> "Where wide powers of decision-making are conferred by statute, it is presumed that Parliament implicitly requires the decision to be made in accordance with the rules of natural justice: . . . However widely the power is expressed in the statute, it does not authorise that power to be exercised otherwise than in accordance with fair procedures."[45]

12.2.7.1 The recipient of a discretionary power must not do anything that fetters the ability to exercise the power. "The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application'."[46] Where the recipient of the discretion is expressly required or permitted to make rules or establish a policy for exercising the discretion, however, provided the rule or policy is intra vires, rational and proportionate it will not amount to an unlawful constraint: and there may be other contexts in which some kind of self-imposed constraint is not unlawful.[47]

The rules of administrative law that prevent unfairness by the executive in general respects will apply in relation to statutory powers as in relation to other matters. Hence the following passage of the judgment of Dyson L.J. in *National Car Parks Ltd v Baird (Valuation Officer)*[48]—

> "It is a well-established principle of public law that it is unlawful to exercise a statutory power (or to refuse to exercise a statutory power) in circumstances of unfairness amounting to an abuse of power: see, for example, *Preston v IRC*.[49] Where unlawfulness of this kind occurs, the court will go on to consider whether in the exercise of its discretion it should grant judicial review."

12.2.7.2 Just because a power is drafted in broad terms does not mean one can assume that anything that falls within the literal meaning of the words used to confer the power will be considered within it. Indeed, the more apparently wide a power is, the more the courts will feel obliged to impose some kinds of limitation based on the context and probable legislative intent. So anything that amounts to a surprising or particularly draconian use of the power may be found to be outside its implicit limits, and would need to be permitted by express qualifying provision. It is therefore common to find statutory powers drafted in very broad terms with a provision following to the effect that "in particular" the power may be relied upon to do a specified list of things, which on examination will often turn out to be a list not of the most important or likely things the recipient of the

[45] See also *M. v Secretary of State for Education* [2001] EWCA Civ 332, *R (X) v Chief Constable of West Midlands Police* [2004] 2 All E.R. 1, QBD and cases cited by Lord Browne-Wilkinson in *Pierson*.

[46] Lord Reid in *British Oxygen Co Ltd v Board of Trade* [1971] A.C. 610, 625.

[47] *R. (Nicholds) v Security Industry Authority* [2006] EWHC 1792 (Admin); see also *Anwar (AP) v The Secretary of State for the Home Department* [2016] ScotCS CSOH 91.

[48] [2005] 1 All E.R. 53, 70 CA.

[49] [1985] A.C. 835.

power is likely to want to do with it, but a list of the things which, because they are most tangential or because they interfere particularly with individual rights, might otherwise be doubted.

This principle is sometimes referred to as the "Padfield principle", emerging from the rule in *Padfield v Minister of Agriculture, Fisheries and Food*[50] that an apparently unfettered statutory discretion must be construed in accordance with the policy and objects of the Act conferring it.[51]

Where there is a general provision and a more specific provision, and a course of action could potentially fall within both, the court will usually interpret the general provision as not covering matters covered by the specific provision. In *Pretty v Solly*[52] Sir John Romilly MR said:

> "The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."[53]

[50] [1968] A.C. 997.

[51] See also *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch.12 per Laws LJ at 37A: "the underlying principle rests on the rule of law; it is that the exercise of statutory power given by the legislature must be condemned as arbitral and capricious if it is done for a purpose which the legislature did not intend, and for that reason must be taken to be unauthorised." See also: "The more helpful approach is to consider the interpretation of section 58(2) having regard to the mischief at which it is aimed. The parties are agreed that the discretion conferred by section 58(2) should be used to promote the policy and objects of the statute. This proposition is supported by high authority—see Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 at 1030 per Lord Reid. This principle led Lord Bridge to observe in R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd [1988] AC 858, at p 873: 'Thus, before deciding whether a discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion is conferred. Some statutory discretions may be so wide that they can, for practical purposes, only be challenged if shown to have been exercised irrationally or in bad faith. But if the purpose for which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose.' " (*R. (on the application of The Electoral Commission) v City of Westminster Magistrates Court* [2010] UKSC 40.)

[52] (1859) 26 Beav. 606.

[53] "Likewise in R v Ramasamy Viscount Radcliffe said of two ill-matched statutory provisions: 'The question is, of course, a difficult one: but their Lordships are of opinion that the correct way to solve it is by applying the maxim of interpretation generalia specialibus non derogant.' " (*Cusack v London Borough of Harrow* [2011] EWCA Civ. 1514; see also—"The judge's answer to the argument that the maxim generalia specialibus non derogant applies to preserve s.27 as the applicable power of sale was that the 1908 Act, properly construed, impliedly repealed s.27 in favour of s.32. But both are simply different views about the construction of s.32 of the 1908 Act in the absence of any express repeal of s.27 and the inconsistency between the two provisions in terms of when a sale will be permitted. One can present the arguments in a number of different ways by asking why s.27 was continued in effect if it was only to have concurrent application with s.32 rather than an exclusive one; whether Parliament can really have intended to remove s.27 protection from s.6(4) allotments; and whether the existence of the wide s.32 power which, on the express language of s.33(4), does apply to s.6(4) allotments suggests (as the judge found) that s.27 was to cease to have any further application to such land." —*Snelling v Burstow Parish Council* [2013] EWCA Civ 1411; similarly see—"We accept the correctness of the statement of Lord Bingham CJ in R v Liverpool CC, ex p

Balance between primary and subordinate legislation

1.3.3 Much has been written and said over the years about the difficulty of achieving an ideal balance between primary and secondary legislation.[48] In essence, the aim in striking a balance is to avoid leaving too much of significance to be determined by the executive or the courts while at the same time preventing the principal purpose of the primary legislation from being obscured by an excess of complicated detail.[49–50] Like many balances between conflicting desiderata, this is both easy to state and impossible to achieve to everybody's satisfaction.

There are two principal advantages of the use of subordinate legislation: that it relieves pressure on Parliamentary time and that it offers flexibility.[51] There are a number of disadvantages of the use of subordinate legislation that have to be borne in mind in striking the correct balance. The advantages and disadvantages are discussed further below.

First advantage—relieving pressure on Parliamentary time

1.3.4 Almost every Bill in Parliament nowadays relegates a substantial amount of subordinate detail to be settled by the executive in subordinate legislation. The range of matters left to be settled in this way ranges from the amount of fees for specific services to, in effect, putting all the flesh on the statutory bones of an area of law.

Two examples of the latter are Sch.4 to the Employment Relations Act 1999[52] and Pt.1 of the Commonhold and Leasehold Reform Act 2002.[53] Of these, the former consists entirely of enabling powers, of enormous breadth, providing for the regulation of complicated and important areas of employment law by subordinate legislation. The latter does give some idea of the intended structure of a commonhold system; but it does no more than that, leaving all the details to be provided by subordinate legislation.

The passage of the provisions about commonhold through Parliament was relatively uncontentious, but still occupied many hours of scrutiny in each House. If one tries to imagine how much scrutiny would have been thought necessary had the legislation occupied not thirty pages of principle but three-hundred or more pages of fine detail, it is easy to appreciate that the use of delegated legislation on a large scale is indispensable if Parliament is to pass the number of measures in each Session that is thought necessary by the executive to satisfy the nation's appetite for legal reform.

Length aside, it is clear that there are many matters of fine technical detail that have to be addressed in modern legislation that will be neither efficiently nor adequately scrutinised by the mechanisms used for the passing of Bills. Statutory instruments are generally referred to committees for both technical[54] and substantive examination.[55]

Second advantage: flexibility

1.3.5 Subordinate legislation can be amended without any, or in some cases without much,[56] expenditure of Parliamentary time, so that anything which is likely to have to be altered in the light of experience or in order to react to changing circumstances is likely, *ceteris paribus*, to be more suited to secondary than to primary legislation.[57] The idea is that once Parliament has approved the fundamental principles of a legal change, it is not necessary to return, and occupy precious Parliamentary time, whenever the details require to be altered.

[48] A useful summary of the arguments will be found in *Making the Law*, the Report of the Hansard Society Commission on the Legislative Process, The Hansard Society for Parliamentary Government, November 1992, paras 253–260 and the evidence referred to there.

[49] The division of an Act between clauses and Schedules is, of course, one way of preserving the flow of the main legislative story, relegating relatively minor details to the end. But that does not have the other advantages of secondary legislation, principally flexibility.

[50] Incidentally, although this is sometimes presented as if it were a modern tension arising from a new willingness of Parliament to dictate general ideas and leave details of execution to the executive, an interesting historical parallel can be drawn with the origins of statutory drafting, whereby petitions were passed in general terms by Parliament and the legislative details were left to a non-Parliamentary committee—see Ch.5, Section 1, fn.1.

[51] A departmental memorandum by the Department for Education and Employment to the House of Lords Select Committee on Delegated Powers and Deregulation on the Education Bill 1996–97 listed four acceptable purposes of secondary legislation in the following terms, approved by the Committee, Session 1996–97, 16th Report (HL Paper 43—12 February, 1997), para.2, fn.2—

"avoiding too much technical and administrative detail on the face of the legislation, and keeping Bills shorter than they would otherwise be;

"ensuring flexibility in responding to changing circumstances, and a measure of ability to make changes quickly in the light of experience without the need for primary legislation;

"allowing detailed administrative arrangements to be set up and kept up-to-date within the basic structures and principles set out in the primary legislation, subject to Parliament's right to challenge any inappropriate use of powers; and

"allowing flexible timing to get legislation right, to consult, and to change it when circumstances change."

[52] 1999 c.26: Sch.4 inserts into legislation elsewhere provisions granting wide enabling powers in relation to entitlement to time off from work for maternity and other domestic reasons.

[53] 2002 c.15.

[54] See Ch.6, Section 2. The secretariat of the Joint Committee on Statutory Instruments is provided by the Counsel to the Speaker and lawyers working under him. These roles are commonly filled by former members of the Government Legal Service (and it has been common in the past for the Counsel to the Speaker to be a former Parliamentary Counsel). There is therefore a "poacher turned gamekeeper" element in the scrutiny offered to instruments by the Joint Committee's advisers, since having been occupied themselves for many years in the preparation of statutory instruments they are aware of the pressures and temptations to which the executive is subject and are admirably placed to control the technical aspects of subordinate legislation.

[55] See Ch.6, Section 2. In the House of Lords statutory instruments are not generally referred for substantive examination in committee, and motions for approval or annulment are taken on the floor of the House—but often during the "dinner-hour", that is to say at a convenient break during the main business of the day and therefore at a time when the Chamber is expected to be attended only by those with particular interest and expertise in the substance of the instrument.

[56] See Ch.6, Section 2.

[57] s.14 of the Interpretation Act 1978 (c.30) implies a power in the case of the most significant kinds of subordinate legislation to amend, revoke and re-enact. The Interpretation Act (Northern Ireland) 1954 (c.33) s.17 makes similar provision in relation to subordinate legislation for Northern Ireland.