Moreover, were the grounds of judicial review to come from the common law without any legislative imprimatur, then the court hearing a review under section 288 of the 1990 Act (being limited to review on the ground that the decision is "not within the powers of this Act") would not have "full jurisdiction". So the curative principle requires—in planning matters at least—the adoption of the modified ultra vires doctrine (see Forsyth (ed.), *Judicial Review and the Constitution* (2000), pp. 406–407).

The curative principle, however, has limits as shown by *Kingsley* v. *The United Kingdom (Application No. 35605/97)* [2001] *The Times*, 9 January. Here the Gaming Board had found that the applicant was not a fit and proper person to hold a gaming licence. The applicant contended that, in the particular circumstances, there was a real danger of bias. But the judicial review court said that even if there was such a danger only the Gaming Board could make the decision and so the rule against bias gave way to necessity; and the Court of Appeal refused leave on similar grounds. (See Wade and Forsyth, *op. cit.*, pp. 452–453 on necessity.) The Human Rights Court held that the judicial review court lacked "full jurisdiction" and the curative principle did not operate. Time has thus been called on the principle of necessity and the impact on the law of bias will be considerable.

CHRISTOPHER FORSYTH

"RAPE SHIELDS" AND THE RIGHT TO A FAIR TRIAL

IN *R.* v. *A (No. 2)* [2001] 2 W.L.R. 1546 the House of Lords knocked a dent in the controversial "rape shield" provision, section 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA). They did so wielding Article 6 of the European Convention on Human Rights, given direct effect by another piece of "flagship" legislation, the Human Rights Act 1998. The decision is important for constitutional law as well as for criminal evidence.

In a rape case where the defendant claimed that the complainant had consented, at one time she could always expect to have her sex-life publicly examined in some detail. In an attempt to limit the abuses to which this was put, section 2 of the Sexual Offences (Amendment) Act 1976 forbade questions or evidence about this except where the judge gave leave. But feminists complained that judges gave leave too readily, and in response to this, the government promoted section 41 of the YJCEA. This, like the 1976 provision, imposes a requirement of judicial leave—but

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sets out in exhaustive detail the circumstances in which it may be given.

Even as amended on its way through Parliament this provision was highly controversial, and it has attracted heavy criticism. It is said to be too narrow, because whilst banning evidence (or questions) about the complainant's sex-life when used to suggest that the complainant actually consented, it allows them without restriction to suggest that the defendant, having heard about her reputation, mistakenly believed she did. And it is said to be too wide, because in banning the use of such evidence to suggest that the complainant did consent, it sometimes prevents the court from hearing information that is highly relevant.

Section 41 allows evidence (or questions) about the complainant's sex-life in support of a defence of consent in three situations only. One is where the prosecution made the running by leading evidence about her sex-life, and the defence wishes to rebut or qualify it (s. 41(5)). Another is where the sexual behaviour to which the evidence relates consists of events that allegedly occurred "at or about the same time as the event which is the subject matter of the charge against the accused" (s. 41(3)(*b*)). And the third is where the evidence is about incidents which are so similar to the defendant's account of the alleged rape "that the similarity cannot reasonably be explained as a coincidence" (s. 41(3)(*c*)).

Unlike the 1976 provision, the ban in section 41 even extends to evidence about the complainant's previous sexual behaviour with the defendant. Thus it apparently prevents the defendant from adducing evidence that, at the time of the alleged rape, they had an on-going relationship which included regular consensual sex—unless the last occasion was "at or about the same time" as the alleged rape. As even the most committed feminists presumably accept that a person more readily consents to sex with her regular sexual partner than with others, it seems quite extraordinary that the defendant should not be allowed to show he was one. And yet this seems to be what was actually intended.

The scenario described in the previous paragraph was part of the defence version of events in *R.* v. *A.* Before trial, the judge made a preliminary ruling that the defendant could not lead evidence of any previous sexual relationship between them because of section 41. The Court of Appeal held that he could—but only for the purpose of showing that he *believed* that she consented, and not to show that she actually did. In the House of Lords, the defence argued that to exclude this evidence contravened his right to a "fair trial" as protected by Article 6 of the European Convention on Human Rights. The defence invited the House to

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use section 3 of the Human Rights Act—which requires the courts to construe statutes in the light of the Convention—to find a way of reading section 41 to allow the evidence in, or failing this, to make a "declaration of incompatibility" under section 4.

To cut a long story—55 pages of erudite and closely-reasoned argument—very short, Lords Slynn, Steyn, Clyde and Hutton all agreed that section 41, if read according to the previously-accepted principles of construction, would exclude evidence of the sort the defendant wished to admit. They also agreed that in some cases, such evidence would be highly relevant to consent, and that if section 41 then rendered it inadmissible this would indeed contravene his right to a "fair trial". But in such a situation, they said that section 3 of the Human Rights Act now required the courts to abandon traditional principles of construction, and (in effect) to do whatever violence was necessary to the language so that the evidence, if truly relevant, was admissible. On that basis, evidence of the complainant's previous sexual relationship with the defendant could be squeezed within the apparently inelastic wording of section 41(3)(*c*): behaviour so similar "that the similarity cannot reasonably be explained as coincidence". So there was no need for a declaration of incompatibility. On this basis, they sent the case back to the Crown Court for the judge to reconsider his ruling. (With some of this Lord Hope was most uneasy. Commenting that section 3 "does not entitle the judges to act as legislators", he found it "very difficult" to accept that the courts could read into section 41 a qualification that it could never shut out evidence required to ensure a fair trial under Article 6 of the Convention.)

Much could be said about this case, and the problems with which it grapples. But here there is room for two short comments only.

The first is wonderment at the change that section 3 of the Human Rights Act wrought. Four of the five Law Lords were clear that it gives the courts power to bend an Act to fit the requirements of the Convention, even where the Act is not ambiguous. We may be on the threshold of exciting times!

The second is satisfaction that their Lordships felt able to interpret section 41 in the way they did. For Parliament to pass a law prohibiting a defendant from producing cogent evidence that tends to show his innocence is nothing short of monstrous.

It is monstrous too, of course, that complainants in sex-cases have their sex-lives publicly dissected. But what is wrong here, surely, is not that their sex-lives are examined, but that this happens publicly. The problem should be tackled not by restricting

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the questions, but by limiting the audience. Complainants should routinely give their evidence with the public and the press excluded: something the "fair trial" requirement in Article 6 undoubtedly permits. And what is also wrong, surely, is that the complainant can be asked if she regularly consents to sex without the defendant having to admit—if such be so—that he has previously forced others to have sex with him without it. In this respect, if in no other, we need to change the rules about evidence of previous misconduct.

J.R. SPENCER

HUMAN RIGHTS REVIEW: RAISING THE STANDARD

THE decision of the House of Lords in *R. (Daly)* v. *Secretary of State for the Home Department* [2001] 2 W.L.R. 1622 provides authoritative guidance as to how human rights issues should be treated in judicial review cases. In common with a number of other recent leading cases in this area, *Daly* concerns prisoners' rights. All governors of closed prisons were required by the Home Secretary to operate a cell searching policy under which prisoners were not permitted to remain in their cells during searches, so as to prevent intimidation of those conducting searches and to stop prisoners gaining knowledge of search techniques. Prison officers were permitted to examine, but not read, legal correspondence stored in cells. The claimant, who stored such correspondence in his cell, successfully contended that the policy was unlawful to the extent that it precluded prisoners' presence during examination of legal correspondence. This note highlights four points of general importance which arise from their Lordships' decision.

First, *Daly* was explicitly decided by reference to the principle of proportionality, as the three-stage methodology embraced by Lord Bingham clearly demonstrates. His Lordship began by determining that the policy infringed the claimant's right to legal professional privilege. However, he then observed that the policy was prima facie justified by the competing public interest in prison security, since legal correspondence may constitute a hiding place for illicit material. Finally, rather than asking whether the policy was reasonable in the *Wednesbury* sense, his Lordship found it "necessary to ask whether ... the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline". It was at this third stage that the policy foundered: although it was possible to justify the

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