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Influence of Proportionality within Public Law in the United Kingdom (UK)

Introduction

In order to effectively present an analysis of the influences of proportionality standards, it is imperative to, firstly, define the principle. Proportionality, in general terms, involved the balancing of private citizens' interests 'adversely affected by public authorities against the public interests which those measures are intended to promote' (Purchase & Chambers, 2021). The doctrine requires that the means employed by a decision-maker, usually a public body or government authority, to achieve a legitimate aim, must be no mora than is necessary to achieve that aim. Such a definition emerges from a general move of domestic courts, in view of the *Human Rights Act (HRA) 1998*, in developing a judicial scrutiny regarding decisions that affect fundamental human rights of citizens. Proportionality can further be defined through comparison with the standards of *Wednesbury* unreasonableness, deriving from the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948)* and distinguished from proportionality as an approach of rationality.

Emergence and development of the proportionality standards in the courts of the United Kingdom

The proportionality doctrine, first emerging from continental European courts and used as a standard by the European Court of Human Rights (ECtHR) 'to determine the legality of state interference with [protected] rights' (Purchase & Chambers, 2021) was met with much criticism in UK courts. Prominent comments from Lord Ackner's judgment in *ex Parte Brind (1991)* present a refusal to accept proportionality as an independent JR ground, stating that 'unless and until Parliament

incorporates the convention [i.e. the ECHR] into domestic law… there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country' (Lord Ackner, 1991). The emergence of proportionality standards in UK courts was contextualised by a wider movement towards the development of greater discretionary powers for the judiciary against a historical background of orthodox judicial constraints. This process of change in 'judicial attitudes towards fundamental rights [and] acceptance of legitimate expectations' (Craig, 1998: 68) was coupled with the plausibility of the 'possible inclusion of proportionality as a head of review in its own right' (Ibid.). Interestingly, and in complete opposition to Lord Ackner's opinion, such changes, Craig clarifies, did not emerge as a result of 'legislative intent' (Ibid.) but rather emerged as a 'categorically judicial creation' (Ibid.) in an attempt to balance the interests of citizens adversely affected by public decisions. The House of Lords in the case of *R (Daly) v Secretary of State (2001)*, in which a prisoner challenged his rights to confidential legal counsel during cell searches, established one of the first such movements towards proportionality. Their Lordships held that proportionality was the appropriate standard of review in claims brought under the HRA 1998. Since then, similar cases on the violation of privacy rights of citizens have also applied proportionality as the suitable review standard, such as in the cases of *R (Unison) v Lord Chancellor (2017)* and *R (Youssef) v Secretary of State (2016)*.

Current degree of influence of proportionality as a standard of review in public law

The last few decades have seen a distinct trend towards the use of proportionality as a consideration in Judicial Review (JR) cases. In this context, the incorporation of broad proportionality principles, in which judges are to have 'regard to a legitimate aim pursued by the public body in the public interest' *(Laws LJ, Nadarajah and Abdi, 2005)* seems relatively logical, considering the purpose of such cases is largely to balance the powers of the Executive and the interests of the people they affect. The JR ground of legitimate expectation has been the centre of much of

the conversation on the utilisation of proportionality, particularly with regards to procedural and substantive expectation, which are traditionally treated as separate types of legitimate expectation, with the former based on a promise or practice and the latter on a tangible benefit by public authority. Proportionality simplifies such categorisations, making no distinction between the two and proposing a more general question of whether 'denial of the expectation in the circumstances is proportionate to a legitimate aim pursued' (Ibid.,). In this regard, such an approach allows proportionality to stand as a separate standard of review.

Significantly, proportionality does not present a limitless prerogative for UK courts, as some critics may argue. It must be understood that similar limitations to that of other JR grounds are also applicable to proportionality, arguably attempting to avoid conflicts with constitutional principles of parliamentary sovereignty the separation of powers. This is for two main reasons. Firstly, proportionality can be applied in varying degrees of intensity, allowing for a reasonable application of the standard based on the facts of each case, and secondly, proportionality is further limited, as are other grounds of JR respectively, by the impact of high policy decisions, in which UK courts have been proactive in drawing a line in the application of proportionality if it were seemingly outside the bounds of judicial competence. These matters provide UK domestic courts, in my opinion, with sufficient constraints in the use of proportionality as a legal test to complement other JR grounds effectively in order to fulfil its purpose of balancing some of the inequalities in decision-making between citizens and public authorities.

Firstly, in the context of human rights issues, proportionality applications present a greatly advantageous method of judicial scrutiny, one that was described, albeit *obiter dictum*, in Pham v Secretary of State (2015) as a 'more forensic and precise legal test than the Wednesbury' standard. Their Lordships exercised their judicial discretion in the application of the proportionality standard of review and marked, arguably, the most direct engagement of the UK Supreme Court, albeit obiter, with proportionality. The advantage of proportionality in this case allowed for

the judges to determine the appropriate level of intensity with which the utilise the proportionality standard, allowing for certain controls to be placed on such a significant constitutional development. Nevertheless, perhaps to legitimise its use further, albeit needing not a direct legislative intent for its use, an address of proportionality in JR must be held by a larger panel of the Supreme Court. Lord Neuberger, in *Keyu v Secretary of State (2015)*, clarified that any possible replacement in domestic law of the Wednesbury unreasonableness standard with proportionality should 'only be sanctioned by a full panel of the UK Supreme Court', which I would agree with. However, in my view, such a formal address would only be required if proportionality were to fully replace other standards of review, and need not be a necessity whilst it its integrated to merely complement the other standards as a discretion, rather than a prerogative of domestic courts.

Secondly, it has been evident in recent cases that, as is often the approach of the courts with higher policy matters, the proportionality standard is refrained from being applied and the traditional rationality *Wednesbury* approach is reverted to. Issues of high policy include matters largely relating to international politics, diplomacy and national security, as exemplified in *Re Finucane's Application (2015)*. In this case, following a review application after the murder of a well-known Northern Irish lawyer by a loyalist paramilitary group, the Supreme Court held that the decision not to hold a public inquiry in an attempt to proportion the interests of the applicant (the deceased's wife) was justified in light of national security interests. This case provides a direct limitation on the use of proportionality for review, but such a limitation seems appropriate. If the trend towards the wider establishment of proportionality for JR were to continue, it seems reasonable that the same limitations that would be applied to other JR grounds, regarding the competence of courts to rule on matters of parliamentary sovereignty, were to also restrict the use of proportionality.

Conclusion

Overall, the cases discussed above are seemingly the most significant in the assessment of the emergence and development of proportionality from continental Europe and throughout UK domestic courts. Albeit a more intense method of review, proportionality presents with it various advantages, particularly in light of the *HRA 1998*. The recent, and in my opinion worrying, discussions of the Conservative party in the UK surrounding the potential repeal of the *HRA 1998* present an even greater need for the integration of proportionality as a judicial discretionary tool in JR cases. In the hopes of its further development, proportionality will enable a greater balancing of interests of citizens' rights, which continue to be adversely affected by the decisions of public authorities in the UK. This opportunity of such constitutional significance must not be missed.