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Proportionality in the United Kingdom

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Proportionality is incorporated into the law of the United Kingdom in four ways:

(1) a generally accepted guiding moral principle;

(2) a test of the limitations under European Union Law ("EU Law) and European Convention on Human Rights ("ECHR");

(3) a ground of administrative law, and

(4) under common law constitutional review.

I. Proportionality as a general moral principle

Although often seen as European in origin, proportionality has an impeccable English origin by way of Magna Carta*,* agreed in 1215, Article 20 of which provides that:

> "For a trivial offence, a man will be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood".

In this sense, proportionality serves to balance the punishment against the crime, and generally to ensure that freedoms, liberties and important interests (such as to a livelihood) are not unnecessarily restricted. In recent days the argument is being made that benefits must also not be disproportionally applied, such as differential salaries between men and women in public institutions, or overly generous remuneration to company directors or bank employees.

Proportionality as a general moral principle is not, however, always observed in law and practice, but its role as a yardstick of justice is not to be underestimated.

II. Proportionality as a technique of statutory interpretation

The UK does not have a codified constitution. As a result, the prime constitutional principle, although not written in any single fundamental document, is the sovereignty of parliament. For that reason, the courts cannot in general strike down or invalidate statutes enacted by parliament. However, there are two situations in which there can be judicial review of parliament's laws:

> 1. The Human Rights Act of 1998 incorporated into UK law the provisions of the European Convention on Human Rights ("Convention rights"). In interpreting these rights UK courts are required to take into account the jurisprudence of the European Court of Human Rights (ECtHR). Convention rights are applied both to those exercising discretionary powers and also to statutes passed by Parliament. In respect of the first (administrative action) , the courts may both review the action and if necessary invalidate the exercise of the power. In respect of the second (legislation), the courts may review the legislation, but only issue a "declaration of incompatibility", which the UK Parliament normally implements, but retains the power (under the principle of parliamentary sovereignty) to ignore.
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> 2. The second exception to parliamentary sovereignty applies to European Union law. At least while the UK is still a member of the European Union, the UK courts may strike down (or 'disapply') legislation that is incompatible with EU law.

In respect of both EU law and Convention rights, the UK courts apply the principle of proportionality as a tool of interpretation. They follow precisely the structured test as applied both in the Luxembourg and Strasbourg courts.

Where the question before the UK court is whether a fundamental norm of EU Law is breached, the courts ask whether the measure which is

being challenged legitimate (is it suitable to attain the ends in view?). Is there a rational connection between the means and ends? Is the measure necessary? Could it be achieved by a less onerous measure?

In respect of rights under the European Convention of Human Rights, as applied by the European Court of Human Rights and in the United Kingdom under the Human Rights Act, a similar structured test is imposed, especially to assess the extent to which the 'qualified' rights may be limited. It is for the authority to justify the departure from the right in question and to show that the measures are 'prescribed by the law', that they pursue a legitimate end or an end specified in the relevant Article of the Convention (ends such as national security or public safety); that the means are rationally connected to that end; that no less restrictive alternative could have been adopted and that the limitation is necessary in a democratic society (and not merely desirable).[1]

III. Proportionality under administrative law

The UK does have a developed system of administrative law. Where a statute confers discretionary powers upon a public official, judicial review of such powers is now commonplace (although that was not always so). The courts may and do strike down administrative action for breach of a number of requirements of good administration, under which we see the developing concept of proportionality.

For much of our history, when Parliament conferred wide discretionary powers on a body or person exercising public functions, the courts were

[1] See Lord Steyn in *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26, [2001] 2 AC 532, applying the Privy Council case of *de Freitas v Permanent Secretary of Ministry of Agriculture and Fisheries, Land and Housing* [1999] 1 AC 69, 80 (Lord Clyde). See also J Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *Public Law* 671; M Elliott, 'The HRA 1998 and the Standard of Substantive Judicial Review' (2001) 60 *Cambridge Law Journal* 301.

reluctant to interfere with the exercise of those powers, interpreting the sovereignty of parliament very broadly. From the middle of the 20th century, however, this strong version of parliamentary sovereignty was softened, and the courts began more boldly to require that the exercise even of the widest discretionary power (such as to act "in the public interest") was subject to three "grounds" of judicial review: Illegality, procedural fairness, and unreasonableness. Under illegality, the courts would insist that the public official further both the letter and purpose of the law. Under procedural fairness the courts would insist that the body provide a fair hearing (sometimes called 'natural justice') to the affected person.

The ground of unreasonableness was much more vague, and the courts here were reluctant to put themselves in the position of the decision-maker and make the decision themselves *de novo*. Judicial review is not the equivalent of appeal, where the courts judge the correctness, rather than the lawfulness, of a decision. They therefore exercised a high degree of deference and gave the decision-maker a wide margin of appreciation, overruling the primary decision only where they had acted in a manner which was **manifestly** unreasonable, described in the famous *Wednesbury* as a decision which was " so unreasonable that no reasonable authority could ever have come to it" [2] [Perhaps this formulation is similar to the French principle of "erreur manifeste d'appreciation" ?].

In order to see how proportionality emerged from this concept of unreasonableness, it is necessary to analyse the kinds of cases which were decided under this ground of review. They include three categories: (**i**) review of the quality of the decision itself, (**ii**) review of the justification

[2] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

of the decision, and (**iii**) review of the impact of the decision on the affected parties.[3]

1. Review of the quality of the decision itself

Under this category, the courts readily invalidate decisions which are uncertain, incomprehensible, or inconsistent.

a. Uncertain or incomprehensible decisions

A decision may be invalid for uncertainty where it fails adequately to indicate its scope. Sometimes the decision is struck down because it is simply incomprehensible, or has the impression of being entirely arbitrary.

b. Inconsistent decisions

Here the decision is assessed in relation to previous decisions or actions of the decision-maker. Like cases need to be treated alike and courts often seek justification as to why law is not equally applied.

2. Review of the justification for the decision

Under this category, the court focuses upon the quality of the reasoning or evidence underlying or supporting the decision or the quality of its reasoning.

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[3] See further Woolf, Jowell et al, de Smith's Judicial Review (7th ed. 2015) chapter 11. The notion of these separate categories of review was first suggested in J. Jowell and A. Lester, Beyond Wednesbury: Towards Standards of Substantive Judicial Review [1987] Public Law, 368. See also J. Jowell, "Proportionality and Unreasonableness: Neither Merger Nor Takeover", in H. Wilberg and M. Elliott (ed.), The Scope and Intensity of Substantive Review (2015), p. 41.

a. Irrational decisions *stricto sensu*

The law reports contain a number of cases of decisions invalidated on the ground that the decision does not 'add up – in which, in other words, there is an error of reasoning which robs the decision of logic. Such cases give the impression of arbitrariness, perhaps 'by spinning a coin or consulting an astrologer'. This happens where the given reasons are simply inadequate, unintelligible or self-contradictory. Sometimes decisions have been invalidated because the bears no 'rational connection' to the measures designed to further its objective.

b. Decisions supported by no or inadequate evidence or made on the basis of mistake of an established and material fact

Courts, under judicial review, rather than appeal, will not normally interfere with a public's authority's assessment of the evidence or facts of a case. However, interference has been permitted where the decision is unsupported by substantial evidence, sometimes simply called a 'perverse' decision. Recently the courts have been prepared also to intervene where there has been a misdirection, disregard or mistake of a material fact.

3. Review of the decision's impact

Under this category the court's assessment focuses on the effect of the decision on the individual who is affected by it. These include breach of a legitimate (substantive) expectation, a decision where undue weight has been accorded to a particular relevant consideration, and unduly oppressive decisions.

a. Decisions which disappoint a legitimate expectation

The notion of the legitimate expectation entered our law as a procedural concept. If an expectation of a benefit induced by a promise or practice had been disappointed, the person was entitled to a hearing on the

matter. Later, it was held that the person could also be entitled to the substantive benefit itself (provided that the representation was clear, unambiguous and unqualified). Thus a prisoner could challenge the decision of the Home Secretary on the ground of its impact in disappointing his legitimate expectation of release after a given period.

b. Decisions where undue weight has been accorded to a relevant consideration

The law reports contain countless examples of such cases, where decision-makers have weighed up considerations that are relevant to the exercise of the power, but where too much or too little weight has been placed on one of the considerations. For example when the police, in the face of disruptive protests, withdrew some protection from demonstrators in order overall to protect others elsewhere in their jurisdiction, the courts have considered whether these (both relevant) considerations have been fairly balanced.[4]

c. Decisions which are unduly onerous or oppressive

The courts have on countless occasions held a decision unreasonable, irrational or perverse where the claimant has endured excessive hardship or unnecessary infringement on his rights or interests. Excessively low compensation, excessive penalties or unacceptable delays fall into this class of case.

Considering the above categories of the 'unreasonable' decision, we see that in two of them in particular proportionality is the test that is applied. In by far the majority of cases the courts did not specifically employ the terminology of proportionality. Indeed, like Moliere's Monsieur Jourdain, who had been speaking prose for more than 40 years without

[4] R *v Chief Constable of Sussex ex p International Trader's Ferry Ltd* [1999] 2 AC 418*;* cf R *v Coventry City Council, ex p Phoenix Aviation* [1995] 3 All ER 37. See further, *de Smith* 7th ed., note 20 above, 11-033.

knowing it, the existing jurisprudence shows that for many years English judges have been stating not only precise principles of substantive review, but also the specific principle of proportionality, without knowing it, or more likely, without admitting it.

The first concerns decisions where undue weight has been accorded to one relevant consideration over another. Here the judge carries out a test that is not the structured test under EU and ECHR law. The test consists of a simple balancing exercise where the court will interfere if one of the relevant matters is given manifestly undue weight over the other or others.

The second category of unreasonableness involves decisions which are unduly onerous or oppressive. Here the test is closer to the structured test, asking whether the extent to which the power exercised is necessary incursion upon a person's rights, freedoms or interests. In these cases the principle of proportionality is employed as a device to ensure that liberties and important interests are not unnecessarily curtailed[5].

Proportionality under common law constitutional review

This is a category which straddles the methods of interpretation under EU and ECHR law, and those under the grounds of administrative law. It arises when a power conferred under a statute is challenged for breach of a constitutional principle or human right that is outside of Convention rights.

[5] Under this category it is sometimes assumed that there is a sliding scale of review, and that the more interference with human rights the more the court would require by way of justification under the unreasonableness test.[5] Conversely, the greater the policy element in the decision, the lower the degree of scrutiny the decision will receive.

I have said above that we do not have rights set out in any document of constitutional status. However, since about the 1990s (and therefore prior to the incorporation of the ECHR into UK law in the Human Rights Act of 1998), the courts have been recognising that in any democracy properly so called, rights do exist and should be presumed to be protected, unless a statute clearly speaks to the contrary. In that way, the sovereignty of parliament is preserved, but parliament is required to speak with clarity if it wishes to over-ride democratic rights and principles. The courts thus imply that those rights are inherent in a democratic society.

Thus in a case brought by a prisoner[6], whose correspondence with his lawyer was obstructed by the prison governor, it was held that the generally-worded statute conferring broad discretion on the prison governor to make rules for the regulation and management of prisons did not infringe the prisoner's right of unimpeded access to his lawyer. Such a right was held to be an inseparable part of the right of access to the courts themselves, an inherent part of the constitutional principle of the rule of law. A very recent case has held that the Minister of Justice's decision to raise fees for appearing in court similarly obstructed access to the courts.[7] In these cases the courts do not specifically apply the structured test of proportionality as they would in interpreting limitations of EU or ECHR law, but the application of proportionality in the sense of fair balance is applied.

Conclusion

Proportionality is increasingly used to support a moral claim in UK law. In some ways it is no less vague than the former general standard of "unreasonableness", and in other cases a decision is required to be

[6] *R v Secretary of State for the Home Department, ex parte Leech* (No.2) [1994] QB 198

[7] *R (UNISON) v. Lord Chancellor* [2017] UKSC 51

'manifestly' disproportionate before the court will intervene.[8] However, as Lord Mance has said,

The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages … [9].

Such a clearer articulation of standards promotes what has been called a 'culture of justification' in place of a 'culture of authority'[10]. However, proportionality cannot, as is sometimes suggested[11], occupy the entire space of substantive review. There may therefore always be room for an additional more general standard such as 'unreasonableness' as a residual category to regulate new or unusual cases.

[8] R *(Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394 (Lord Neuberger). But see Lady Justice Arden and, dissenting, Lord Justice Laws.
[9] *Kennedy* v Charity Commissioners [2014] UKSC 20, [54].
[10] E. Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994 S.A.J.H.R. 31,32.
[11] Eg by Paul Craig, see P.Craig, "Proportionality, Rationality and Review' [2010] N.Z.L.R. 265.