Decisions of the extinct Appellate Committee of the House of Lords will continue to resonate in South African administrative, constitutional and international law*

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1 Introduction

In 2003 it was announced that a Supreme Court would replace the Appellate Committee of the House of Lords. This transpired in 2009 and saw the end of the House of Lords acting in the specific judicial capacity as the final court of appeal for the United Kingdom.[1] The other judicial committee of the House of Lords, the Judicial Committee of the Privy Council, continues to function. For all practical purposes the Supreme Court continues to exercise the same jurisdiction as its predecessor. There is merely a change of name and a change of venue. The Supreme Court is to be headed by a President who was named as Lord Phillips of Worth Matravers.

It may be opportune at this juncture to assess the major decisions of the Appellate Committee of the House of Lords (hereinafter the House of Lords) and their possible influence on South African administrative law, constitutional law and international law. These three branches of law have been selected due to the initial – and continuing – influence of English law upon them. The influence of English law on South Africa has been immense[2] and is clearly visible in the law of evidence, the

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*Dedicated to the memory of Ellison Kahn who, as I perceive, believed that the fusion of the best of Roman- Dutch and English law could blend into a harmonious union. He further believed that, in the long run, the test is social utility and that emotion should not cloud the debate about the purity of Roman-Dutch law versus reliance on English authorities. He saw no point in embarking on a war of attrition to starve our legal system of relevant English influences.

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[1]See Le Seur 'From appellate committee to supreme court: A narrative' in Blom-Cooper, Dickson and Drewry *The judicial House of Lords 1876-2009* (2009) 65.

[2]Schreiner *The contribution of English law to South African law and the rule of law in South Africa* (1967) 24; Schmidt and Rademeyer *Law of evidence* (2003) para 1311; Cowen *The law of*

law of delict, competition law, criminal procedure, negotiable instruments, commercial law, company law, the law of insurance, interpretation of statutes in addition to the above-mentioned branches of international, administrative and constitutional law.

Judgments by the House of Lords have often influenced South African courts by the cogency of their reasoning and the clarity of their language. This influence did not cease despite the sincere attempt by our appellate division to develop a South African common law free from the imperial influence of English law. Examples of such attempts are *Regal v African Superslate (Pty) Ltd*;[3] *Trust Bank van Afrika Bpk v Eksteen*[4] and *Jordaan v Biljon*[5] where the appellate division declined to follow principles which had entered South African law through English law. As pointed out by Cameron[6] (now Mr Justice Cameron of the Constitutional Court), Steyn CJ wished to terminate the special bond between English law and South African law. This he attempted to do, not only by firing broadsides at English law, but by embarking on a war of attrition which would eventually lead to English elements in the South African legal system being starved of their support by foreclosing the judicial amenability and congeniality to them.

South Africa's constitutional law (especially prior to the 1996 Constitution), administrative law (despite the introduction of the Promotion of Administrative Justice Act 3 of 2000) and international law (despite sections 231-233 in the 1996 Constitution) have been fashioned along English lines. English cases are cited no less often than before, although their force is persuasive rather than compelling.

Ellison Kahn's comments that 'our courts have been successful in taking the best from Roman-Dutch law and the best from English law and fusing the two in a harmonious union'[7] are more than apt. To attempt to deny the English elements in our constitutional, administrative and international law would be 'as impossible as to eliminate Roman law from the fabric of European legal systems or to sort out the waters of the sea into the rivers whence they came'.[8]

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negotiable instruments in South Africa (1985) 146; Joubert *et al The law of South Africa* vol 19 (1996) para 1; Hahlo and Kahn *The Union of South Africa: The development of its laws and Constitution* (1960) 41; Van der Merwe and Olivier *Die onregmatige daad in the Suid-Afrikaanse reg* (1989) 18; Van Heerden and Neethling *Unlawful competition* (1995) 53.

[3] 1963 1 SA 102 (AD) (nuisance).

[4] 1964 3 SA 402 (estoppel). Hoexter J (at 414) concurring stated that 'I bear in mind that our courts have pointed out over and over again that, in matters of estoppel, it is proper and safe to look for guidance, to decisions of the English courts'. His was a lone voice in the court in this regard.

[5] 1962 1 SA 286 (AD) (defamation). See too *Craig v Voortrekkerpers Bpk* 963 1 SA 149 (AD) and *Nydoo v Vengtas* 1965 1 SA 1 (AD).

[6] See Cameron 'Legal chauvinism, executive mindedness and justice: LC Steyn's impact on South African law' 1982 *SALJ* 38. See Chaskalson 'South Africa' in Blom-Cooper (n 1) 360-366.

[7] Kahn (n 2) 47.

[8] *Id*. See Bodenstein 'English influences on the common law of South Africa' (1913) 30 *SALJ* 304; Wessels *History of the Roman Dutch law* (1908) 399; De Wet 'Gemenereg of wetgewing' (1948) 11 *THRHR* 2.

In what follows, those House of Lords' constitutional, administrative and international law decisions which stand out will be discussed. In many instances, as will emerge, these decisions have impacted on our own law.

2 International law

As a colony of Britain (1795-1803, 1806-1910) the acts of the Cape of Good Hope that were governed by international law were undertaken by the colonial power. The international affairs of Natal, annexed by Britain in 1843, were similarly conducted. Britain also annexed the South African Republic (Transvaal) 1877 to 1881. The Orange Free State and Transvaal were formally annexed by Britain in 1900, the Transvaal for the second time. In 1910, despite the formation of the Union of South Africa, the colonial government continued to act on its behalf. It was only in 1926 that the Imperial Conference resolved that Britain and the Dominions were autonomous communities within the British Empire. This resolution was endorsed by the Statute of Westminster in 1931. Up to this period the foundations of South Africa's approach to international law was decidedly British and this approach continued after 1931. The respect South African courts have always shown to international law is illustrated as far back as 1894 where Kotze CJ in *Maynard et al v The Field Cornet of Pretoria*[9] declared that municipal law must be interpreted in such a way as not to conflict with the principles of international law.

Britain belongs to the *dualist* school. This school sees international law and municipal law as completely different systems of law with the result that international law may be applied in domestic courts only if *adopted* by the courts or *transformed* into domestic law by legislation. South Africa falls within this school. Before the 1996 South African Constitution most courts applied customary international law without questioning its place in the legal order.[10] In *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*[11] Steyn CJ stated that the provisions of an international treaty are not embodied in our law except by legislative enactment. This dualist position pertains post the 1996 Constitution. Section 232 of the Constitution declares that customary international law 'is law in the Republic' unless inconsistent with the constitution or an Act of Parliament. Section 231(4) provides that a treaty becomes law in the Republic when enacted into law by legislation.[12]

The House of Lords made some significant decisions relating to the relationship between international law and municipal English law. In *The Cristina*[13]

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[9] 1894 1 SAR 214, 223. In the same case Jorissen J (at 232) described international law as being a 'higher law'.
[10] *S v Penrose* 1966 1 SA 5 (N) 10.
[11] 1965 3 SA 150 (A) 161.
[12] For an extensive discussion of the place of international law in South African municipal law see Dugard *International law: A South African perspective* (2011) 42.
[13] 1933 AC 485.

Lord MacMillan referred to the need to adopt public international law into municipal law. In *Chung Chi Cheung v The King*[14] Lord Atkin pointed that international law lacks validity in English courts unless the principles of the relevant law have been accepted by and adopted into English domestic law. In *I Congress del Partido*[15] the House of Lords agreed with the Appeal Court decision in *Trendex Trading Corporation v Central Bank of Nigeria*[16] that international law is not subject to *stare decisis*, that it changes and that an English court can give effect to these changes without an Act of parliament. In *R v Jones*[17] the issue was whether the international crime of aggression was capable of being a crime within the meaning of the 1967 Criminal Law Act and the 1994 Criminal Justice and Public Order Act. The House of Lords held that while old crimes in international law had been acknowledged in municipal law, new crimes could only be acknowledged by legislative intervention.[18]

The House of Lords' view as to unincorporated treaties remains vague. Different approaches emerged in *Salomon v Customs and Excise Commissioners*,[19] *Woodend (K v Ceylon) Rubber and Tea Co Ltd v Commissioner of Inland Revenue*,[20] *Inland Revenue Commissioners v Collco Dealings*,[21] *Waddington v Miah*,[22] *AG v Guardian Newspapers (No 2)*,[23] *R v Home Secretary, ex parte Brind*[24] and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry.*[25] In the context of this article, it is not opportune to set out the different approaches to this issue. It suffices to state that in *McFarland v Secretary of State*[26] the House of Lords was prepared to assess whether a claim relating to section 133 of the Criminal Justice Act 1988 fell under the unincorporated article 14(b) of the International Covenant on Civil and Political Rights. *Kuwait Airways Corporation v Iraqi Airways Company*[27] dealt with the question of whether certain United Nations Security Council resolutions were part of United Kingdom law. The House of Lords held that the answer lay in whether the United Kingdom was bound by these resolutions by virtue of article 25 of the UN Charter.[28]

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[14] 1939 AC 160, 167.
[15] 1981 2 Lloyd's Rep 367, 371; 1983 1 AC 244 (HL).
[16] 1997 QB 529, 554.
[17] 2007 1 AC 136.
[18] This decision has not been welcomed unanimously. See O'Keefe 'Customary international law in English courts' (2001) 72 *BYBIL* 293, 335.
[19] 1967 2 QB 116.
[20] 1971 AC 321.
[21] 1962 AC 1.
[22] 1974 1 WLR 683.
[23] 1990 1 AC 109.
[24] 1991 1 AC 696.
[25] 1990 2 AC 418.
[26] 2004 1 WLR 1285.
[27] 2002 2 AC 883.
[28] 'Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

The judicial attitude to unincorporated treaties by the House of Lords appears to have been heavily influenced by the European Convention on Human Rights. The latter has been regularly referred to in the interpretation of English law relating to fundamental freedoms.[29] It would appear that in the human rights field the United Kingdom has deviated from its dualist position regarding unincorporated treaties. Unincorporated international human rights treaties nowadays play a major role in the interpretation and application of human rights in the United Kingdom.[30]

Treaty interpretation can be approached in three ways: textual (the literal and grammatical meaning of the words); teleological (the object and purpose of the treaty) and the intention of the parties (inferred from the text and the preparatory works or *travaux preparatoires)*. In 1980 in *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corp*[31] the House of Lords affirmed the use of *travaux preparatoires* as a method of interpreting international treaties. This was also the approach of the House of Lords twenty-one years later in *King v Bristow Helicopters Ltd*[32] where it was held that in understanding the term 'bodily injury' in the Warsaw Convention of 1929, recourse could be had to the *travaux preparatoires* of that convention. South African courts relatively recently invoked the *travaux preparatoires* of the Vienna Convention on Diplomatic Relations of 1961 in *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues*[33] and of the International Convention on Salvage of 1989 in *MV Mbashi Transnet Ltd v M Mbashi.*[34]

It took the House of Lords many years to adopt the doctrine of restricted or qualified sovereign immunity in respect of the commercial activities of states. The stimulus for abandoning the approach of absolute sovereign immunity was *Trendex Trading Corporation v Central Bank of Nigeria*[35] where Lord Denning in his famous dictum approved the restrictive approach. This restrictive approach was expressly approved by the House of Lords in *I Congreso del Partido*.[36] South African courts in *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique*[37] and *Kaffraria Property v Government of the*

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[29]See Higgins 'Dualism in the face of a changing legal culture' in Andenas and Fairgrieve (eds) *Judicial review in international perspective, liber amicorum in honour of Lord Slynne of Hadley* (vol II) (2000) 9.

[30]Webber *The decline of dualism: The relationship between international human rights treaties and the United Kingdom's domestic counter-terror laws* LLD thesis University of South Africa (Pretoria) (2012).

[31]1981 QB 368.

[32]2002 AC 628.

[33]2001 1 SA 1285 (W) 1293.

[34]2002 3 SA 217 (D) 222.

[35]1977 QB 529 (CA) 554.

[36](N 15) 372.

[37]1980 2 SA 111 (T). For the earlier approach of our courts to the doctrine of sovereign immunity see *Parkin v Government of the Republique Democratique du Congo* 1971 1 SA 259 (W) and *Lendalease Finance Co (Pty) Ltd v Corporacion de Mercadeo Agricola* 1975 4 SA 397 (C). See

Republic of Zambia[38] under the influence of the *Trendex* case applied the restrictive doctrine of sovereign immunity. Shortly after these judgements the South African legislature approved the restrictive approach with the Foreign Sovereign Immunities Act 87 of 1981 (which is modelled on the United Kingdom's State Immunity Act 1978).

The *Pinochet* case[39] dramatically brought to the fore the issue of sovereign immunity and customary international law. In this specific instance grave violations of human rights were alleged. The various opinions of the law lords were widely supported and criticised. Torture was allegedly committed by Pinochet, the former head of state of Chile. The House of Lords held that *immunity materiae*, which relates to acts performed in an official capacity, does *not* exist when a person is charged with an *international crime*. Firstly, because such acts can never be official and secondly, such acts violate norms of *ius cogens* and such peremptory norms prevail over immunity.[40] In extradition proceedings against Pinochet the House of Lords consequently held that Pinochet was not entitled to immunity. The law lords differed in their reasons for their conclusions. The majority held that a state cannot assert immunity *ratione materiae* in relation to a criminal prosecution for torture inasmuch as torture is a breach of *ius cogens* under international law.[41]

International human rights have also affected the act of state doctrine concerning the judicial determination of the legal effect of an act of a foreign state or government. Traditionally in the United Kingdom acts of foreign states within their own territories have been beyond judicial scrutiny. This principle of judicial restraint has been heavily criticised. Decisions in the latter part of the previous century indicate that United Kingdom courts were prepared to pronounce on the compatibility of foreign law with international human rights. The House of Lords in *Oppenheimer v Cattermole*[42] and *Williams and Humbert Ltd v W and H Trademarks (Jersey) Ltd*[43] held that it would not apply the act of state doctrine if the act of the foreign state constituted a grave infringement of human rights. In

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Dugard 'The "purist" legal method, international law and sovereign immunity' in Gauntlett (ed) *JC Noster: 'n Feesbundel* (1979) 36.

[38] 1980 2 SA 709 (E).

[39] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* 2000 1 AC 147; 1999 2 WLR 872 (HL); 1999 2 All ER 97 (HL). See Van Allbeck 'The *Pinochet* case: International human rights on trial' (2000) 71 *BYIL* 29; Pillay 'Revisiting *Pinochet*: The development of customary international law' (2001) 17 *SAJHR* 477.

[40] Dugard (n 12) 253.

[41] It must be noted that the European Court of Human Rights in *Al-Adsani v United Kingdom* 2001 34 EHRR 273 held that notwithstanding the *ius cogens* character of the prohibition on torture, international law does not provide that a state does not enjoy immunity from a *civil* suit in the courts of another state where acts of torture are alleged. See Dugard 'Immunity, human rights and international crimes' (2005) *TSAR* 482, 483.

[42] 1976 AC 249.

[43] 1988 AC 368.

Kuwait Airways Corporation v Iraqi Airways Company[44] the succinct question was whether United Kingdom courts should recognise and give effect to an Iraqi confiscatory decree promulgated in the wake of its invasion and attempted annexation of Kuwait. The House of Lords held that the Iraqi decree violated a rule of international law of fundamental importance and it would thus not give effect to the decree. It also held that to do so would be contrary to the United Kingdom's obligations under the UN Charter. This decision was cited with approval by Patel J in *Van Zyl v Government of the RSA*.[45]

3 Constitutional law

The adoption of the principle of constitutional supremacy is without a doubt the most fundamental change to South African constitutional law. For two centuries our legal system was dominated by parliamentary sovereignty. This meant that parliament was supreme and subject to no other authority – not even the courts. Parliamentary sovereignty was abolished and the 1996 Constitution became the supreme law of the land. All government bodies are subject to the Constitution. This includes parliament and any law or conduct, including parliamentary legislation, inconsistent with the Constitution is invalid and can be struck down by the courts. This is a constraint on the majority government when it exercises its powers.[46] Previously the general point of departure in South Africa which adopted the Westminster system was that there was no judicial control over laws of parliament. This was regarded as a necessary implication of parliamentary sovereignty.[47]

With the 1996 Constitution the influence of English constitutional law clearly took a back-seat in South Africa. There are however certain universal constitutional principles emanating from House of Lords decisions which will hopefully resonate in the future South African constitutional dispensation. In *Anisminic v Foreign Compensation Commission*[48] the House of Lords closed the door on absolute ouster clauses: Lord Reid held that it is a well-established principle that a provision ousting the jurisdiction of the courts must be interpreted strictly and construed in a way that preserves the jurisdiction of the court. *Anisminic* is usually referred to in the context of administrative law but its very essence refers to constitutionalism and an independent judiciary thereby avoiding

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[44](N 27).
[45]2005 11 BCLR 1106 (T) para 70.
[46]For an overview of the South African Constitution see Malherbe *The South African Constitution* (2000) 55 *Zeitschrift für offentliches Recht* 61. See *Executive Council of the Western Cape Legislature v President of the Republic of South Africa I* 10 BCLR (1995) 1289 (CC); *De Lille v Speaker of the National Assembly* 7 BCLR (1998) 916 (CC).
[47]Rautenbach and Malherbe *Constitutional law* (2004) 171.
[48]1969 2 AC 147.

the possibility of autocratic power.[49] Lord Atkins' dissent in *Liversidge v Anderson*[50] is considered as one of the greatest constitutional law statements of the twentieth century:

> I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive .... In this country amid the clash of arms the laws are not silent. They may be changed but they speak the same language in war as in peace. It has always been one of the pillars of freedom ... that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any encroachment is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I ... I know of only one authority which might justify the (majority's) suggested method of construction ... Humpty Dumpty.

It has also been seen to be one of the most significant dissents in the House of Lords in the previous century. As stated by Hadfield,[51] Lord Atkin's dissent contained the essence of constitutionalism and captured the spirit of much of British constitutional history. It was well ahead of its time and well before debates on civil liberties transmitted into human rights.

Regarding the separation of powers doctrine, the significant dissents of Lord Mustill and Lord Keith in the *Fire Brigade Union* case[52] deserve mention. Lord Mustill stated that it is the task of parliament and the executive in tandem, and not of the courts, to govern the country.[53] Lord Keith stated that what must be avoided is an unwarrantable intrusion by the court into the political field and a usurpation of the function of parliament.[54]

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[49]There have been various proposals recently to inquire into the role played by the South African Constitutional Court. Statements such as those of the Deputy Minister of Correctional Services, Mr Ramatlhodi, in *The Times* (2012-04-16) at 15 to the effect that the judiciary must not invoke the Constitution to undermine the very same Constitution, raises various concerns regarding the independence of the judiciary. In the same vein is the comment of the US President, Barack Obama, that the biggest problem on the US Supreme Court is judicial activism or the lack of restraint and the possibility for an unelected group of people to overturn a duly passed law – see *The Australian* (2012-04-04) at 12. For the clash between Kotze CJ and the State President of the South African Republic regarding the independence of the judiciary, see Kotze *Documents and correspondence relating to the judicial crisis in the South African Republic* (1898).

[50]1942 AC 206, 244.

[51]Hadfield 'Constitutional law' in Blom-Cooper (n 1) 510. See Ewing and Gearty *The struggle for civil liberties* (2000) 86.

[52]1995 2 AC 513.

[53]*Id* 560.

[54]*Id* 546. This is similar to the sentiments expressed by Viscount Simonds in *Magor and St Mellons RDC v Newpoint Corporation* 1952 AC 189, 191 where he warned against filling judicially discerned gaps in legislation. He said that such action would be a naked usurpation of the legislative function under the thin guise of interpretation.

These dissenting judgments clearly resonate in South Africa where constitutionally the doctrine of the separation of powers means that the freedom of the citizens can only be ensured if there is no concentration of power. This is achieved by a division of government authority into legislative, executive and judicial authority. It is generally accepted however that no constitutional scheme can reflect a complete separation of powers. The scheme is always one of partial separation as was held by the Constitutional Court in *In re: Certification of the Constitution of the RSA, 1996.*[55]

The English doctrine of the sovereignty of parliament dominated the South African constitutional terrain up until two decades ago and is irrelevant now. The supremacy of parliament no longer exists and it is subject to no other authority. Our parliament is now subject to the Constitution.

The question arises as to whether the sovereignty of parliament in the United Kingdom is still as absolute as when it was described by Dicey? The answer to this question is Lord Steyn's judgment in *Jackson v AG*:[56]

> The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom … [It remains] the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances (for example the abolition of judicial review) … the new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

4 Administrative law

Due to the influence of British rule at the Cape the administrative law model followed by South Africa was one in which the administration became subject to the jurisdiction of the ordinary courts.[57] The model developed at the Cape was subsequently adopted in Natal, and after the Anglo-Boer War, in the Orange River

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[55] *In re: Certification of the Constitution of the RSA, 1996* 1996 10 BCLR 1253 (CC), 1996 4 SA 744 (CC) para 109. See also *De Lange v Smuts NO* 1998 7 BCLR 779 (CC), 1998 3 SA 785 (CC) para 60. The Westminster system has a considerable overlap between the three branches of government. A lesser overlap is found in the United States of America. No system exists in which a complete separation of powers can be found or where the various government bodies function in total isolation from one another.

[56] 2006 1 AC 262, 302. See Barrie 'Die soewereiniteit van die Britse parlement in 2010: Is dit steeds soos Dicey dit uitgespel het?' (2010) *TSAR* 486.

[57] In the other model followed (eg, France), the administration was subject not to the supervision of the ordinary courts but to a special system of administrative courts. This model is followed in Australia. See Barrie 'The State Administrative Tribunal of Western Australia: An example to follow?' (2010) 25 *SAPL* 630.

Colony and the Transvaal. It was also adopted by the Union of South Africa.[58] The formal style of South African administrative law is heavily influenced by the doctrines, traditions and conventions of English law. South Africa has inherited the belief, so fundamental to the Diceyan doctrine of the rule of law, that the administration ought to fall under the jurisdiction of the so-called 'ordinary courts', and that all inferior tribunals and public bodies are subject to the supervisory review jurisdiction of the High Court. The *ultra vires* rule was adopted at the Cape virtually at the same time as their Supreme Court was established. The rationale for judicial review was articulated in 1855 in *Central Road Board v Meintjies*.[59] Since those early days the South African High Court (previously known as the Supreme Court) has enjoyed 'inherent' jurisdiction to review administrative acts. English law has been the predominant influence on our administrative law and Roman-Dutch law has had a minimal influence.[60]

In *Ridge v Baldwin*[61] the House of Lords entered into a discussion on the rules of natural justice. It held that a chief constable who could be dismissed was entitled to notice of the charge and an opportunity to be heard before being dismissed. The importance of a right to notice was reaffirmed by the House of Lords in *R (on the application of Anufrijeva) v Secretary of State for the Home Department.*[62] Lord Steyn held that a notice of a decision to reject an asylum application was essential in order to enable the person affected to challenge it. According to Lord Steyn the rule of law required that a constitutional state should accord to individuals the right to know of a decision before their rights could be affected. To do otherwise, held Lord Steyn, was to have a state where the rights of individuals were overridden by hole in the corner decisions or knocks on the door in the early hours of the morning.[63] In *R v Secretary of State for the Home Department ex parte Doody*.[64] Lord Mustill stated that a prisoner given a life sentence for murder should be told the reasons behind the length of their imprisonment. Once such information was obtained he may be able to persuade the decision-maker to change his mind or challenge the decision in the courts.

The House of Lords' decision in *Anisminic Ltd v Foreign Compensation Commission*[65] prepared the ground for jurisdictional review based on error of law. Lord Reid's judgement broadened the potential scope of review. The seeds sown

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[58]For the historical context, see Baxter *Administrative law* (1984) 27.
[59]1855 2 Searle 165. See Hoexter *Administrative law in South Africa* (2012) 109.
[60]See Coertze 'Watter regsisteem beheers die verhouding tussen owerheid en onderdaan in die Unie, Romeins-Hollandse Reg of Engelse reg?' (1937) 1 *THRHR* 34; Wiechers *Administrative law* (1985) 33; Beinart 'The English legal contribution in South Africa: The interaction of civil and common law' (1981) *Acta Juridica* 7; 'Administrative law' (1948) 11 *THRHR* 204.
[61]1964 AC 40.
[62]2004 1 AC 604.
[63]*Id* para 28.
[64]1994 AC 531, 551.
[65]1969 2 AC 147; 1969 1 All ER 208 (HL).

in *Anisminic* came to fruition in *R v Hull University Visitor, ex parte Page*[66] where the House Lords held that *Anisminic* had rendered obsolete the distinction between errors of law on the *face* of the record and *other* errors of law and in so doing it had extended the doctrine of *ultra vires.* It was held that a misdirection in law in making a decision rendered a decision *ultra vires*.[67] Further that *any* error of law made by an administrative tribunal or inferior court in reaching its decision be quashed for error of law.[68]

The celebrated test for reasonableness set by Lord Greene MR in *Associated Picture Houses Ltd v Wednesbury Corp*[69] that a discretion could be invalidated if it had successfully negotiated the hurdles of propriety of purpose and relevancy *but* was so unreasonable that no reasonable body could have reached such a decision, was scrutinised by the House of Lords in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.*[70] Here Lord Cooke saw Lord Greene's formulation as exaggerated. He preferred a less extreme test in the form of simply asking if the decision was one which a reasonable authority could have reached? This formulation for the test for reasonableness was followed by O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[71] where she held that article 6(2)(*h*) of the Promotion of Administrative Justice Act 2000 should be understood to 'require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach'.[72]

In *R v Secretary of State for the Home Department, ex parte Daly*[73] Lord Cooke went further and described W*ednesbury* as an unfortunate retrogressive decision in English administrative law 'insofar that 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'.[74]

Council for the Civil Service Unions v Minister for the Civil Service[75] *(GCHQ* case) is an important House of Lords decision for two reasons. Firstly, a legitimate expectation was defined as arising either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.[76] Corbett CJ embraced the legitimate

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[66]1993 AC 682.
[67]*Id* 701.
[68]*Id* 702.
[69]1948 1 KB 223; 1947 2 All ER 680 (CA).
[70]1999 1 All ER 129.
[71]2004 4 SA 490 (CC).
[72]*Id* para 44.
[73]2001 3 All ER 433 (HL); 2001 2 AC 532.
[74]*Id* para 32. See Hoexter (n 59) 348. Wade and Forsyth *Administrative law* (2009) 314 see the *Wednesbury* doctrine as being in terminal decline.
[75]1984 3 All ER 935 (HL).
[76]*Id* 943.

expectation doctrine in *Administrator, Transvaal v Traub*[77] which captured the judicial imagination of South Africa. The doctrine of legitimate expectation developed considerably in South Africa pre-1994 and more so after the 1996 Constitution. The doctrine has become an important element in procedural fairness in South African law.[78] Noteworthy South African cases on legitimate expectation since 1994 are *Nortjé v Minister van Korrektiewe Dienste*;[79] *Bullock NO v Provincial Government, North West Province*[80] and *President of the RSA v South African Rugby Football Union*.[81]

The *GCHQ* case is also important for a second reason. Traditionally English courts had maintained that the courts could only control the existence and extent of prerogative power. In the *GCHQ* case the House of Lords held that the *manner of exercise* of a prerogative power could be open for judicial scrutiny. The significant message of the *GCHQ* case was that when the executive exercised prerogative power it would be subject to the same types of control as for statutory powers.

The distinction between reviewable (jurisdictional) and non-reviewable (non-jurisdictional) errors of law has traditionally caused heated debate. The House of Lords in *Anisminic*[82] suggested that any error of law could go to jurisdiction and thus be *ultra vires*.[83] In *Re Racal Communications Ltd*[84] the House of Lords held that the distinction between jurisdictional and non-jurisdictional errors had effectively been abolished. Lord Diplock concluded that legislation could still specifically give administrators the power to decide questions of law, but clear words were required to this effect. Corbett CJ in *Hira v Booysen*[85] referred to *Racal*[86] and *Anisminic*[87] and similarly held that the reviewability of an error of law depended essentially on whether the legislature intended a tribunal to have exclusive authority to decide the question of law concerned. This, he said, was a matter of construction of the statute conferring the power of decision.

The views of the House of Lords in *Anisminic*[88] on the requirements for procedural fairness were cited with approval by our appellate division in *Du Preez v Truth and Reconciliation Commission.*[89] The South African Constitutional Court

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[77]1989 4 SA 731 (A).
[78]It features in s 3 of the Promotion of Administration Act 3 of 2000. See Hoexter (n 59) 395, 424.
[79]2001 3 SA 472 (SCA).
[80]2004 5 SA 262 (SCA).
[81]2000 1 SA 1 (CC).
[82](N 65).
[83]See Hoexter (n 59) 286.
[84]1981 AC 374. See *O'Reilly v Mackman* 1983 2 AC 237, 238.
[85]1992 4 SA 69 (A) 93-94.
[86](N 84).
[87](N 65).
[88]*Id.*
[89]1997 3 SA 204 (A) 231-233.

in *First National Bank of SA t/o West Bank v Minister of Finance*[90] accepted the contextual[91] approach to judicial review set out by Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly*.[92] The same court in the *Bato Star*[93] case accepted Lord Cooke's view in *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd*[94] that the text for reasonableness entitling a court to interfere with an administrative decision is based on whether the decision is one which a reasonable decision-maker would not reach.

The adoption of proportionality as a ground for review in English administrative law advocated by Lord Diplock in *CCSU v Minister for the Civil Service;*[95] Lord Slynne in *R v (Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions;*[96] Lord Bridge and Lord Roskill in *R v Secretary of State for the Home Office, ex parte Brind*[97] and Lord Steyn in *R v Secretary of the State for the Home Department, ex parte Daly*[98] has as yet not been received with acclamation in English courts. The doctrine of proportionality, in a nutshell, requires a reviewing court to assess the balance which a decision-maker has struck, not merely whether the decision is rational and reasonable.[99] Proportionality would require a court to judge whether the administrative action taken was really needed as well as whether it was within the range of courses of action that could reasonably be followed.[100] In 1998 the United Kingdom adopted the Human Rights Act.[101] This Act gave effect in the United Kingdom to those rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights has frequently applied the doctrine of proportionality and it is expected that these decisions will

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[90] 2002 4 SA 768 (CC) para 18.
[91] In *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 4 SA 511 (SCA) para 19, Zulman JA described the *audi* principle as contextual and relative. The most eminent example of this contextual approach in South Africa is *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A). Section 3(2)(a) of Promotion of Administrative Justice Act recognises that a fair procedure depends on the circumstances of each case.
[92] (N 73).
[93] (N 71).
[94] (N 70).
[95] 1985 AC 374.
[96] 2003 2 AC 295, 320-1.
[97] (N 24).
[98] (N 73) para 32.
[99] For a seminal account of proportionality in English law see Jowell and Lester 'Proportionality: Neither novel nor dangerous' in Jowell and Olivier (eds) *New directions in judicial review* (1988) 51 and Rivers 'Proportionality and variable intensity of review' (2006) 65 *Cambridge LJ* 174, 181.
[100] Barrie 'Proportionality – expanding the bounds of reasonableness' in Carpenter (ed) *Suprema Lex: Essays on the Constitution presented to Marinus Wiechers* (1998) 23; Hoexter 'Standards of review for administrative action: Review for reasonableness' in Klaaren (ed) *A delicate balance: The place of the judiciary in a constitutional democracy* (2006) 61, 64.
[101] 1998 (c) 42 (Eng).

influence United Kingdom courts.[102] The European Court of Justice has also applied the doctrine of proportionality[103] and those decisions are also expected to influence United Kingdom courts to apply the doctrine. Such influences led to Lord Slynne in *R (Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions,*[104] with reference to the principle of proportionality, to state that even without reference to the 1998 Human Rights Act, the time is ripe to recognise the principle in English administrative law and in domestic law in general. The House of Lords' decisions on the doctrine of proportionality will have great persuasive value in our own courts where reasonableness is an issue. Proportionality has been applied by the South African Constitutional Court in *S v Makwanyane;*[105] *Soobramoney v Minister of Health;*[106] *S v Bhulwan;*[107] *S v Mbatha;*[108] *National Coalition for Gay* and *Lesbian Equality v Minister of Home Affairs;*[109] *S v Manamela*[110] and *Prince v President of the Cape Law Society*.[111] O'Regan J's approach in the *Bato Star* case,[112] by referring to the nature of the administrative decision, the factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decisions on the lives of those affected, is another example of the application of the doctrine of proportionality.[113]

It has been suggested that with the passage of time *Wednesbury*[114] review is likely to be totally eclipsed by the principle of proportionality and relegated to becoming a relic of the past.[115]

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[102]Fedman 'Proportionality and the Human Rights Act 1998' in Ellis (ed) *The principle of proportionality in Europe* (1999) 117; Clayton 'Regarding a sense of proportion: The Human Rights Act and the proportionality principle' (2001) *Eur Hum Rts LR* 504.
[103]*Handyside v United Kingdom* 1 EHRHR 737 (1979) para 47.
[104](N 96) 320.
[105]1995 6 BCLR 665 (C).
[106]1998 1 SA 765 (CC).
[107]1996 1 SA 388 (CC).
[108]1996 2 A 464 (CC).
[109]2000 2 SA 1 (CC).
[110]2003 3 SA 1 (CC).
[111]2002 2 SA 794 (CC).
[112](N 71) para 45.
[113]See Hoexter (n 59) 343; Burns and Beukes *Administrative law under the 1996 Constitution* (2006) 411; De Ville 'Proportionality as a requirement of the legality in administrative law in terms of the new Constitution' (1994) 9 *SAPR/PL* 360 and Plasket *The fundamental right of just administrative action: Judicial review of administrative action in the democratic South Africa* PhD thesis Rhodes University (Grahamstown) (2002).
[114](N 69).
[115]Felix 'Engaging unreasonableness and proportionality as standards of review in England, India and Sri Lanka' (2006) *Acta Juridica* 95.

5 Conclusion

The initial and ongoing influence of English law, and more so the well-reasoned and clearly set out judgments of the House of Lords, can be expected to continue in South Africa in the fields of international, constitutional and administrative law. This influence so far, as has been illustrated above, runs deep and has been continuous. In these three fields of law, judicial amenability and congeniality[116] have seen to it that English influences in these three branches of law have not lost their persuasive and informative value or their applicability in South African law.[117]

Hopefully the immoderate arguments of the 1950s and 1960s to the effect that any doctrine or principle of English origin was relentlessly tracked down and rejected as being foreign to our legal system[118] has abated. Whether or not the English influence was in keeping with modern notions and worked well was regarded as being immaterial. It is hoped that 'judicial amenability and congeniality'[119] towards future decisions of the United Kingdom's Supreme Court will continue to prevail. Especially in the field of administrative, constitutional and international law, 'unselfconscious comparativism'[120] in fields of law having similar roots can only be healthy. As said by De Villiers CJ in *Henderson v Hanekom,*[121] however anxious the court may be to maintain the Roman-Dutch law in all its integrity, there must be a progressive development of the law keeping pace with modern developments. The law is a virile living system seeking to adapt itself consistently with its inherent basic principles and must deal effectively with the increasing complexities of modern organised society.[122]

Clearly the degree of English influence on our law is by no means the same in all branches of our law. There are few branches of our law which have remained entirely uninfluenced by English law. Regarding administrative, constitutional and international law, however English principles have been 'received' quite extensively – as illustrated above. It has become quite common

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[116]See Cameron (n 6) 50.
[117]Chaskalson (n 6) 363.
[118]Pont's review of McKerron's *Law of delict* (1939) (2ed) in (1940) 4 *THRHR* 163, 173; Pont 'Vergoeding van skade op grond van "Loss of expectation of life"' (1942) 6 *THRHR* 5, 11; Proculus '*Bellum juridicum* – two approaches to South African law' (1951) 68 *SALJ* 306; Hathorn '*Bellum juridicum* (2)' (1952) 69 *SALJ* 23; Mulligan '"*Bellum juridicum* (3)": Purists, pollutions and pragmatists' (1952) 69 *SALJ* 25; Proculus Redevivus 'South African law at the crossroads – or what is our common law?' (1965) 82 *SALJ* 17; Boberg 'Oak tree or acorn – conflicting approaches to our law of delict' (1966) 83 *SALJ* 150; Van der Merwe's review of McKerron *Law of delict* (1965) (6ed) in (1965) 28 *THRHR* 160; Stuart's review of Van der Merwe and Olivier *Die onregmatige daad* (1966) in (1967) 84 *SALJ* 362; Van Blerk 'The irony of labels' (1982) 99 *SALJ* 365; Dyzenhaus 'LC Steyn in perspective' (1982) 99 *SALJ* 380.
[119]Cameron (n 6) 50.
[120]Boberg *The law of delict* vol 1 (1989) 29.
[121]1903 20 SC 513, 519.
[122]*Pearl Assurance Co v Union Government* 1934 AD 560, 563.

for our courts to seek guidance in similar branches of English law. In these branches of law, English law is not an 'alien' system but can be seen to be a tributary of our own legal stream or *vice versa*.[123]

Our administrative, international and constitutional law, on account of their flexibility, inherent sense of equity and capacity for meeting the needs of modern society, have from the beginning drawn upon the wealth of English jurisprudence.[124]

[123]Proculus Redevivus (n 118) 20.
[124]Boberg (n 118) 150.