoffmann (an undoubtedly great judge) to include his often-quoted tirade in paragraph 97. It was not necessary in order to explain his analysis – as it happens, a dissent on the point he was considering – and it had the potential to provoke.

If judges are to have an enhanced role, which I welcome, it is important that they do not express themselves in unnecessarily critical or inflammatory terms in their judgments or, a fortiori, when speaking extra-judicially. It is important not only in order to underwrite their reputation for impartiality but also so as to give no succour to those who wish to politicise the appointment and promotion of judges – but don't get me started on that!

Master Maurice Kay