The Significance of the Doctrine of Proportionality in protecting the Freedom of Expression: A Case Study of UK Judicial System

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Abstract

The doctrine of proportionality is a valuable tool in the protection of the "fundamental rights" of the individual. The European Union laws have recognized this doctrine and many European states have included it in their legal systems. The application of this principle has been supported by the presence of the EU and the ECHR: therefore, the application of proportionality into UK legislation has been extended by the "European Convention of Human Rights" and EU intervention. However, the UK's judicial system has not yet recognized the doctrine of proportionality as a general norm of the judicial review and limited this doctrine to cases related to the ECHR only. The critical analyses in the said article will focus to understand the importance of the doctrine of proportionality as compared to its competitor the principle of unreasonable. This article focused on the question on the doctrine of proportionality and its importance in the protection of freedom of expression in the UK, and the future of unreasonableness when equated with the doctrine of proportionality.

Key Words*: Doctrine of Proportionality, Unreasonableness, Freedom of Expression.*

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Introduction

The doctrines of proportionality and unreasonableness both claim to provide a suitable title toward the judicial evaluation of irrationality in "Administrative Law". The Wednesbury assessment is derived from the case between the Care of "Associated Provincial Picture Houses Ltd v. Wednesbury Corp". The coined phrase "Wednesbury unreasonableness" is implemented to refer to the third limb of being so irrational that it cannot be taken into consideration by any reasonable power. The Wednesbury notion is an implement for challenging administrative action. To make sense of this concept, the Wednesbury standard is interpreted considering the basis for judicial appraisal of administrative endeavour. In correlation, there is already an existing ultra vires standard. The ultra vires principle indicates an action that is greater than the authority of the legal organisations, with the implementation of this standard having significance in continuation of parliamentary independence and the decree of law.

Decisions in England allowed for significant changes to the principles of Wednesbury unreasonableness. In this scenario, the GCHQ is a landmark case which has given recognition to the doctrine of proportionality as a tool of judicial review. In this case, the court has widened the grounds for judicial review by introducing 'illegality', 'irrationality' and 'procedural impropriety' for administrative action to the judicial review process. I must say that the principles of proportionality in this case anticipated that a public authority should remain proportionate in relation to his goals and the means by which he aims to achieve these goals so that public interest is preserved. The concept of proportionality therefore dictates that for any decision made by the Court, the advantages and disadvantages of any administrative feat need to be assessed. That is except if the questioned action is in the interest of the public domain, for which it cannot be supported. In my view, the main theme of this concept is the inspection of the administrative action to elucidate whether there is proportionality relating to the authority given and the purpose for which the authority was

granted. Therefore, any powers issued by the administrative authority while employing flexible authority are required to balance the decision in proportion to the body of the control provided.[1]

Prof Jowell divides proportionality into a four-step procedure, which attempts to answer the following questions:

1. Did the action follow an appropriate end goal?
2. Was the process undertaken appropriate to achieving this objective?
3. Were there other less constrained means of accomplishing the aim?
4. Is the derogation suitable generally when considering the welfare of a democratic society?

In elaborating these four-step approaches, it is essential to state that prima facie defilement of any democratic rights is hard to achieve while still providing a scheme for effective scrutiny of any decisions summoned into query. When legislative and administrative measures are against private interests, individual rights and fundamental freedoms (among other areas), the ECJ applies the proportionality principle in order to balance these measures; however, this will not be further discussed here. As a result, it can be shown that there are numerous ways to interpret the proportionality principle. Due to its ability to adopt different balancing schemes (its relativistic nature), it can also be said that this is the reason why the proportionality principle is adopted by many international and national courts.[2]

The doctrine of proportionality and reasonableness: an analytical approach

The doctrinal debate about proportionality, and about whether and how it fits within the English model of judicial review, is expressed – not only by academic commentators but also by the judiciary in the course of decision-making and elsewhere – in terms of the constitutional framework of the state and the role of the judiciary within this. This section denotes that if the law is unconstitutional due to its restrictions of human rights, it is disproportional. This impinges on all sub-legal actions governed by the statute restricting the

constitutional right, which is unlawful, due to lack of adequate approval. If there is approval over constitutional decrees due to proportionality, this should extend to sub-statutory actions, which are also required to be proportional. Hence, whichever the case, proportionality as a concept governs both statutory legitimacy and the constitutional legitimacy of sub-statutory actions.

However, first I prefer to explain and define the principle of Reasonableness, which it is essential to divide into two parts.

1. When is an action reasonable?
2. Reasonableness as a balance between conflicting principles.

When is an Action Reasonable?

There is no collective agreement on the absolute definition of reasonableness.[3] By prior practice and knowledge, reasonableness was decided on a case-by-case basis.[4] The Wednesbury[5] test was created by the UK to produce guidance on the margins separating reasonableness within administrative law. Courts were hesitant to impose unless the unreasonableness was excessive: hence, "so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it".[6] On the question of when "simple" unreasonableness turns into "extreme" unreasonableness, no one has the answer.

The principle of unreasonableness under criticism

Analysing the Wednesbury principle, it is concluded that there are two main objections relating to its content. First, unreasonableness may be redundant, as it does not add anything to existing techniques. For instance, there seems to be an overlap between unreasonableness on the one hand and arbitrariness on the other. Public law does not consider unreasonableness as a separate head of review, but treats it as a distinct head of review from dishonesty/bad faith, which focuses on the decision-maker's motives. The link between unreasonableness and dishonesty is not inevitable, and the non-overlapping areas are significant enough to warrant treating the

two as distinct heads of review.[7] The same holds true in private law.[8] After all, "someone may act irrationally while being honest".[9] Braganza v BP Shipping Ltd[10] showed that a decision might be found to be irrational although it was arrived at honestly. Similarly, in Clark v Nomura, the court did not find that the employer had acted dishonestly when it failed to award a bonus to the defendant, but found that it had acted irrationally. These cases show that there is no necessary link between irrationality and dishonesty, and that their overlap is not so substantial as to render the distinction between them insignificant. The second criticism against Wednesbury review is that its content is vague, and thus it may be deployed opportunistically and hence cause uncertainty and disruption to viable dealings.[11] Although ambiguity has been raised as an objection to Wednesbury review in public law as well, the discourse there suggests that vagueness can be alleviated by distilling Wednesbury's "inherent logic and structure".[12] Administrative law scholars have analysed how the principle has been applied by the courts in the case law in order to discern the "indicia of unreasonableness".[13]

The "doctrine of proportionality" a tool of Judicial Review in United Kingdom

It is vital to mention here that the doctrine of proportionality is struggling to establish its place in the UK's legal system. Though this doctrine came into the UK legal system some time prior to the HRA, it was not functional as it was after the promulgation of HRA. The Judiciary has given the responsibilities to review the decisions of legislation and executive, the elected branches of government, to guarantee that they act within their constitutional limits. The first ever formulation of proportionality was applied in the UK system upon the case of Daly,[14] In this case, the court approved the approach to proportionality, and the limitations imposed on the rights were also accepted by applying the following statements:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it;

and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. [15]

Regarding R vs A,[16] "public law is not, at its base, about rights, even though abuses of power may and often do invade private rights; it is about wrongs: that is to say misuses of public power".[17] In the UK, the doctrine of proportionality has been taken as an interpretive instrument and its application is subject to the nature of the case. However, most judges agree that the doctrine of proportionality can be construed in four different stages to measure its legitimacy; however, no established precedent has yet been defined. Prof. Jeffery Jowell has considered this doctrine in "*Beyond the Rule of Law: Towards Constitutional Judicial Review*"[18] – a useful tool of judicial review. After looking in to the principle of this doctrine, it can be defined in four stages, which are mentioned below:

(i) Sufficient importance of objective measure. (Legitimate objective).
(ii) Rational connectivity to measure the objective. (Rational connection).
(iii) Did the measure follow minimal impairment by not going further than required? (Minimal Impairment).
(iv) Was fair balance achieved between the interest of the community and the rights of the individual? (Overall balance). [19]

In my analyses, this system ensures that the right kind of scrutiny of the decision should be made by avoiding harming the fundamental rights. These questions established the proportionality test by the "House of Lords", and the court acknowledged that "the intensity of review is somewhat greater under the proportionality approach".[20] However, the fourth question, which talks about *balance*, was later applied for the first time in a case known as "Samaroo v Secretary of State for the House of Department".[21] This case established the four principles of the doctrine and the House of Lords specified that all four questions must be satisfied for proportionality. This doctrine demands a more active part from the court, rather than only looking into the rationality of the decision, they should

assess the balance achieved by the chief decision-makerIn addition, it allows methodology that is more organized. Hence, I would argue that proportionality is a extremely organised and refined method.[22] The doctrine of proportionality functions differently comparative to Wednesbury, as in proportionality, the burden of proof is on both the parties to establish their cases. However, in *Wednesbury*, it is only the claimant who must first establish his part of the case and then prove that the actions of the authorities are unreasonable and irrational.[23] The "European Court of Human Rights" also judged this approach of unreasonableness with doubts. In a clear statement, the court once said that the standard of review before the domestic courts was:

Placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued….[24]

Coming back to Smith's case, this case reveals that the doctrine of irrationality actually does not have enough potential to protect the rights of the applicant to that extent, where proportionality is easily reached. In this case, it can be alleged that the authority had no substantial and profound[25] justification to constitute the policy. The government provided no proof to show that the presence of homosexuals in the military undermined its adequacy. In the decision of Smith and Grady, it is clear to see that regarding Convention rights, irrationality was not a strong enough standard of review.

"In a horizontal test, the existence of LRM is not decisive in itself, but it might be taken into account as a relevant factor. A vertical proportionality test, on the other hand, is a step-by-step test that consists of a number of independent sub-tests. A failure to satisfy any of these sub-tests is both sufficient and necessary to establish the dis-proportionality of a right restricting measure".[26]

I concur with Alexy's argument that an "understanding of rights and the public interest, which is based on principles, requires a mechanism for resolving conflicts when those

principles come into competition with each other".[27] This means that there is a central idea regarding the doctrine of proportionality that there must be a balance between the interest of the society and the right of the individual. It is pertinent to mention here that the German legal system works with Alexy's idea of legitimate objectives and suitability, and this concept is also found in some cases here in UK.

It is indispensable to mention here that the doctrine of proportionality test also addresses the theory of threshold criteria, according to which legitimate aim and rational connection are the essentials to be determined, which can be done in the second and the third stage of the proportionality test. Furthermore, an "illegitimate aim"[28] will not be enough to deduce a "public interest principle", and thus, in the first place, a lack of proportion in the task will be seen. At the time of applying this principle, the legitimate aim stage is the most important phase to find out the precise principles between the two rights. In this stage, the court that is adjudicating the case needs to examine the normative force of the public interest goal while pursuing the decision-maker's intention. It means that actually, the proportionality test encompasses the balance between the two principles against one another; this can be established in the case of B vs. Secretary of State for the Home Department.[29] In the said case, the court showed a serious concern when the Home Secretary deported an Italian national who had been involved and convicted for having multiple criminal records. In doing so, my objective is to analyse how the court applied this doctrine on these cases, which limited the freedom of expression of an individual. Moreover, this effort will also clarify the different characteristics of the doctrine of proportionality, when applied on the cases.

The Application of the Doctrine of Proportionality and Laws LJ's Assertion of Incompatibility in *Miranda's* Case

In the concluding section of the judgment, Laws LJ took into consideration the issue of whether the stop control (if used in relation to the journalistic information or material) failed to be "recommended by law" as mentioned in Article 10 (2). What

I have conceived from this, contended five standards which could be taken from the Strasbourg statute on this point.[30] To begin with, the assurance of journalistic sources must be checked with a lawful procedure proportionate to the protection and the significance of the Article 10 in question. Secondly, there must be a guarantee of a proportionate review by a judge or any other independent lawful authority. Furthermore, there must be impartial and proportionate judgement of the material handed over by a journalist. The third standard is the legitimate position of the body, which should be impartial and independent in practice, to judge and measure the potential danger and relevant interest prior to disclosure. This means that whatever the decision is, it should be according to a rule of law. The fourth standard relates to the exercise of an independent review, which should be capable enough to make a decision on reviewing the material handed over by the journalist and should not infringe upon the freedom of expression mentioned in Article 10 of the European Convention of Human Rights. Lastly, in high profile cases such as this, where sometimes it is very hard for an authority to give detailed grounds, it is essential to establish whether any issue of privacy arises, and if so, whether the public interest invoked by the investigating authorities outweighs the general public interest in source protection.[31]

Doctrine of Proportionality and Miranda's case analyses

After analysing the Miranda case of Appeal,[32] the exceeding verdict of the UK's Court of Appeal can be summarized on five major bases, in which the Court of Appeal has ousted the decision of the High Court.

(i) The court erred in determining the reason of the investigating officers who directed the stop by using the information and judgements provided to them by other parties, mainly security services.

(ii) The court erred in assessing the main task for which Schedule 7 power was actually utilized.

(iii) The court embraced a defective approach of the review of proportionality by being unable to

determine whether there was a genuine threat to public protection that justified the use of Schedule 7 power to take away journalistic material.

(iv) "The court erred in its assessment of proportionality in concluding that the use of TA2000 would not have been possible or practical";[33] and

(v) "The Schedule 7 power was not compatible with Article 10 of the Convention because it is not "prescribed by law" as required by Article 10 (2)".[34]

The court reversed the High Court's previous decision. Thus, it clarified that journalists have the right of protection under the European Convention on Human Rights. Hence, restraining and searching them for the sake of counterterrorism laws should be restricted. After the court gave verdicts on this case, the Home Office of the UK made a press release stating that the Home Office has changed the mode of practice for inspecting officers to train them not to inspect journalistic material at all. This goes well beyond the court's suggestions for this situation, so maybe legislative change will not be required after all.[35] In my assertion, the idea to represent a reporter as an accidental terrorist has been rightly dismissed, as the seizure of journalistic material is secured by lawful protections[36] and it is proved that the UK's terrorism law breaches the *freedom of press* and surely journalism is not terrorism.[37] The Court of Appeal used the doctrine of proportionality, and by applying the forth pillar of the doctrine "fair balance", came to the conclusion that Schedule 7 of the Terrorism Act 2000 was not compatible with the European Convention on Human Rights Article 10 (2) to provide adequate protection from police officers' power to stop and search, and hence violated the freedom of the expression of the appellant. According to the principle of proportionality, an understandable connection between the aim and the method that is used to achieve the aim needs to be present. The principle of proportionality is applied by the UK court when reviewing action or legislation for compatibility with the European Convention on Human Rights or European Union law. The courts have the power to cancel penalties ordered by administrative bodies and lower courts that

are disproportionate when compared to the related misconduct.[38]

Conclusions

This article demonstrated that the doctrine of proportionality has struggled to come into prominence, as the domestic courts always refused to use proportionality as a free-standing ground of Judicial Review,[39] but it received its most significant recognition in English administrative law, when Lord Diplock in GCHQ upheld the potential importance of proportionality when used in one of the human rights violation case. He argued that "for the judges to use proportionality as a ground for judicial review would be a step towards the incorporation of the convention rights by the back door".[40] It seems that as in daly's case "Wednesbury unreasonableness turned out to be almost useless in terms of fundamental rights, and irrationality would not seem strong enough to deal with this higher perception of law", [41] so the much awaited principle of proportionality was eventually used by the court after strict scrutiny only in cases where there is a human rights violation in reference to ECHR law.

This article has also examined the application of the doctrine of proportionality by analysing the most recent cases of the Supreme Court of the UK. It has effectively checked the balance between the interest of the society and the rights of the individual, with all due credit to the Lords, who have confidently applied it in each particular case. It is compatible with the common law system; however, there are some areas which can be interpreted well to make this doctrine a firm principle in the judicial review process in the UK judicial system. This doctrine has proved that it has the potential to safeguard the rights of an individual, and simultaneously, if the interest of the society is critical, it should be prioritised over the rights of an individual. This article has also focused the question of whether the doctrine of proportionality is harmonious with the common law system and whether the UK's legal system should seriously consider it as a common norm in protecting freedom of expression leaving the principle of unreasonableness behind. One can quote many cases where the

unreasonable principle has been used as a ground of judicial review;[42] and proved to be the difficult one. Hence, the findings of this article are important that the doctrine of proportionality can be regarded as a superior concept to Wednesbury or irrationality, thanks to the principle's emphasis on balance and justification, which is taken to offer a more structured methodology.

References

[1] P. Craig, 'The Nature of Reasonableness Review' (2013) 66 CURRENT LEGAL PROBLEMS 131 p 157.
[2] Sweet, A. S., & Cananea, G. D. (2013). Proportionality, general principles of law, and investor-state arbitration: a response to José Alvarez. *NYUJ Int'l L. & Pol.*, *46*, 911.
[3] Tom R Hickman, 'The reasonableness principle: Reassessing its place in the public sphere' (2004) 63 The Cambridge Law Journal 166, Barak, 'the Judge in the a Democracy 'p 248.
[4] A, 'Proportionality: Constitutional Rights and Their Limitations' p 373.
[5] Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223.
[6] Council of Civil Service unions v. minister for the Civil Service [1985] AC 374, 410) Lord Diplock).
[7] R. (Hoyte) v Southwark LBC [2016] E.W.H.C. 1665 (Admin)
[8] Hooley, "Controlling Contractual Discretion" [2013] C.L.J. 65 at 74–79.
[9] Mallone v BPB Industries plc. [2003] B.C.C. 113 at [39].
[10] [2015] 1 W.L.R. 1661.
[11] Morgan, "Resisting Judicial Review of Discretionary Contractual Powers" [2015] L.M.C.L.Q. 483 at 486.
[12] Daly, "Wednesbury's Reason and Structure" [2011] P.L. 237 at 254.
[13] Woolf et al., De Smith's Judicial Review (2013) at [11-028–11-072].
[14] Daly vs. Secretary of the State for the Home Department 2001] UKHL 26; [2001] 2 AC 532.
[15] R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532.
[16] R vs. A 2001] UKHL 25; [2002] 1 AC 45.
[17] R v Somerset County Council, ex p Dixon [1998] Env LR 111, 121.
[18] Available at http://www.lawteacher.net/free-law-essays/constitutional-law/proportionality-as-a-ground-of-judicial-review-constitutional-law-essay.php accessed on 21september 2017.
[19] Samaroo v Secretary of State for the Home Department [2001] EWCA Civ 1139.
[20] R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532 para 27.

[21] Samaroo vs. Secretary of State for the Home Department [2001] EWCA Civ 1141.
[22] Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'' in Nicholas Bamforth and Peter Leyland (eds), Public Law in a Multi-Layered Constitution (Hart 2003) 337.
[23] Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671, 680.
[24] Ibid Smith EHRR para 138.
[25] Ibid Smith para 105.
[26] Ibid p 101.
[27] Ibid p 389.
[28] Ibid p 101.
[29] Unreported, Court of Appeal, 18 May 2000.
[30] Sanoma Uitgevers B.V. v The Netherlands, 14 September 2010, Application No. 38224/03, European Court of Human Rights (The Netherlands).
[31] Ibid.
[32] R (on the application of Miranda) v Secretary of State for the Home Department and additionally with (Liberty and others intervening) [2016] EWCA Civ 6.
[33] Ibid
[34] Ibid.
[35]Available at http://www.bbc.co.uk/news/uk-35343852 accessed on 26 June 2017.
[36] Ibid.
[37]Available at https://twitter.com/davidmirandario/status/689407688871047168 accessed on 30 June 2017.
[38] R v Barnsley Metropolitan Borough Council.
[39] *ex parte Brind* AC 1.
[40] Dyzenhaus, D., Hunt, M., & Taggart, M. (2001). The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation. *Oxford University Commonwealth Law Journal*, *1*(1), 5-34.
[41] Steyn, *R (Daly) v. Secretary State for the Home Department*.
[42] Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) p 23.