Assess the proposition that the majority judgments in *Liversidge v Anderson* were wholly subversive of the principles both of the rule of law and the sovereignty of Parliament as Dicey would have understood them

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The 'orthodox' conception of Parliamentary sovereignty, as set out by AV Dicey, consisted of two propositions: that Parliament has the right to make or unmake any law, and that no other individual or body has the power to overrule any law made by Parliament. He likewise conceived of the rule of law as composed of several propositions: that punishment be only due for breaches of law established by the courts, and that everybody (including the government) is subject to the same laws.[1]

The case *Liversidge v Anderson*[2] concerned a plaintiff, using the alias of Liversidge, who accused the Home Secretary, a Mr Anderson, of wrongful imprisonment. The plaintiff had been detained under Defence Regulation 18, which stated that "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations … and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained"; no reason was specified in the order made for Mr Liversidge's arrest, and as such one was applied for to the High Court. None was provided, and on appeal the House of Lords held that, although the regulation referred to 'reasonable cause to believe',

[1] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885).
[2] [1942] AC 206, [1941] 3 All ER 338.

it was not to be interpreted objectively, but rather that the Home Secretary had absolute discretion in deciding whether there was reasonable cause.

The conflicts with the Diceyan conception can be summarized briefly. Firstly, in terms of Parliamentary sovereignty, it would appear that the courts are being granted the power to redefine statute; where Parliament required the Home Secretary to have 'reasonable cause to believe', the courts in effect refused to enforce this requirement. In fact, this phrase had been absent from the initial draft of the regulation, and then explicitly introduced (although Parliamentary privilege would have prevented the drafting history of the regulation from being introduced as evidence).

Secondly, and relatedly, this appears to undermine the rule of law by failing to apply the same laws to Government ministers as to everyone else; this is particularly evident in the majority judgments in the House of Lords, where the decision was justified by reference to wartime necessity. There is also a broader concern regarding the predictability of the legal system: that an individual should be able to know the law, to have a reasonable understanding of how it might be interpreted, and to know the nature of the charges against himself or herself; all of these could be said to have been absent in *Liversidge*, and more generally in any situation where the courts interpret a statute so broadly.

This is the position taken by Allen in the Law Quarterly Review;[3] in a highly critical article, he expands upon Lord Atkin's minority opinion, arguing that the term 'reasonable cause' had an established meaning (i.e., that it implied an objective test). For Allen, the decision in *Liversidge* not only departs from established principles of statutory interpretation, but reflects a novel (and unjustified, to judge from his use of sarcasm) deference to the authority of the Secretary of State.

The majority judgments were based on a principle of purposive interpretation: according to Viscount Maugham, 'we should prefer a construction which will carry into effect the plain intention of those responsible … rather than one which will defeat that intention'. This principle was echoed by Denning LJ some years later, in *Magor and St Mellons RDC v Newport Corporation*,[4] when he argued 'We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it [but] to find out the intention of Parliament and of Ministers and carry it out …'. (Ironically, the House of Lords now called this line of reasoning 'a

[3]Carlton Kemp Allen, 'Regulation 18B and Reasonable Cause' [1942] *LQR* 232.

[4][1952] AC 189, [1951] 2 All ER 839.

naked usurpation of the legislative function'.)

However, questions of 'the intent of Parliament' are inherently fraught: while it may have been clear in *Liversidge* that Parliament intended to permit the Home Secretary to issue orders for detention on certain grounds relating to security, was it also clear that Parliament intended that such an order required only subjective justification, rather than objective? Lord Atkin thought not; in his opinion, the decision of the majority amounted to a granting of complete discretion to the Home Secretary, requiring nothing more than good faith which, he thought, could not be disproved. Moreover, he provided extensive examples of the usage of the term 'reasonable cause', arguing that it was settled law that this referred to an objective test, and described the idea of a subjective test as 'fantastic'.

Indeed, it can well be argued that the intent of Parliament, as a body of individuals with many varying opinions on any given matter, can only be determined by reference to what they have agreed to in the text of a statute; this is an argument in favour of progressively stricter forms of statutory interpretation. While it may not be necessary to restrict interpretation to a literal one, since interpreting the statement entirely absent of any context may be impossible if not nonsensical, it does require strict reference only to documented sources of Parliamentary intent: other parts of the statute, similar statutes, and Hansard, for example. The House of Lords' criticism of Denning's judgment in *Magor* included the implication that his attempt to 'fill the gaps' had been based in guesswork, rather than any principled determination of what Parliament really had intended. Indeed, arguments have been made for the inclusion of a 'statement of purpose' in the preface to an Act of Parliament, in order to provide a guideline for interpretation.

Conversely, Goodhart, writing in support of the majority judgment,[5] suggests that in reality every decision can only be subjective, being based on fallible individual judgment; Allen is disparaging of this line of reasoning, pointing out that 'he would not find it easy to persuade any Court that there is no difference between having a broken ankle and thinking that one has a broken ankle'. Indeed, a significant part of Goodhart's article seems more political than jurisprudential; he expresses concern that Atkin's dissent 'seems to assume that executive officers have little respect for the law unless there is an appeal to the Courts against their acts'. He, like Denning some years later, places faith in the Secretary of State to do only what is permitted by law. Like the majority of the House of Lords, Goodhart departs from Dicey in his willingness to permit punishment without establishing

[5] A. L. Goodhart, 'Liversidge v Anderson' [1942] *LQR* 3.

a breach of law before a court, on the apparent grounds that the Secretary of State can be trusted not to depart from the regulation.

However, the Diceyan perspective does not tell the whole story, and it is important to note the limits to this interpretation. In particular, Dicey's conception of Parliamentary sovereignty is descriptive, not normative: it is an explanation of how Parliament had appeared to work up until that time, rather than defining how Parliament would continue to work. This has been shown most clearly by developments over the past several decades relating to the interaction between domestic and European law, especially following *Factortame*. Furthermore, Dicey's theory of the rule of law was influenced by the dominant ideologies of his time, an individualist liberalism that would not admit of the possibility of a system of public law distinct from the ordinary private law. This too has been departed from over the course of the 20th century, with the development of a more robust system of judicial review.

Nor was *Liversidge* unique in its deference to executive authority; numerous instances can be found both since that time. While, of course, the Government has never been entirely unconstrained by judicial oversight (the Pergau Dam case[6] being a noteworthy example), there have been others where the courts have been unwilling to restrict ministerial discretion, especially when the question of national security is raised. For example, in *ex parte Adams*,[7] the court found that, while the Home Secretary's decision under the Prevention of Terrorism (Temporary Provisions) Act 1989 was in principle judicially reviewable, he was not under any duty to reveal the reasons for the decision, since to do so might require the disclosure of sensitive information; thus, the court could not determine whether the decision was illegal or unreasonable. Suggestions that the decision was in fact politically motivated (the plaintiff was a Northern Irish politician and former MP, invited to Parliament by an Opposition MP against the wishes of the Government and its allies) were therefore to no avail.[8] A similar situation had arisen earlier in *ex parte Hosenball*,[9] in which an American journalist was deported for national security reasons, which the Home Secretary refused (on request) to explain further; the Court of Appeal upheld the decision, with Denning MR asserting that rules of natural justice did not apply

[6] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1994] EWHC 1 (Admin), [1995] WLR 386.

[7] *R v Secretary of State for the Home Department, ex parte Adams* [1995] All ER (EC) 177.

[8] JAG Griffith, *The Politics of the Judiciary* (5th edition, Fontana Press, 1997) 198.

[9] *R v Secretary of State for the Home Department, ex parte Hosenball* [1977] 3 All ER 452, [1977] 1 WLR 766.

in cases involving national security, but that in England, anyway, "[ministers] have never interfered with the liberty or the freedom of movement of any individual except where it is absolutely necessary for the safety of the state."

In summary, the decision in *Liversidge* is difficult to reconcile with a Diceyan understanding both of the rule of law and of Parliamentary sovereignty; but it is not so unique or divergent that we can safely assume that the decision itself is wrong; instead, we must also consider the possibility that Dicey was, at least in part, wrong, and that if the judgment is to be criticized it may need to be on other grounds than a strict adherence to 19th century jurisprudence.

List of Cases

- *Liversidge v Anderson* [1942] AC 206, [1941] 3 All ER 338
- *Magor and St Mellons RDC v Newport Corporation* [1952] AC 189, [1951] 2 All ER 839
- *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1994] EWHC 1 (Admin), [1995] WLR 386
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- *R v Secretary of State for the Home Department, ex parte Hosenball* [1977] 3 All ER 452, [1977] 1 WLR 766

Bibliography

- Allen CK, 'Regulation 18B and Reasonable Cause' [1942] *LQR* 232
- Dicey AV, *Introduction to the Study of the Law of the Constitution* (1885)
- Goodhart AL, 'Liversidge v Anderson' [1942] *LQR* 3
- Griffith JAG, *The Politics of the Judiciary* (5th edition, Fontana Press, 1997) 198