Law, Fact and Discretion in the UK, EU and the USA

Professor Paul Craig[*]

The elaboration and explication of the tests for judicial review of law, fact and discretion in a particular legal system can, as all administrative lawyers will know, be a complex task, since this is the very core of judicial review. Any attempt to explicate the tests for judicial review of law, fact and discretion across three different legal systems is even more difficult, but the enterprise can be rewarding for the comparative insights that it thereby brings to the resolution of problems that endemic to all legal systems.

The scale of the task will however constrain the manner of explication. It is clearly not possible within the confines of the space and time available this evening to give a very detailed analysis of the salient issues. Nor would that be very helpful from the perspective of comparative insight, since excessive detail would mask the similarities and differences between the legal systems.

What follows will therefore necessarily be a schematic overview of the relevant law in relation to review of law, fact and discretion, which is designed to reveal the commonalities and differences between UK, EU and US law, and thereby set the stage for discussion concerning the points of contact and contrast with French law.

1. JUDICIAL REVIEW: QUESTIONS OF LAW

1) *Preliminary*:

a) Legal systems will commonly distinguish between law, fact and discretion for the purposes of judicial review. The nature of these distinguishing criteria can be contentious. There are differing views, for example, as to the criteria for regarding an issue as one of law, as opposed to fact. This is an endemic problem in all legal systems, and the criteria to be found in any one legal system may not necessarily be applied consistently by the courts. The criteria for distinguishing between law and fact, or law and discretion may moreover differ as between legal systems. It would clearly be impossible within the confines of the present discussion to consider the detailed positive law for the three systems under scrutiny, since this intellectual exercise could easily occupy the entirety of the time at our disposal.

b) For the purposes of the present discussion I shall therefore distinguish between the terms law and fact in the following manner. The paradigm instance of fact involves a dispute as to what are commonly termed primary facts, what people saw, heard, did, etc., although as we shall see in the discussion concerning review of fact, the nature of these inquiries may be more complex in certain areas than in others. The paradigm instance of a question of law for the purposes of judicial review in the UK, USA and EU is the meaning to be accorded to a statutory term that defines the initial decision-maker's scope of authority. Thus an agency may be accorded power in the following terms. The empowering statute may say 'if an employee is injured at work, then he shall be given compensation'. The company may contend that the person injured was not an employee and hence the agency

could not award compensation. The meaning of the term ‘employee’ will commonly be regarded as an issue of law in the flowing sense. The primary facts will tell one that a person was, for example, working certain hours per week, under certain terms, with a particular degree of control exercised by the employer. These facts by themselves will not however tell one whether the person should therefore be regarded as an ‘employee’ for the purposes of the particular statute. That can only be resolved through giving a legal meaning to the term ‘employee’. The courts will interpret the term ‘employee’ in the light of existing legal principle and the purposes of the particular statute, which will lead to a legal meaning for that term. The legal meaning will then be applied to facts, or to put the matter conversely, it will then be decided whether the factual nature of the working conditions of the person injured in this case meant that he came within the definition of ‘employee’ for the purposes of this statute.

2) *The Test for Judicial Review*: we can now consider the test for judicial review which the courts will use in relation to issues of law. Four possible tests or types of test can be distinguished in this regard.

   a) The reviewing court simply substitutes judgment on the meaning of the relevant legal term. By substitution of judgment I mean that the reviewing court will decide for itself what the legal meaning of the term should be and will quash or invalidate the decision of the initial decision-maker if it does not accord with the meaning decided on by the court. This is the approach adopted in most, if not all civil law countries; it is the approach adopted in the EU by the Community courts;

it is the predominant approach in the UK, (*Anisminic*, *Page*, *South Yorkshire Transport*).

b) The reviewing court substitutes judgment on some of the issues of law that define the scope of an agency's authority, but not all of them. This was the approach that dominated the case law in the UK for 250 years under the title of the collateral or jurisdictional fact doctrine.

c) The court substitutes judgment on certain issues of law, and uses a rationality test for others. This is the approach in the USA in the famous *Chevron* case.[1] In that case the Supreme Court drew the following distinction. *If* a court reviewing an agency's construction of the meaning of a term in a statute decided that Congress had a specific intention on the precise question in issue then that intention should be given effect to. The court will substitute judgment for that of the agency and impose the meaning of the term Congress had intended.[2] *If*, however, the reviewing court decided that Congress had not directly addressed the point of statutory construction, the court did *not* simply impose its own construction on the statute. Rather, if the statute was silent or ambiguous with respect to the specific issue, the question for the court was whether the agency's answer was based on a permissible construction of the statute. In answering this question the reviewing court might uphold the agency finding even though it was not the interpretation which the court itself would have adopted, and even though it was only one of a range of permissible such findings that could be made.[3] Moreover, the Supreme Court also held that the delegation to an agency of the determination of a particular issue might well be implicit rather than explicit, and that in such

instances "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency".[4]

d) The reviewing court uses a number of functional considerations to determine the intensity of review of the issue of law placed before it in a particular case. This is the approach used by the Canadian courts. They will take account of the expertise of the agency, the nature of the question that is in dispute, whether that question is one which the agency is well-placed to interpret, and whether there is a clause that limits or restricts judicial review. The courts will, depending on the answers to this range of factors, either substitute judgment, or more commonly use a less intensive form of review, cast in terms of rationality.

3) *Normative Reflection*: The following points can be made by way of normative reflection on this positive law.

a) The second, third and fourth approaches in the previous section are premised implicitly or explicitly on the assumption that an issue can be characterized in conceptual terms as one of law, without this necessarily entailing substitution of judgment by the reviewing court. On these approaches, the reviewing court must maintain some real control over the primary or initial decision-maker, but this does not have to take the form of substitution of judgment, but can rather take the form of a rationality test, or something akin thereto. This might well sound shocking, heretical, or simply undesirable to those from a civil law background, but then one of the virtues of comparative law is to test the fundamental assumptions about one’s own system against those from other legal orders.

b) This does not in any way mean that the first approach is wrong or misconceived. There may be many reasons why a legal system feels that it should adhere to the first approach. These reasons may well be eclectic: they may be in part derived from a reading of that country's constitution; they may in part flow from the view that it is simply axiomatic that courts decide questions of law; they may be based on the implicit legal theoretical assumption that it is wrong or dangerous to acknowledge that legal terms may have more than one reasonable interpretation; the established judiciary may be an unwilling to accept that an interpretation of a legal term by the initial decision maker should ever be accorded legal respect; there may be distrust of the established bureaucracy which translates for these purposes into the desire to impose strong controls through substitution of judgment on issues of law.

c) It should moreover be recognized that there are problems/tensions in legal systems that use approaches two, three or four. This can be exemplified by the jurisprudence of the US Supreme Court on the *Chevron* test. The court possesses considerable judicial discretion in deciding whether a case should come within part one of the test, and lead to substitution of judgment, or whether it should come within part two of the test, and be subject to rationality review. There has been real disagreement within the Supreme Court as to the nature of the divide between the two parts of the test. The broad view of Chevron part one sees it as a resolvability test: provided that the reviewing court can decide on the meaning of the disputed term using ordinary tools of statutory construction broadly conceived then the case fall within part one and the court substitutes judgment. The narrow

view of Chevron part one sees it as a clarity test: only if the meaning of the disputed term really is clear from the face of the statute should the matter be regarded as within Chevron part one. See *Cardozo-Fonseca, Rust, Tobacco* case. See also the problems caused by the *Mead* judgment.

2. JUDICIAL REVIEW: QUESTIONS OF FACT

1) *Preliminary*: Primary facts, what is seen done, heard etc, may be simple or they may be complex. This may be obvious but it is important nonetheless. Where the primary fact is relatively straightforward then it is realistic to think in terms of the primary fact being established or not through 'observation' or 'perception': did A hit B, was C seen by D etc. However there may be many instances where more complex primary facts require 'evaluation', rather than simple 'observation' or 'perception'. Thus many of the factual issues that arise in, for example, competition cases, or those concerning state aid, are of this kind.
2) *The Standard of Review*: There are once again a number of different tests for review of fact that the courts can use.
    a) The courts might substitute judgment on the facts for that of the primary decision-maker. This option is acknowledged in UK and US law, and also implicitly in EU law. It is however rare. The court will normally regard the primary decision-maker, who may have heard oral argument and have intimate knowledge of the dossier, as the person best equipped to make factual determinations. Thus in UK and US law substitution of judgment will normally only be undertaken when there is either some indication of structural infirmity with the decision-making process

used by the primary decision-maker, or where the reviewing court feels equally or better equipped to find or evaluate facts as the primary decision-maker.

b) The courts can use a substantial evidence test. This is the general approach in US law in relation to the assessment of more formal factual findings resulting in a record of the proceedings. The courts will uphold the agency finding if there is substantial evidence in the record as a whole, even if the court might not have made those findings if it had been the initial decision-maker.[5] There must be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[6] The courts might, alternatively, use a test for review couched in terms of rationality or arbitrariness. Such tests have been deployed in the USA in relation to factual findings resulting from less formal adjudicatory proceedings, and in relation to informal rule-making, the argument being that criteria framed in terms of rationality or arbitrariness are better suited to situations where there is no formal record. There is however considerable support for the view that tests of rationality and arbitrariness tend to converge with the substantial evidence test, in the sense that a finding unsupported by substantial evidence is regarded as arbitrary.[7]

c) The approach to review of factual findings in the UK has been uncertain and unsatisfactory in the past. Some greater clarity has been forthcoming as a result of a Court of Appeal judgment that laid down the following test: First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively

verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

d) The test for review of fact in the EU is manifest error. It will be for the applicant or claimant to show that the initial decision-maker, usually the Commission, made some manifest error in its handling of the facts, and the Community courts state repeatedly that it is not for them to substitute their judgment on the facts for that of the Commission. However, as we shall below, the meaning accorded to manifest error has altered considerably in the Court's more recent jurisprudence.

3) *Normative Reflection*: A number of points can be made about judicial approaches to review of fact in the light of the tests set out in the preceding section.

a) Other things being equal, if a legal system opts for strict substitution of judgment on issues of law, there will be greater incentive for the courts to 'manipulate' the law/fact or law /discretion distinctions for the following reason. The court may be wedded to the idea that it should substitute judgment on issues of law, but feel that it does not wish to do so in a particular case that has come before it. The court does not feel that it can or should modify doctrinal orthodoxy in relation to substitution of judgment on issues of law; it does not therefore regard it as open to the court to admit that the issue is conceptually to be regarded as one of law, and apply any form of review other than substitution of judgment. In such circumstances, if the court does not wish to substitute judgment then its only option is to classify the issue that has come before it as one of fact or discretion

and apply a less intensive standard of review. There is evidence of this in EU law and in UK law.

b) It should be recognized that the courts can alter the intensity of review of facts, even though they do not alter the doctrinal label through which such review is conducted. This can be exemplified by the transformation in the meaning and application review for manifest error in relation to facts in EU law. It should be recognized at the outset that there has always been a duality or ambiguity latent in the term 'manifest error': the controlling word 'manifest' can either connote an error that is both extreme and obvious, or it can connote an error that is serious, even if not extreme, and even where the seriousness of the error only becomes apparent after searching inquiry by the reviewing court. The story of review for manifest error in relation to facts in EU law has been from the former meaning to the latter, at least when reviewing for factual error in certain types of case, such as those dealing with risk regulation and competition. Thus the approach in the ECJ's early jurisprudence was for very light touch review under the guise of manifest error. If the alleged factual error was not apparent on the face of the relevant decision or document, the ECJ would not intervene, and even if it was apparent it would have to be very serious. In such cases, the ECJ would normally devote no more than one or two paragraphs of its judgment to the issue. In the cases on risk regulation or competition, review of facts is still undertaken through a test of manifest error, but the court, especially the CFI, will undertake far more searching scrutiny, often devoting thirty or more pages (not paragraphs) to the issue, *Pfizer, Airtours, Tetra Laval etc*. There are indeed certain statements by the

ECJ in *Tetra Laval* that indicate that the reviewing court is to go beyond anything that could readily be described as review for manifest error, and the reasoning comes close to a form of substitution of judgment. Thus the ECJ stated that, 'not only must the Community courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it'.

c) It is important as a matter of principle to distinguish and keep separate two related, but distinct, issues: the standard of proof required of the original decision-maker for the finding of facts, and the standard of judicial review used by the court in relation to those factual findings.

   i) It is axiomatic that the existence or not of a factual error will be affected by the standard of proof demanded in relation to the facts before the primary or initial decision-maker makes the contested decision. There are a range of standards from which to choose, including high degree of probability, probability, possibility, sufficiency, a requirement that the evidence should be convincing, or that there should be a preponderance of evidence to sustain the action taken. It will normally be for the legislature to determine the standard of proof in the enabling legislation, or if it does not do so the matter will be decided by the courts.

   ii) The second issue is, as stated above, the standard of judicial review used by the reviewing court in deciding whether the standard of proof has been met or

not. The standard of proof tells us the degree of likelihood that must be established in relation to factual findings in order for the primary decision-maker to make its initial decision. It does not tell us the standard of judicial review applied by the court in deciding whether the primary decision-maker has met the standard of proof required of it. It is the latter that tells us how far the reviewing court should reassess findings of fact made by the primary decision-maker to decide whether the standard of proof for the initial decision has been attained or not. The distinction between the standard of proof required of the initial decision-maker and the standard of judicial review when assessing whether the former has been met is important conceptually in legal systems.[8]

iii) The standard of proof required of the primary decision-maker will frame the test for review applied by the court, but the latter is nonetheless distinct from the former. Thus it might be decided that the standard of proof for certain administrative action should be probability, such that a chemical could only be prohibited if it was probable that it would cause harm. This would still leave open the standard to be applied by the reviewing court when determining whether the facts and evidence before the administrative body sufficed to establish the requisite probability. It might be felt that the test for review should, for example, be cast in terms of substantial evidence: the court would then consider whether the primary decision-maker had substantial evidence to justify the conclusion that there was a probability of the chemical causing harm such as to warrant Commission intervention.[9]

d) If the two issues, standard of proof required of the initial decision-maker and standard of judicial review, are not kept distinct there is a danger that review of fact will collapse into substitution of judgment. This may not be problematic if the legal system has consciously decided that there should be substitution of judgment for factual issues, but it is problematic where the legal system persists with impression that review is based on manifest error. Consider once again the preceding example, where the standard of proof demanded of the primary decision-maker is that there should be a probability that a chemical might cause harm before it could be banned. It is not for the reviewing court to decide whether, if it had been the primary decision-maker, it would have concluded that such a probability existed. This would be substitution of judgment by the reviewing court for the view taken by the primary decision-maker. The reviewing court must instead develop a standard of review that will allow it to assess whether the person making the initial decision had enough evidence to warrant its conclusion that the chemical would probably be harmful. The test for such review might be that the evidence used by the decision-maker to justify the finding of probability was, for example, substantial or sufficient, even if the reviewing court might not itself have reached that conclusion had it been charged with the initial decision. This is especially so given that the existence of facts and evidence might be contestable, more particularly when the contested decision is a complex one.

3. JUDICIAL REVIEW: QUESTIONS OF DISCRETION

1) *Preliminary*: It is important at the outset to say something about the meaning of discretion, which is a complex concept, on which there is a considerable philosophical literature. Three senses of discretion can be distinguished for the purposes of the present analysis, and all three can be found in the case law of the courts in the UK, US, and EU.

   a) The first type of case can for convenience be termed classic discretion. All grants of power will take the form 'if X you may or shall do Y'. It is common for there to be multiple X conditions, so that the grant of power states that if X^1, X^2, X^3, X^4 exists you may or shall do Y. Thus classic discretion is present where the relevant statute, Treaty article, regulation directive or decision states that where certain conditions exist the public body *may* take certain action. Put in terms of this conceptual schema this is a case where the statute, Treaty article or regulation etc states that if X^1, X^2, X^3, X^4 exists you may do Y.

   b) The second type of case where the courts have held that discretion exists is where there are broadly-framed conditions that have to be established before the power or duty can be exercised at all. The phrase jurisdictional discretion can be used to capture this type of situation. This is exemplified by *Philip Morris Holland*.[10] The issue before the ECJ concerned the meaning to be attributed to the phrases 'abnormally low', and 'serious under employment' within Article 87(3)(a) EC. The ECJ held that the Commission had a discretion, the exercise of which involved economic and social assessments that had to be made in a Community context. Put in terms of the conceptual schema identified above, if X^1, X^2, X^3, X^4

exists you may or shall do Y, the discretion recognized in *Philip Morris Holland* resided in one of the X conditions. Article 87(3)(a) provides that if aid promotes the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, the Commission may consider it to be compatible with the common market. The dispute concerned the meaning to be given to 'abnormally low', and 'serious under employment', these being conditions that had to be met before the Commission's power to declare such aid compatible with the common market became applicable. The ECJ was willing to characterize these conditions as involving discretion, which then had an impact on the standard of review applied.

c) There is also a third type of situation where discretion can exist, even where the enabling statute, Treaty article, regulation, directive or decision is cast in mandatory terms. There will of course be many instances where this is not so. Where the relevant legislation provides 'if X, you shall do Y' and Y entails a specific measure there will be no room for any meaningful discretion once the conditions have been met. There are however other instances where the content of Y, the mandatory obligation, is cast in more general terms, thereby leaving some measure of discretion as to how it should be fulfilled. This is exemplified by the Common Agricultural Policy, Article 34 EC.

2) *The Standard of Review in the UK*:

a) The courts in the UK approach the review of discretion in two stages. They will inquire, firstly, whether the discretion was exercised for improper purposes, and whether it was based on relevant considerations. If the courts decide that the

discretion was exercised for improper purposes, or that it was based on irrelevant considerations then the decision reached by the public body will be annulled. The judicial exercise of deciding whether the power was exercised for improper purposes etc is normally regarded as a matter of statutory interpretation, and the courts will regard themselves as the arbiter of what the statute intended. They will in that sense substitute judgment. The courts nonetheless also accept that the determination of the meaning to be ascribed to complex or vague statutory words may well be unclear or contentious.

b) The UK courts will, in addition, exercise control over the rationality of the exercise of discretion. Thus even though the discretion may be deemed to have been exercised for proper purposes and that it was based on relevant considerations, it can still be challenged on grounds of rationality.

   i) The basic conception of rationality review in the UK was set out in the *Wednesbury* case:[11] a decision could be attacked if it was so unreasonable that no reasonable public body could have made it. To prove this would require something quite extreme, Lord Greene MR giving the example of a teacher being dismissed because of red hair. This distinctive meaning of the term unreasonable was said to be warranted by the constitutional position of the courts. They could not intervene simply because they believed that a different way of exercising discretionary power would be more reasonable than that chosen by the public body. This would be to substitute a judicial view for that of the public body. Judicial intervention was therefore warranted only where the decision could be shown to have been so unreasonable that no reasonable

public body could have made it. It is clear from Lord Greene MR's judgment that he conceived of this test being used only in the extreme and hypothetical instance of 'dismissal for red hair type of case'. This was reinforced by Lord Diplock in *GCHQ* who stated that this species of irrationality would only apply to a 'decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it'.[12]

ii) The courts have nonetheless applied the *Wednesbury* test to discretionary decisions that could not, whether right or wrong, be classified as of the 'red hair type'.[13] The test was applied in a way that made it closer to asking whether the court believed that the exercise of discretion was reasonable. This has become more explicit recognized in later cases:[14] rationality review covered not only decisions that defied comprehension, but also those made by 'flawed logic'.[15] The loosening of Lord Greene's test received explicit support from Lord Cooke in the *ITF* case.[16] He regarded the formulation used by Lord Greene as tautologous and exaggerated. It was not, said Lord Cooke, necessary to have such an extreme formulation in order to ensure that the courts remained within their proper bounds as required by the separation of powers. He advocated a simpler and less extreme test: was the decision one that a reasonable authority could have reached. Lord Cooke returned to the topic in more forthright terms in *Daly*,[17] where he said the following: "[I] think that the day will come when it will be more widely recognised that … *Wednesbury* … was an unfortunately retrogressive decision in English

administrative law, insofar 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. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field by a finding that the decision under review is not capricious or absurd".

iii) The UK courts have also varied the intensity with which they apply the *Wednesbury* test in cases concerned with rights, prior to the Human Rights Act 1998. The growing recognition of the importance of rights was accommodated by modification of the meaning of unreasonableness. It is now common to acknowledge that the courts apply the principles of judicial review, including the *Wednesbury* test, with varying degrees of intensity depending upon the nature of the subject-matter.[18] Lord Bridge in *Brind*[19] said that, in cases concerned with rights, the court must inquire whether a reasonable Secretary of State could reasonably have made the primary decision being challenged. The court should begin its inquiry from the premise that only a compelling public interest would justify the invasion of the right. Sir Thomas Bingham MR's formulation was very similar.[20] The court was to consider whether the decision was beyond the range of responses open to a reasonable decision-maker, and the greater the interference with human rights the more the court would require by way of justification.

c) The UK courts will also use proportionality as a test for review of discretion in certain types of case. They will clearly do so in cases where EU law is concerned and will also do so when reviewing discretionary determinations under the Human Rights Act 1998. There is also now case law authority that proportionality is the standard of review to be used when a public body seeks to resile from a legitimate expectation. The courts have moreover also used proportionality, or something very similar, in cases concerned with challenges to penalties. Proportionality is not however thus far a free-standing, general principle of administrative law in the UK.

3) *The Standard of Review in the US*: A similar development is evident in US law. Under the Administrative Procedure Act 1946, agency findings can be set aside if they are 'arbitrary, capricious or an abuse of discretion'.[21]

a) The arbitrary and capricious test is therefore a principal tool for substantive review of discretion. Judicial interpretation often matched the facial language of the test. Plaintiffs faced an uphill task to convince a reviewing court that an agency decision really was arbitrary and capricious, The criterion tended to be narrowly interpreted, it being sufficient for the agency to show some minimal connection between the statutory goal and the discretionary choice made by it;[22] or to put the matter conversely the plaintiff would have to demonstrate some manifest irrationality before the court would intervene. Thus as Shapiro states, 'in fact in the 1940s and '50s, rules almost never failed the arbitrary and capricious test',[23] with New Deal judges being very reluctant to say that New Deal

bureaucrats had failed 'the APA sanity test, that is had done something arbitrary and capricious'.[24]

b) The label 'hard look' developed because the courts began to desire more control than allowed by this limited reading of the arbitrary and capricious test.[25] In *State Farm*[26] the Supreme Court founded its intervention on the arbitrary and capricious test, but then gave a broader reading to that phrase than that provided in earlier cases. The court accepted that it should not substitute its judgment for that of the agency. It could, however, intervene if any of the following defects were present: if the agency relied on factors which Congress had not intended it to consider; failed to consider an important aspect of the problem; offered an explanation which ran counter to the evidence before the agency; was so implausible that it could not be sustained; failed to provide a record which substantiated its findings; or where the connection between the choice made by the agency and the facts found was not rational. The hard look doctrine therefore represented a shift from a previously more minimal substantive review, where judicial intervention would occur only if there was serious irrationality, to one where the courts would interfere where the broader list of defects set out above are present. The hard look test proved to be a powerful tool, because of the insistence on the provision of reasons, the demand for a more developed record and a judicial willingness to assess the cogency of the reasoning process used by the agency when it made its initial determination. This is not to say that the test was unproblematic. There have been problems resulting from an excessive

demand for information and justification by the courts, which led some to coin the phrase ‘paralysis by analysis’.

4) *The Standard of Review in the EU*: Similar judicial creativity is apparent in EU law.[27] The general test under EU law is that factual and discretionary determinations will only be set aside if there is some manifest error, misuse of power or a clear excess of the bounds of discretion. This test has remained generally unchanged since the inception of the European Community. The meaning given to the test has however altered over time.

   a) In the early years of the Community’s existence the test was applied with a ‘light touch’. The ECJ repeatedly emphasized that its task was not to substitute judgment for that of the Commission and that it would only intervene if there was some patent error or misuse of power, more especially if the decision or rule being challenged involved the complex balancing of factors that was normal in the context of the Common Agricultural Policy.[28] This test was applied with a ‘light touch’, in the sense that the ECJ would commonly devote only one or two paragraphs of its judgment to the issue, and would then conclude that no such manifest error existed in the instant case.

   b) The more modern case law reveals a rather different picture. The criteria for review are formally the same. Manifest error, misuse of power or a clear excess of the bounds of discretion remain the grounds of review, with the corollary that the Community courts do not substitute judgment. It is however clear that while retaining the established grounds of review the Community courts, and more especially the Court of First Instance, the CFI, have been applying these with

greater intensity than hitherto, at least when reviewing certain types of action, in particular risk regulation and competition cases. This is apparent from cases such as *Pfizer*.[29] One of the applicant's arguments was that the Commission was in breach of the test of manifest error in the way that it exercised its discretion. It was therefore necessary for the CFI to decide whether 'the Community institutions made a manifest error of assessment when they concluded … that the use of virginiamycin as a growth promoter constituted a risk to human health'.[30] The CFI proceeded in line with orthodoxy. It cited the well- established case law that in matters concerning the common agricultural policy the Community institutions had a broad discretion regarding the objectives to be pursued and the means of doing so. Judicial review should therefore be confined to examining whether the exercise of the discretion was vitiated by a manifest error, misuse of power or clear excess in the bounds of discretion.[31] The CFI also referred[32] to settled case law to the effect that where a Community authority was required to make complex assessments in the performance of its duties, its discretion also applied to some extent to the establishment of the factual basis of its action.[33] It followed said the CFI that in a case such as the present where the Community institutions were required to undertake a scientific risk assessment and evaluate complex scientific facts judicial review must be limited. The court should not substitute its assessment of the facts for that of the Community institution, but should confine its review once again to manifest error, misuse of power or clear excess in the bounds of discretion.[34] The CFI nonetheless considered in detail the argument put forward by the applicant company. The CFI devoted 28 pages or 92

paragraphs of the judgment to this matter, which contrasts markedly with the 1 or 2 paragraphs to be found in the earlier jurisprudence. The same intensity of review is apparent in recent cases concerned with judicial review of competition decisions.[35] It should be made clear that the CFI and ECJ have not always reviewed for manifest error in the modern law with the intensity that is evident in *Pfizer* and *Airtours*. There are many cases where they apply the test of manifest error more intensively than in the early case law, but less intensively than in the two cases considered above, with the consequence that there is in effect a differential standard of review for discretion in EU law depending upon the nature of the subject matter that is being reviewed by the courts.[36]

c) Proportionality is of course also a general ground for review of Community and Member State action. It is commonly used to challenge discretionary determinations made by the Commission, or by Member States when acting within the confines of EC law. It is also well recognized that proportionality is a test for review that can and is used with varying degrees of intensity by the Community courts.[37] Discretionary determinations may also be challenged on other grounds, such as equality.

5) *Normative Reflection*: A number of points may be made by way of normative reflection on the tests for review of discretion.

a) It is doubtful whether a legal system truly needs both rationality review and proportionality review, for the following reasons.

i) First, if rationality review is limited to legal intervention only when the decision being reviewed is so unreasonable that no administrative authority

would have reached it, then there is little doubt that this is a narrower form of substantive review than that which normally exists under the three-part proportionality test. If however the courts of a legal system really believe that administrative action should only ever be annulled if it is irrational in the extreme sense set out above, then it would be very strange for that system to countenance proportionality review as an additional head of judicial review operating alongside rationality review in this narrow sense. This is because proportionality review would allow the courts to annul administrative action in circumstances where it would not be open to challenge under the narrow conception of irrationality. The logical solution would therefore be for the courts of this legal system either to retain their narrow sense of rationality review, refusing to review on grounds of proportionality, or to recognize and apply proportionality as a general head of review, in which case the narrow sense of rationality review would become redundant.

ii) Secondly, the same conclusion is true even if the courts of a legal system apply rationality review in a more intensive manner. In such a system it would also be unnecessary to have both rationality review and proportionality for the following reason. The courts may well decide that while they should not substitute their judgment for that of the administration, they should intervene when the decision reached by the administration was not reasonable, not simply where it was so unreasonable that no administrator could have reached the decision. It would then be necessary for the courts to articulate in some ordered manner the rationale for finding that an administrative choice was one

which could not reasonably have been made, where that choice fell short of manifest absurdity. It is, however, difficult to see that the factors which would be taken into account in this regard would be very different from those used in the proportionality calculus. The courts would in some manner want to know how necessary the measure was, and how suitable it was, for attaining the desired end. These are the first two parts of the proportionality calculus. It is also possible that a court might well, expressly or impliedly, look to see whether the challenged measure imposed excessive burdens on the applicant, the third part of the proportionality formula. If these kinds of factors are taken into account, and some such factors will have to be, then it will be difficult to persist with the idea that this is really separate from a proportionality test.

iii) Thirdly, there are considerable advantages to proportionality as a test for review of discretion. It provides a structured form of inquiry. The three-part proportionality inquiry focuses the attention of both the agency being reviewed, and the court undertaking the review. The agency has to justify its behaviour in the terms demanded by this inquiry. It has to explain why it thought that the challenged action really was necessary and suitable to reach the desired end, and why it felt that the action did not impose an excessive burden on the applicant. If the reviewing court is minded to overturn the agency choice it too will have to do so in a manner consonant with the proportionality inquiry. It will be for the court to explain why it felt that the action was not necessary etc in the circumstances. A corollary is that

proportionality facilitates a reasoned inquiry of a kind that is often lacking under the traditional *Wednesbury* approach.

iv) Fourthly, the experience with proportionality in EU law reveals that the concept is applied with varying degrees of intensity so as to accommodate the different types of decision subject to judicial review. Cases involving rights with be subject to the strictest review, cases involving broad discretion will see the courts being more deferential to the administration and adopt lower intensity proportionality review, while cases involving penalties with entail a level of proportionality review intermediate between the other two.[38]

b) We should also be aware of the inherent judicial creativity in the application of the tests for review of discretion. It is the courts that will determine the real meaning to be given to the criterion of review used by the particular legal system. This is so whether review is characterized as being in terms of rationality, arbitrary and capricious, manifest error or abuse of power.

i) The language of each of these terms, *Wednesbury* unreasonableness, arbitrary and capricious and manifest error, would suggest that the court would only intervene on these heads of review if the discretion were exercised in some extreme manner. The reality has proven to be rather different in each of the legal systems mentioned. The courts, while retaining the same head of review in each legal system, have transformed them into a far more potent mechanism for substantive review of administrative discretion. The precise reasons why they have done this have varied in each legal system, but the common denominator is that the courts in those systems wish to exert more

control over the exercise of discretion than hitherto; they wish to be able to intervene and control discretionary determinations even if they are not manifestly absurd or tainted by unreasonableness that is so extreme that no reasonable authority would ever have reached that decision.

ii) It is axiomatic that if the courts operating in any system of administrative law wish to expand the scope of substantive review of discretion they can do so in one of two ways. They might choose to add new heads of substantive review to those currently available within that system, a classic example being the recognition and generalization of proportionality review. They might also expand the reach of substantive review by taking existing heads of review and giving them a more expansive interpretation than hitherto. Both techniques might be used in tandem. The latter does however have 'attractions' for the judiciary. It is, other things being equal, easier for courts minded to expand substantive review to preserve the impression of continuity with existing doctrine if they continue to use well-recognized labels or heads of review, while at the same time imbuing them with greater force than hitherto. This approach obviates the need for the type of judicial self-inquiry that normally attends the decision as to whether to introduce a new head of review to the existing armoury. It will moreover often be the case that investing existing heads of review with more vigour will only became apparent when the task has been judicially accomplished. Reflection on the new status quo, whether by academics or courts, will therefore take place against the backdrop of an already developed jurisprudence that embodies the new or modified meaning

given to the ‘classic’ head of review. It is in that sense *ex post facto*, as compared with the judicial and scholarly discourse that will attend the decision as to whether to introduce a new head of review, which will normally be *ex ante*.

iii) It is equally important to understand the ‘driving force’ behind this development. If the courts within a legal system decide that they wish to exercise more intensive rationality review, or that they desire to imbue an arbitrary and capricious test with more force than hitherto, then a principal tool used to achieve this end is to demand more reasons from the administrative authority and to subject those reasons to closer scrutiny. They may also demand more by way of inquiring into the evidentiary foundations underlying the particular decision that is being challenged. The latter, the evidentiary foundations for the contested decision, is related to the giving of reasons, but is nonetheless separate. A legal duty to provide reasons imposed by the courts will force the administrator to reveal why it acted in the way that it did, and thereby renders it easier for the reviewing court to decide whether those reasons were acceptable in the light of the relevant statute and its objectives. The provision of reasons is therefore an essential tool when the courts undertake substantive review of discretionary determinations, whether through a test framed in terms of rationality, manifest error or arbitrary and capricious. However a reviewing court may well feel that the reason that has been given is indeed rational, provided that there is some evidence to substantiate it. It is for this reason that reviewing courts will consider looking

to the evidentiary foundations of the contested decision. There is therefore a proximate connection between procedural and substantive review. Thus expansion of the duty to give reasons will normally lead to closer judicial scrutiny of the administration's reasoning process in order to discover whether there has been a substantive error. While it is perfectly possible in principle for the courts to demand more by way of reasons, but still to engage in low intensity review of the reasoning process in the context of substantive review, the reality is that expansion of process rights will at the least encourage the courts to engage in more intensive substantive review, because they have more to work with and therefore feel more confident about asserting judicial control.

iv) This still leaves open the issue touched on above, which is the reason or reasons why the courts have sought to expand their control over discretionary determinations. The reasons may of course differ from one legal system to another, but there are nonetheless certain common themes. Thus, in the US, the transformation of the arbitrary and capricious test from a relatively minimal 'long stop' to catch clear arbitrariness into a more potent tool for substantive control over discretion, was motivated in part by an increasing distrust of technical expertise combined with a greater willingness to engage in more serious review of technocratic decision-making.[39] This was combined with increasing emphasis placed on the importance of transparency and participation in the making of the initial decision or rule.[40] This served to place before a reviewing court a wider range of arguments about the content

of the contested norm, thereby facilitating closer review of the cogency of the reasoning used by the agency.

v) We can see analogous considerations at work in the development of EU law. The application of manifest error with a light touch in the early years was likely influenced by the ECJ's reticence in overturning norms in the new Community order, more especially when they were brokered through hard fought battles in the legislative arena. The EU is now firmly established and the Community courts may well justifiably feel that it can withstand annulment of some of its initiatives without thereby sending shock waves through the system as a whole. More intensive deployment of manifest error in relation to discretion and fact may also be explicable in terms of legitimacy. There has as is well known been a growing discourse on the legitimacy of the EU and on accountability of the decisions made therein. Imbuing the manifest error test with greater force and thereby bolstering substantive review is one way in which to enhance the accountability of those who made the initial decision and hence to increase the legitimacy of the resulting norms. The creation of the CFI is also undoubtedly of importance in this respect. It was established to ease the burden on the ECJ. Its initial jurisdiction was for complex cases with a heavy factual quotient, which required in-depth scrutiny of facts and attention to the reasoning of the primary decision-maker. These skills could be carried over when its jurisdiction was expanded to cover all direct actions brought by non-privileged applicants. The CFI was therefore well placed to put more intensive substantive review into practice. This is

reflected in the view expressed by Advocate General Vesterdorf that the creation of the CFI as a court of both first and last instance for the examination of facts in the cases brought before it was 'an invitation to undertake an intensive review in order to ascertain whether the evidence on which the Commission relies in adopting a contested decision is sound'.[41]

---

[*] Professor of English Law, St John's College, Oxford.

[1] *Chevron USA Inc v N.RD.C* 467 US 837 (1984).

[2] See also, *Etsi Pipeline Project* v. *Missouri* 484 US 495, 517 (1988); *Pittston Coal Group* v. *Sebben* 488 US 105, 113 (1988); *Bowen* v. *Georgetown University Hospital* 488 US 204, 212 (1988); *Adams Fruit Company, Inc.*, v. *Ramsford Barrett* 494 US 638, 649 (1990); *Department of the Treasury* 494 US 922 (1990); *Dole* v. *United Steelworkers of America* 494 US 26, 43 (1990); *NRDC* v. *Defense Nuclear Faclities Safety Board* 969 F.2d 1248, 1250-1251 (D.C.Cir.1992).

[3] 467 US 837, 842-843.

[4] *Ibid* 844. See also, *NLRB* v.*United Food and Commercial Workers Union, Local 23, AFL-CIO* 484 US 112, 123 (1987); *Mississippi Power* v. *Moore* 487 US 354, 380-382 (1988); *Sullivan* v. *Everhart* 494 US 83, 89 (1990); *Pension Benefit Guaranty Corporation* v. *LTV Corporation* 496 US 633, 648 (1990); *Department of the Treasury, Internal Revenue Service* v. *Federal Labour Relations Authority* 494 US 922, 928 (1990); *Armstrong World Industries, Inc.*, v. *Commissioner of Internal Revenue* 974 F.2d 422, 430 (3rd Cir. 1992); *West* v. *Sullivan* 973 F.2d 179, 185 (3rd Cir.1992).

[5] A Aman and W Mayton, *Administrative Law* (West Publishing, 2nd. ed., 2001), 453-460.

[6] *Consolidated Edison Co. v NLRB* 305 U.S. 197, 229 (1938).

[7] *Associated Industries v US Dept of Labor* 487 F.2d. 342, at 350 (2d Cir. 1973); *Association of Data Processing Service Organizations, Inc. v Board of Governors of the Federal Reserve System* 745 F.2d 677, 683 (D.C. Cir. 1984).

[8] A. Aman and W. Mayton, *Administrative Law* (West, 2nd ed., 2001), 234-6; *Steadman v. SEC* 450 US 91 (1981).

[9] *Ibid*. at 453-71.

[10] Case 730/79, *Philip Morris Holland BV v. Commission* [1980] ECR 2671.

[11] *Associated Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, 228-230.

[12] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410.

[13] *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240; *R. v. Hillingdon London Borough Council, ex p. Royco Homes Ltd.* [1974] Q.B. 720; *West Glamorgan County Council v. Rafferty* [1987] 1 W.L.R. 457; *R. v. Secretary of State for the Home Department, ex p. Tawfick* [2001] A.C.D. 28; *R. v. Secretary of State for Health, ex p. Wagstaff* [2001] 1 W.L.R. 292; *R. (on the application of Howard) v. Secretary of State for Health* [2002] E.W.H.C. 396; *R. (on the application of Von Brandenburg) v. East London and the City Mental Health Trust* [2002] Q.B. 235. .

[14] *R. v. Lord Saville of Newdigate, ex p. A* [1999] 4 All E.R. 860, para. 33; *R. v. Parliamentary Commissioner for Administration, ex p. Balchin* [1997] C.O.D. 146; *R. v. North and East Devon Health Authority, ex p. Coughlan* [2001] Q.B. 213, para 65.

[15] *Ibid*. para. 65.

[16] *R. v. Chief Constable of Sussex, ex p. International Trader's Ferry Ltd.* [1999] 2 A.C. 418, 452.

[17] *R. v. Secretary of State for the Home Department, ex p. Daly* [2001] 2 A.C. 532, 549; *R. (on the application of Louis Farrakhan) v. Secretary of State for the Home Department* [2002] 3 W.L.R. 481, para. 66.

[18] Sir John Laws, "*Wednesbury*", in C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord, Essays in Honour of Sir William Wade* (Oxford University Press, 1998), pp. 185-202.

[19] *R. v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 A.C. 696, 748-749.

[20] *R. v. Ministry of Defence, ex p. Smith* [1996] Q.B. 517.

[21] Administrative Procedure Act 1946, s. 706(2)(a).

[22] A. Aman and W. Mayton, *Administrative Law* (West, 2nd ed., 2001), 519-29; S. Breyer, R. Stewart, C. Sunstein and M. Spitzer, *Administrative Law and Regulatory Policy* (Aspen Law & Business, 5th ed., 2002), 415.

[23] M. Shapiro, 'Codification of Administrative Law: The US and the Union' (1996) 2 *ELJ* 26, 28.

[24] *Ibid*. at 33.

[25] See, *Greater Boston Television Corp. v. Federal Communications Commission* 444 F.2d 841, at 850-53 (D.C.Cir. 1970), cert. denied 403 U.S. 923 (1971); *Environmental Defense Fund Inc v. Ruckelshaus* 439 F.2d 584 (D.C.Cir. 1971); H. Leventhal, 'Environmental Decision making and the Role of the Courts' 122 *U.Pa LRev* 509 (1974); R. Stewart, 'The Reformation of American Administrative Law' 88 *Harv.L Rev* 1667 (1975); R. Stewart, 'The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decision Making; Lessons From the Clean Air Act' 62 *Iowa L Rev* 713 (1977); A. Aman, 'Administrative Law in a Global Era: Progress, Deregulatory Change & The Rise of the Administrative Presidency' 73 *Corn L Rev* 1101 (1988).

[26] *Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile Insurance Co.* 463 U.S. 29, at 42-3 (1983).

[27] Paul Craig, *EU Administrative Law* (Oxford University Press, 2006), Chap. 13.

[28] See, eg, Case 57/72, *Westzucker GmbH v. Einfuhr-und Vorratsstelle für Zucker* [1973] ECR 321; Case 98/78, *Firma A. Racke v. Hauptzollamt Mainz* [1979] ECR 69.

[29] Case T-13/99, *Pfizer Animal Health SA v. Council* [2002] ECR II-3303. See also Case T-70/99, *Alpharma Inc v. Council* [2002] ECR II-3495.

[30] *Ibid*. para. 311.

[31] *Ibid*. para. 66.

[32] *Ibid*. para. 168.

[33] Case 138/79, *Roquette Freres v. Council* [1980] ECR 3333, para. 25; Cases 197, 200, 243, 245, 247/80, *Ludwigshafener Walzmuhle Erling KG v. Council and Commission* [1981] ECR 3211, para. 37; Case C-27/95, *Woodcock District Council v. Bakers of Nailsea* [1997] ECR I-1847, para. 32; Case C-4/96, *Northern Ireland Fish Producers' Association (NIFPO) and Northern Ireland Fishermen's Federation v. Department of Agriculture for Northern Ireland* [1998] ECR I-681, paras. 41-2.

[34] Case T-13/99, *Pfizer*, n. 29, para. 169.

[35] Case T-342/99, *Airtours plc v. Commission* [2002] ECR II-2585; Case T-5/02, *Tetra Laval BV v. Commission* [2002] ECR II-4381; Case C-12/03 P, *Commission v. Tetra Laval*.

[36] Craig, *EU Administrative Law*, n 27, Chap. 13.

[37] Craig, *EU Administrative Law*, n 27, Chap. 17-18.

[38] Craig, *EU Administrative Law*, n 27, Chap. 17.

[39] Shapiro, n. 23, 33-6.

[40] Stewart, 'The Reformation of American Administrative Law', n. 25.

[41] Case T-7/89, *Hercules v. Commission* [1991] ECR II-867, I.B.1. See also, Case C-344/98, *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369, AG Cosmas, at para. 54.