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PROPORTIONALITY AND VARIABLE INTENSITY OF REVIEW

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I. INTRODUCTION

ARTICLES 29 and 30 of the Universal Declaration of Human Rights contain a series of limitations to human rights. Article 29(2) states:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

This is a general limitation clause. There are similar clauses in domestic Bills of Rights such as those of Canada,[1] New Zealand[2] and South Africa.[3] By contrast, the European Convention on Human Rights contains specific limitation clauses, most notably in articles 8–11. Here, the text refers to restrictions on the exercise of the right which are "prescribed by law and necessary in a democratic society"[4] to pursue an individually tailored range of legitimate state aims. Such rights are often termed "qualified" rights on account of their limitability.

Determining whether a Convention right guaranteed by the Human Rights Act 1998 has been violated is therefore often a two-stage process. The court needs to establish first whether a right has been impinged on at all, and then if it has, whether the limitation can be justified. The doctrine of proportionality in the wide sense is the name given to the set of tests used to establish whether a limitation of rights is justifiable. Proportionate limitations of rights are justifiable; disproportionate ones are not.

The text of the Convention might lead one to assume that the responsibility for determining the proportionality of limitations is

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[1] Canadian Charter of Rights and Freedoms 1982, s. 1.
[2] New Zealand Bill of Rights 1990, s. 5.
[3] Constitution of the Republic of South Africa 1996, s. 36.
[4] Article 8 uses the phrase, "in accordance with the law".

judicial. After all, the process seems to require the specification of legal rights on the facts of concrete cases, which is pre-eminently a judicial function. Nevertheless, this assumption is undermined by the Court's own doctrine of a "margin of appreciation." As formulated classically in the *Handyside* case, this states:

> ... it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context. Consequently, Article 10 § 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.[5]

Numerous cases since *Handyside* have developed the doctrine, although its precise function and contours remain disputed.[6] Regardless of that dispute, a consensus quickly emerged in the United Kingdom that there is a domestic equivalent in respect of the Human Rights Act.[7] However, the domestic "margin of appreciation" cannot be identical, primarily because the European Court is an international tribunal supervising complete domestic legal systems with legislative, executive and judicial branches. By contrast, the domestic equivalent addresses the relationship of the judiciary to other branches of government, requiring regard to be had at some point to their assessments of proportionality. An international court also has to take account of the cultural diversity of human rights conceptions among nations in a way inappropriate for the courts of a single political community.[8] Judges and academic writers in this country have therefore rightly avoided the language of "margin of appreciation," preferring "margin of discretion," "discretionary area of judgement," or "judicial deference" instead.

Furthermore, there is considerable agreement as to why judges should have regard for the views of legislatures and executive bodies when testing for proportionality. The Human Rights Act 1998 makes the protection of Convention rights a joint responsibility of Parliament and the courts.[9] Broadly speaking,

[5] *Handyside* v. *United Kingdom* A.24 1 E.H.R.R. 737 at 754.
[6] The fullest treatment is now Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford 2002).
[7] D. Pannick, [1998] P.L. 545; A. Lester and D. Pannick (eds.), *Human Rights Law and Practice* (1999), para. 3.26, as approved in *R* v. *DPP ex parte Kebilene* [2000] 2 A.C. 326 and *Brown* v. *Stott* [2003] 1 A.C. 681. The judgements in *R. (Alconbury)* v. *Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295 also imply the existence of discretion on the part of the executive which can co-exist with proportionality review.
[8] P. Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism" (1998) 19 H.R.L.J. 1.
[9] See, in particular, sections 4 (2) and 10.

courts are not suitable bodies for resolving "polycentric" questions affecting a large number of disparate interests.[10] Executive bodies also sometimes have special expertise in relation to complex matters of fact and prognosis. In short, there are different institutional competences and different forms of legitimacy which must be brought to bear on the specification of Convention rights.[11] The doctrine of proportionality needs structuring in such a way that, although applied by the judiciary, it is sensitive to the proper contribution of the other branches of government.

Nevertheless, while there is general agreement that judicial deference plays a part in testing for proportionality, there is much uncertainty as to what exactly that part is. In a recent case before the Court of Appeal, Laws L.J. had cause to consider the problem again. He commented that "the nature and quality of the court's task in deciding whether an executive decision is proportionate to the aim it seeks to serve is more conceptually elusive than has perhaps been generally recognised."[12] This should not surprise us. What the courts are looking for is a general account of the separation of powers in a context in which responsibility for the substantive content of law has shifted significantly. The doctrine of proportionality has become the framework within which a new theory of the separation of powers must be realised. Part of the problem is that there is uncertainty as to the conceptual structure within which debates about relative institutional competence and legitimacy can take place. Confusion about the role of discretion is caused in no small part by confusion about the nature of proportionality itself.

The purpose of this essay is to distinguish and defend a typically European "optimising" conception of proportionality from the inadequate "state-limiting" alternative which has predominated in British courts. The optimising conception sees proportionality as a structured approach to balancing fundamental rights with other rights and interests in the best possible way. The state-limiting conception sees proportionality as a set of tests warranting judicial interference to protect rights. The key advantage of the optimising conception is that it requires a clear distinction to be drawn

[10] Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353. J.W.F. Allison, "Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication" [1994] C.L.J. 367 contains a critical discussion and refers to the "need to demarcate rights satisfactorily in a more-polycentric setting" (p. 382).

[11] From the literature, see particularly Michael Supperstone and Jason Coppel, "Judicial review after the Human Rights Act" (1999) 3 E.H.R.L.R. 301; Richard A. Edwards, "Judicial Deference under the Human Rights Act" (2002) 65 M.L.R. 859; Jeffrey Jowell, "Judicial deference: servility, civility or institutional capacity" [2003] P.L. 592.

[12] *Huang* v. *Secretary of State for the Home Department* [2005] UWCA Civ 105, para. [49] (footnotes removed).

between the substantive question of when a limitation of rights is justified and the formal question of the responsibility of the courts in ensuring that this is the case. As regards that formal question, the essay distinguishes between judicial deference (which relates to institutional competence) and judicial restraint (which relates to constitutional legitimacy). Deference and restraint interact with proportionality at different points. Moreover, both deference and restraint admit of degrees. Judges can be more or less deferential, more or less restrained. This feature gives content to the idea of variable intensity of review within proportionality. It is argued that the correct intensity of review should be set by the seriousness of the rights-infringement in the case at hand. We should therefore conceive of two parallel principles in operation: a substantive principle of proportionality which requires the seriousness of any rights-infringement to be matched by the importance of a competing right or public interest, and a formal principle of intensity of review, which requires the seriousness of prima facie rights-infringement to be matched by decreasing judicial deference and restraint.

II. Two Conceptions of Proportionality

British courts deciding cases under the Human Rights Act have been reasonably consistent in their exposition of the structure of proportionality. They tend to start with the judgement of Lord Clyde in *de Freitas*.[13] In this case, the Privy Council set out a three-stage test, asking whether the policy in question pursues a sufficiently important objective; whether the rule or decision under review is rationally connected with that objective, and whether the means adopted are no more than necessary to achieve that objective.[14] In formulating this three-stage test, Lord Clyde followed South African case law and conflated the last two stages of a four-stage test ultimately derived from Canadian case law. Some judges simply adopt the *de Freitas* test,[15] while some expound the necessity stage to embrace both necessity and proportionality in the narrow sense.[16] The confusion is not helped by the fact that the European Court of Human Rights uses "necessary in a democratic society" as the textual peg on which to hang a requirement of proportionality. Practitioners' texts tend to follow the courts in

[13] *De Freitas* v. *Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 A.C. 69.
[14] *Ibid*., p. 80.
[15] *E.g*. Lord Bingham in *A* v. *Secretary of State for the Home Department* [2005] 2 W.L.R. 87 at 106.
[16] *E.g*. Lord Steyn in *R. (Daly) v Secretary of State for the Home Department* [2001] 2 A.C. 532 at 547.

synthesising all the available material. Thus, Lester and Pannick interpret the necessity test as a fair balance test.[17] Clayton and Tomlinson open their discussion of proportionality with a classic statement of proportionality as necessity in the narrow sense, or efficiency,[18] but then draw on comparative case law to adopt a four-stage test, including a final "not disproportionate" stage. They understand this in the sense of avoiding excessive burdens or harms.[19] The general impression from both judicial and practitioner exposition is that there is essentially one doctrine of proportionality offering a range of tests directed towards the same end, with minor variations in formulation. If there are distinguishable conceptions of proportionality, the language used to identify the various stages is very similar, indeed interchangeable.

The possibility that there are competing conceptions of proportionality becomes more apparent when one juxtaposes two leading administrative law textbooks. In line with his interest in European Union law, Craig puts it like this:

> The Court considers:
> (1) Whether the measure was necessary to achieve the desired objective.
> (2) Whether the measure was suitable for achieving the desired objective.
> (3) Whether it nonetheless imposed excessive burdens on the individual. The last part of this inquiry is often termed proportionality *stricto sensu*.
>
> It will be apparent from the subsequent analysis that the court will decide how *intensively* to apply these criteria.[20]

By contrast, Wade and Forsyth state that proportionality "ordains that administrative measures must not be more drastic than is necessary for attaining the desired result."[21] Although they then suggest that the impact of deference may cause this test to be closely assimilated to Wednesbury reasonableness, their examples show that proportionality tends to merits review. In other words it leads the court to an insistence that the executive body take the correct decision as regards the least intrusive means. Thus, in their view, proportionality is not about optimising costs and benefits but

[17] A. Lester and D. Pannick, *Human Rights: Law and Practice*, 2nd ed. (London 2004), p. 89.
[18] R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford 2000), p.278 citing Halsbury, *Laws of England* (4th reissue), vol. 1(1) para. 78.
[19] *Ibid.*, p. 298.
[20] P.P. Craig, *Administrative Law*, 5th ed. (London 2003), p. 622. Elsewhere Craig (correctly) reverses the first two criteria. See, *e.g.*, "Judicial Review, Intensity and Deference in EU Law" in D. Dyzenhaus (ed.), *The Unity of Public Law* (Oxford 2004), 335.
[21] H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 9th ed. (Oxford 2004), p. 366.

about the efficient pursuit of pre-determined goals. It does not raise questions about the intensity of review; it imposes a judicially-generated criterion of correctness in respect of necessity, or efficiency. Their exposition is fully in line with the tendency of British, and it would seem, Canadian and South African courts, to treat "necessity" as the final stage of proportionality review and to suppress the language of balancing.[22]

This difference is not merely semantic, but can be explained by reference to two competing theories of the relationship between rights and the public interest.[23] Common law conceptions of proportionality assume that courts exist to protect individuals and groups from the other branches of government. Courts maintain a framework of legal rights which set limits to the freedom of action of legislative and executive bodies. This presupposes that rights and the public interest can be clearly distinguished, perhaps along the lines of Ronald Dworkin's distinction between anti-utilitarian principle and utilitarian policy.[24] Courts stand on one side of a constitutional divide, charged with representing the individual interests of right-holders, whereas legislatures and executives represent the collective interest.

On this account, qualified rights are already problematic, since they assume that rights can be limited by considerations of the public interest, when rights are supposed to set limits to the public interest.[25] In theory, rights ought to be defined and upheld, not qualified. It follows that once qualified rights are admitted, as they have to be under the European Convention, proportionality needs to be reconstructed in such a way as to preserve the "proper" roles of courts, legislatures and executive bodies. This is done by first ensuring that only sufficiently important public objectives are permitted to limit the enjoyment of rights. The language implies that there are legitimate public objectives that are not important enough to warrant limiting the enjoyment of rights. It is the

[22] See *de Freitas* v. *Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 A.C. 69. Although the Canadian case law provides authority for a four-stage test similar to the European conception as set out below, in practice the final stage is not relied on, and the court does all the work under the rubric of "necessity", which has been rendered more flexible than at first sight appears. See R. Clayton and H. Tomlinson, *The Law of Human Rights*, pp. 293–295. Section 36(1)(e) of the Constitution of the Republic of South Africa 1996 also gives the impression that necessity is the final stage of proportionality review.

[23] Aileen McHarg, "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" (1999) 62 M.L.R. 671.

[24] *Taking Rights Seriously* (London 1977), ch.7. Tom R. Hickman has recently drawn an instructive parallel with Robert Bork in this respect in "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [2005] P.L. 306 at 313–315.

[25] Dworkin's hostility to qualified rights can be found in "Does Britain need a Bill of Rights?", in R. Gordon and R. Wilmot-Smith (eds.), *Human Rights in the United Kingdom* (Oxford 1996), 59.

responsibility of the court to act as gatekeeper here. However, if a legislative objective is sufficiently important, any state action rationally connected to the objective and necessary to fulfil it is justified. Carrying out important public objectives is the responsibility of legislatures and executives. All the court does is maintain an efficiency-based oversight to ensure that there are no unnecessary costs to rights, that sledgehammers are not used to crack nuts, or rather, that sledgehammers are only used when nutcrackers prove impotent. Finally—and this is less frequently observed—the state-limiting conception of proportionality sometimes assumes that there is an absolute minimum to each right, a core content, which may not be violated on any account.[26] This is supposedly defined without any reference to any public interest and is, once again, the preserve of the courts.

Thus the way that British courts tend to approach proportionality is orientated towards the limiting of other state organs and already builds into itself a theory of legitimacy: "rights" are for courts, "policy" is for legislatures and executives. This has significant implications for our understanding of the role of discretion. It suggests that the problem is already partially solved; courts should simply get on with their job of defining and upholding rights.[27] Questions of "sufficiently important public objective" and "essential core" are for the judiciary. By contrast, a case can still be made for deference at the necessity stage, which is the domain of legislative and executive competence. Thus, while it is usually assumed that there is a most efficient way to carry out any given legislative objective, this is coupled with judicial hesitation about telling the other branches of government that they mistook the action necessary to deliver their policy objective. In this way the sense that proportionality delivers one right answer is moderated by a strong commitment to deference.

By contrast, the conception of proportionality that predominates in continental European contexts[28] is rooted in an assumption that rights and other interests are formally indistinguishable. Any rational decision-taker is faced with one complex question: given the importance of this right and the extent to which enjoyment of

[26] See, *e.g.*, E. Orücü, "The Core of Human Rights and Freedoms: the Limit of Limits" in T. Campbell *et al.* (eds.), *Human Rights* (Oxford 1986). R. Edwards (above note 11), at p.879, does not note that there is a vigorous discussion in Germany as to whether the absolute core can be defined without reference to proportionality.

[27] Ian Leigh, "Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg" [2002] P.L. 265 represents a clear example of this approach.

[28] J. Schwarze, *European Administrative Law* (London 1992), ch. 5; for a helpful brief account see Walter van Gerven, "The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe" in E. Ellis (ed.) *The Principle of Proportionality in the Laws of Europe* (Oxford 1999), 37.

it will be limited by the act in question, and given the importance of the public interest pursued, and the degree to which it is going to be realised, does the act realise the public interest to such an extent that, all things considered, the gain to the public interest at least balances out the cost to the right?

Precisely because this is a complex question, it is broken down into convenient stages. The doctrine of proportionality structures the answer by way of a fourfold test:

(1) Legitimacy: does the act (decision, rule, policy, etc.) under review pursue a legitimate general aim in the context of the right in question?[29]
(2) Suitability: is the act capable of achieving that aim?
(3) Necessity: is the act the least intrusive means of achieving the desired level of realisation of the aim?
(4) Fair balance, or proportionality in the narrow sense: does the act represent a net gain, when the reduction in enjoyment of rights is weighed against the level of realisation of the aim?[30]

It should immediately be apparent that this formulation is institutionally neutral. It is not necessarily designed to help courts determine their relationship with other organs of government. European proportionality is first and foremost about identifying the rational optimisation of the common good, which includes both rights as protected interests and other interests.[31] The *volonté générale* takes account of rights, but relates rights to the public interest in the process of determining the best course of action. Once proportionality becomes a legal test, the optimising conception risks treating courts as the constitutional guarantors of the rationality of the entire state process.

In an essay published in 2001, Michael Fordham and Thomas de la Mare set out an account of the optimising conception of proportionality with admirable clarity.[32] Unsurprisingly, their material is drawn predominantly from European Union and

[29] It is normal to exclude the "legitimate aim" from the scope of the doctrine of proportionality. Thus the European Court of Human Rights talks in terms of the proportionate pursuit of a legitimate aim. However, it is both more convenient and theoretically more elegant to include all the tests for justifying a limitation of rights under the rubric of proportionality. Within the context of the European Convention we can then distinguish between articles in which legitimate aims are separately and expressly enumerated and those in which they are not. The process of reasoning is identical.

[30] The Israeli Security Fence decision is a fine example of a "necessary" decision being found disproportionate. A lower level of security had to be tolerated given the immense additional cost to rights: *Beit Sourit Village Council* v. *Govt. of Israel* HCJ 2056/04 (30 June 2004).

[31] Robert Alexy, *A Theory of Constitutional Rights* (tr. Julian Rivers, Oxford 2002), pp.66–69.

[32] "Identifying the Principles of Proportionality", in Jeffrey Jowell and Jonathan Cooper (eds.), *Understanding Human Rights Principles* (Oxford 2001).

European Convention case law, to which Privy Council and Commonwealth material is assimilated. The character of their conception is strikingly illustrated by the following quotation:

> Although domestic judges should not read-across the margin of appreciation as described by the Strasbourg Court, there will need to be *some* doctrine of a "margin." Otherwise, the Court will risk arrogating to itself the role of primary policy- and decision-maker.[33]

This correctly implies that the doctrine of proportionality is not already specifically designed for implementation by courts, but forms a general rational test for the limitation of rights. Only when coupled with a theory of institutional competence and legitimacy can it adequately be implemented by courts. An additional doctrine of judicial deference and restraint is necessary if courts are not to take over the functions of the other branches of government. On the other hand, that same doctrine of deference and restraint must be sufficiently limited to ensure that courts retain responsibility for protecting fundamental legal rights.

III. Balancing Before the European Court

The state-limiting approach to proportionality is predicated on the illegitimacy and avoidability of balancing rights and public interests. At this point it is customary to contrast qualified and unqualified Convention rights, admitting that while some may require a balance to be struck between the right and other public interests, others do take the form of an absolute rule. The paradigm example of an unqualified, rule-based, Convention right, is article 3: "no-one shall be subjected to torture or to inhuman or degrading treatment or punishment." It seems as if the only matter requiring consideration is the effect of treatment or punishment on the individual. Once this achieves a certain threshold of inhumanity or degradation, the right has been violated.

In practice, the European Court engages in balancing in the context of almost every Convention right. Given the British judicial tendency to evade the question of balance it is important to emphasise just how pervasive this is. In the context of article 2, the requirement that deprivation of life be absolutely necessary implies a requirement of strict proportionality between the aims sought to be achieved and the use of lethal force.[34] In the case of article 3, factors relevant to whether extradition to face the death penalty engages the right include the proportionality of the penalty to the

[33] *Ibid.*, p. 83.
[34] *McCann and others* v. *United Kingdom* (1996) 21 E.H.R.R. 97.

gravity of the crime.[35] Whether conditions of detention are inhuman and degrading depends in part on its purposes.[36] As regards article 4, the Court has held that the types of work set out in paragraph 3 are exemplary only of a balance between the interests of the individual and the community. This balance determines the meaning of "forced or compulsory labour."[37]

Article 5 § 1 sets out six circumstances under which deprivations of liberty are permissible. Although the use of proportionality in respect of the six sub-paragraphs is variable, there is an increasing tendency to recognise its relevance. In *DG* v. *Ireland*,[38] the Court stated that the purpose of sub-paragraph (d) was to ensure a reasonable relationship between the ground of permitted deprivation of liberty and the conditions of detention; in *Fox, Campbell and Hartley* v. *United Kingdom*,[39] the Court agreed that the strength of the suspicion justifying lawful arrest under sub-paragraph (c) depended on the nature of the offence under consideration.[40] Limitations of the right of access to a court under article 6 must be proportionate.[41] The second sentence of article 6 § 1 expressly takes the form of a qualified right to a public hearing. Although the presumption of innocence appears absolute in article 6 § 2, the burden of proof may be shifted to the accused in relation to defences, and presumptions of fact or law may operate to the detriment of the accused, so long as these are kept "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[42] The prohibition on retrospective conviction and punishment in article 7 does not prevent the reasonable development of the law on a case by case basis. In *Streletz, Kessler and Krenz* v. *Germany*,[43] the Court upheld the convictions of former members of the Government of the GDR, on the grounds that the strict approach of German courts to the law of the GDR was justifiable in the context of the border regime for which the accused were responsible and the importance

[35] *Soering* v. *United Kingdom* (1989) 11 E.H.R.R. 439.
[36] *Kröcher and Möller* v. *Switzerland* (1982) 34 D.R. 24. Elements of balancing admittedly do not often arise in article 3 cases. They are nevertheless present both in the reference to the nature and context of treatment in determining whether the "threshold of severity" has been surpassed and in the often repeated requirement that the "suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of *legitimate* treatment or punishment" (my emphasis). *Kudla* v. *Poland* (2002) 35 E.H.R.R. 11 is a tolerably clear and recent example of balancing in this context.
[37] *Van der Mussele* v. *Belgium* (1984) 6 E.H.R.R. 163.
[38] (2002) 35 E.H.R.R. 33.
[39] (1991) 13 E.H.R.R. 157.
[40] See also in relation to article 5, *Winterwerp* v. *Netherlands* (1979–80) 2 E.H.R.R. 387; *Van Droogenbroeck* v. *Netherlands* (1982) 4 E.H.R.R. 443 and *Caprino* v. *United Kingdom* (1982) 4 E.H.R.R. 97.
[41] *Ashingdane* v. *United Kingdom* (1985) 7 E.H.R.R. 528.
[42] *Salabiaku* v. *France* (1991) 13 E.H.R.R. 379 at 388.
[43] (2001) 33 E.H.R.R. 31.

of the right to life. The "exception" in respect of acts criminal under general principles of international law also implies a balance between foreseeability and predictability on the one hand and the punishment of serious wrongdoing on the other.

Articles 8 to 11 are admittedly qualified and require no further mention. Restrictions on the right to marry under article 12 must be proportionate.[44] The equality right set out in article 14 is also qualified in form.[45] There should be no differentiation between members of the same class on grounds of sex, race, color, etc., but differentiation may be justified if it is necessary to pursue a legitimate state aim. The fact that derogations in time of emergency under article 15 must be "strictly required" also means that the Court tests for proportionality, albeit in a more demanding way. As regards the rights of the First Protocol, the right to property is clearly limitable to pursue various general interests so long as limitations are proportionate.[46] States have a wide discretion to provide for education and regulate it in a way consonant with respect for parental religious and philosophical convictions, although there is a limit in the duty not to indoctrinate.[47] Similarly the right to vote implies a wide discretion in ensuring a fair electoral system.[48]

In short, there is hardly a Convention right which may not be defined, limited or rendered more precise by reference to the competing public interests at stake.[49] Where the Convention does include relatively precise rules, these are to be seen as the outcome of an underlying balancing approach which then re-emerges to guide the interpretation of the rule.

State-limiting approaches to proportionality suggest that at least rights have an absolute core which cannot be interfered with on any account. "Absolute core" in this context is to be understood as an extreme infringement, rather than merely an exemplary one.[50] They thus try to create a clear limit to state action without balancing. The idea of an absolute core finds a counterpart in European Convention case law in the idea of the "very essence" of a right. If the notion of essences or cores is to be any use, it must be definable independently of proportionality and perform a distinct role in preventing certain forms of state action. "Very

[44] *F* v. *Switzerland* (1988) 10 E.H.R.R. 411.
[45] *Belgian Linguistic Case* (1979–80) 1 E.H.R.R. 252 at 293 and subsequent case law.
[46] *Sporrong and Lönnroth* v. *Sweden* (1983) 5 E.H.R.R. 35.
[47] *Kjeldsen, Busk Madsen and Pedersen* v. *Denmark* (1979–80) 1 E.H.R.R. 711.
[48] *Matthieu-Mohin* v. *Belgium* (1988) 10 E.H.R.R. 1.
[49] Simon Atrill "Keeping the Executive in the Picture: a reply to Professor Leigh" [2003] P.L. 41 makes this point well.
[50] Opening private correspondence is an exemplary infringement of privacy; surreptitiously filming consensual sexual activity is an extreme one.

essence'' language crops up occasionally in respect of many rights. Rare examples can be found in the context of the right to liberty,[51] privacy,[52] freedom of religion,[53] association[54] and the right of individual petition.[55] On the whole, the term seems to be used as a synonym for a serious violation. In the context of freedom of expression and the right to property, applicants have sometimes argued that the very essence of their rights has been infringed, but the court has considered the matter by way of the doctrine of proportionality.[56] The case of *Brand* v. *Netherlands* is interesting in that the court found that the very essence of the right to liberty had been infringed *because* the state had failed to strike a reasonable balance between the relevant competing interests.[57] In other words, ''very essence'' language operated as a synonym for ''disproportionate.''

In only three contexts has the notion of a ''very essence'' had a significant role to play: the right to marry and found a family (article 12), the right to free elections (article 3 First Protocol) and the right to a fair trial (article 6 § 1). It is the latter of these which is numerically the most common. As regards article 12, *Rees* v. *United Kingdom* established that the right to marry was subject to national law, but that that law must not impair the very essence of the right.[58] The Court held in this and subsequent cases without argument that the restriction of marriage to members of the opposite sex did not impair the essence of the right. In *Goodwin* v. *UK*,[59] the Court modified that position and found that the allocation of gender at birth on the basis of biological sex did violate the very essence of the right of post-operative transsexuals to marry, since they were prevented from marrying anyone they would be likely to want to marry. The only other relevant case is *F* v. *Switzerland*,[60] in which a three-year prohibition on remarriage after divorce was found to violate the very essence of the right because it was disproportionate.

In the context of the right to free elections, the Court has held that it ''has to satisfy itself that the conditions [imposed by the state] do not curtail the rights in question to such an extent as to

[51] *Winterwerp* v. *Netherlands* (1979–80) 2 E.H.R.R. 387; *Brand* v. *Netherlands* (49902/99).
[52] *Sahin* v. *Germany* (2003) 36 E.H.R.R. 43, dissenting opinion of Judges Rozakis and Tulkens.
[53] *Larissis* v. *Greece* (1999) 27 E.H.R.R. 329, concurring opinion of Judge de Meyer.
[54] *Sigurdur Sigurjonssen* v. *Iceland* (16130/90).
[55] *Orhan* v. *Turkey* (25656/94); *Tanrikulu* v. *Turkey* (2000) 30 E.H.R.R. 950.
[56] See, *e.g.*, *Müller* v. *Switzerland* (1991) 13 E.H.R.R. 212; *Barthold* v. *Germany* (1985) 7 E.H.R.R. 383; *Hutten-Czapska* v. *Poland* (35014/97), *Schirmer* v. *Poland* (2005) 40 E.H.R.R. 47.
[57] (49902/99).
[58] (1987) 9 E.H.R.R. 56.
[59] (2002) 35 E.H.R.R. 18.
[60] (1988) 10 E.H.R.R. 411.

impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate."[61] In most cases involving questionable restrictions on the rights to vote or to stand as a candidate, the Court has considered the matter from the perspective of the proportionate pursuit of legitimate aims, and found violations or not accordingly.[62] In two cases the Court has concluded that there was an infringement of the very essence of the right because the measures in question were disproportionate,[63] and in two cases the Court has found that a complete denial of the right to vote (Gibraltarians in respect of European elections and Turkish-Cypriots in Cyprus) impaired the very essence without needing to consider the aims of the restriction.[64]

The case law regarding the right of access to a court under article 6 §1 displays similar tendencies. The right is not absolute, but limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with the Convention if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[65] The question once again is whether the very essence can be determined in the absence of proportionality. There are cases in which the limitation of rights of access occurs in pursuit of some legitimate aim, in which case the analysis proceeds explicitly by way of proportionality, as for example with the restrictions flowing from Parliamentary immunity[66] or the defence of qualified privilege.[67] By contrast, in cases of procedural complexity or poor procedural design, where the court can find no reason for the difficulties the applicant has faced in their domestic system, the tendency is to find a violation without reference either to proportionality or to the essence of the right.[68] In short, it is not clear that the concept of an essence of the right of access to a court has any distinct role to play.

The problem with the "very essence" of a right is that it is almost impossible to define usefully without reference to competing

[61] *Matthieu-Mohin* v. *Belgium* (1988) 10 E.H.R.R. 1 at p.16.
[62] *E.g. Gitonas* v. *Greece* (1998) 26 EHR 691; *Ahmed* v. *United Kingdom* (2000) 29 E.H.R.R. 1; *Labita* v. *Italy* (26772/95); *Podkolzina* v. *Latvia* (46726/99); *Hirst* v. *United Kingdom* (2004) 38 E.H.R.R. 40.
[63] *Selim Sadak* v. *Turkey* (2003) 36 E.H.R.R. 23; *Zdanoka* v. *Latvia* (58278/00).
[64] *Matthews* v. *United Kingdom* (1999) 28 E.H.R.R. 36; *Aziz* v. *Cyprus* (69949/01).
[65] *Ashingdane* v. *United Kingdom* (1985) 7 E.H.R.R. 528.
[66] *A* v. *United Kingdom* (35373/97).
[67] *Fayed* v. *United Kingdom* (1994) 18 E.H.R.R. 393.
[68] *E.g. Geouffre de la Pradelle* v. *France* (12964/87); *Philis* v. *Greece* (1998) 25 E.H.R.R. 417.

public interests.[69] The few real examples which have arisen in the Convention case law (*i.e.* where it is not functioning as an expression of the outcome of proportionality review), involve the complete denial of two relatively specific rights to minorities: the right to marry and the right to vote. While one can imagine instances of a denial of rights that could never conceivably be justified (*e.g.* indiscriminate shooting, excruciatingly painful torture, mutilation, etc.) they hardly ever arise in practice. And there would be no difficulty in finding these disproportionate. The concept of "very essence" is practically useless.

In short, balancing rights and the public interest is endemic under the Convention. The point should really not need making at such length. In *Sporrong and Lönnroth* v. *Sweden* the Court recognised it as a general principle: "the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ... The search for this balance is inherent in the whole of the Convention ..."[70]

IV. Proportionality in Practice

The inevitability of balancing rights with the public interest means that in practice it creeps unnoticed into state-limiting approaches to proportionality. Since it is unnoticed, it is uncontrolled. This is best seen by looking closely at one familiar example: *A* v. *Secretary of State for the Home Department*.[71] The question is whether the situation of public emergency represented by the threat of terrorist attacks in the United Kingdom justifies the indefinite detention without trial of foreign terrorist suspects. The formal structure of the answer is slightly different from a normal limitation of rights case, in that it involves a derogation from rights under article 15 ECHR. This is only permitted if strictly required by the exigencies of a situation of public emergency threatening the life of the nation, but this too requires an examination of proportionality.[72] The House of Lords found that the law was both disproportionate and discriminatory. The second finding does not interest us for now.

The first stage considers whether the legislation pursues a legitimate aim or objective. The optimising construction sees the

[69] Alexy makes this point in the German context: *A Theory of Constitutional Rights*, pp. 193–6.
[70] (1983) 5 E.H.R.R. 35 at 52.
[71] [2005] 2 W.L.R. 87.
[72] We can ignore for the moment the fact that the test is one of "strict" proportionality. As will be suggested below, this is best understood as requiring relatively intense review for proportionality.

avoidance of a public emergency as the legitimate aim. The only question is whether fair trial rights may, in principle, be limited in situations of public emergency. Once that condition is fulfilled, this stage is satisfied. In the state-limiting construction of proportionality, balancing is uncontrolled on account of the flexibility with which one can define the objective. If one defines the legitimate statutory objective as "protecting the British people from the risk of catastrophic Al-Qaeda terrorism," this is practically identical to the European conception, because the question of whether there is a public emergency threatening the life of the nation turns on whether there is a risk of catastrophic Al-Qaeda terrorism. However, if (at the other extreme) one were to define the legislative objective as "protecting the British people from the risk of catastrophic Al-Qaeda terrorism by giving the Home Secretary the power to detain foreign terrorist suspects without trial" this amounts to the whole question facing the court and would implicitly weigh all the costs and benefits of the legislation. If this "legislative objective" is legitimate, there is nothing else to be said, and there is nothing left for the other stages of the proportionality test to do. In practice, the majority of the court seem to adopt a middle range definition of the legislative objective, such as "avoiding the threat to the security of the United Kingdom presented by Al-Qaeda terrorists and their supporters."[73] This already moves in the direction of legitimising measures taken against certain individuals, including those only connected with actual terrorists, because it identifies them as representative of the threat. In other words it has started to bring the specific legislative response into relationship with the right, implicitly approving the initial choice of means.

At the second stage, the court looks for a rational connection between the legitimate objective and the policy. It was argued that this connection might be lacking for three reasons: the policy did not address the threat from British terrorists (it was underinclusive); the policy permitted Al-Qaeda suspects to carry on activities abroad (it was ineffective); the policy permitted the detention of terrorist suspects not related to the public emergency (it was overinclusive).[74] The optimising conception of proportionality simply asks whether the policy is capable of addressing the public emergency. The difference is that underinclusiveness is not a problem for the optimising conception, so long as the policy makes some contribution to the aim.[75] Ineffectiveness is only a problem if it is

[73] See Lord Bingham at 106.
[74] *Ibid.*
[75] Underinclusiveness is better dealt with by reference to non-discrimination.

total. If a policy is totally ineffective it is not capable of pursuing a legitimate aim. If it is partially ineffective, it may not be worth it all things considered, but it is still capable of contributing to the achievement of the aim. Overinclusiveness is a problem on both conceptions, because it means that decisions may be taken which do not contribute to the legitimate aim. The point is that to strike down a law on grounds of underinclusiveness or partial ineffectiveness implies the existence of better ways of carrying out the policy objective all things considered. This must implicitly take account of the cost to rights as well as the gains to the public interest. Thus at the second stage, the optimising conception of proportionality is much simpler in that it sets a factual and normative plausibility threshold. It looks for a chain of possible justification back to the legitimate aim. By contrast, the rational connection test is much broader, including notions of arbitrariness, which as well as including pointless decisions, also includes discriminatory, "unreasonable" or grossly disproportionate ones. This is a Wednesbury test with all its ambiguities; a rough cut version of proportionality.

The necessity stage is summed up by the short argument that if it is not necessary to detain British terrorist suspects it cannot be necessary to detain foreign terrorist suspects. This apparently simple point masks considerable complexity. Either the detention of foreign terrorist suspects adds something to the level of national security (the Government's position) or it does not. If it does not add anything to the level of national security, then the policy is not merely not necessary, it is not even *capable* of achieving its aim. It must fail at the second stage. Lord Hope seems to reach this conclusion.[76] However, if it does add something to the level of national security—it may be the only way of achieving the level of national security represented by the "prison with three walls" policy for foreign terrorist suspects—then it might well be necessary. Here, we encounter the major difficulty with the way British judges approach proportionality. By "necessary" some understand necessity in the strict sense of efficiency. In order to find a policy unnecessary one has to identify a third option (*e.g.* non-custodial restraint) which is *as effective* in protecting national security but *less intrusive* on rights. Lords Bingham, Scott, Rodger and Carswell seem to find the policy unnecessary in this strict sense that the policy as regards British terrorist suspects would have been equally effective in the case of foreign suspects, but less invasive. The danger is that the judiciary seem to treat this as the final stage

[76] *Ibid.*, p. 145.

of proportionality. Thus, Lord Walker considers all the ways in which the policy was not as oppressive as it might have been and concludes that it was necessary. He seems to think that it was the least intrusive way of achieving its particular level of national security. But his Lordship fails to go on to consider whether the policy is balanced. By contrast, Lord Nicholls and Baroness Hale seem to treat "necessity" in a broad sense as incorporating an element of balancing, in that they make reference to the small additional gains in national security and the large cost to rights implicit in the way foreign terrorist suspects are treated. But in no judgement is the question squarely faced: even granted that the risk of catastrophic Al-Qaeda terrorism could not be reduced without detaining foreign suspects without trial, is this a price worth paying, taking account both of the size of the risk (*i.e.* probability of realisation and magnitude) and the cost to rights (*i.e.* intrinsic importance and extent of denial)?[77]

Commensuration, or balancing, of different rights and interests is undoubtedly the most complex and controversial part of proportionality. Just how much loss of fair trial rights is national security really worth? That is a much harder question to answer—indeed it may be impossible to answer rationally—than the question whether two alternative policies contribute more or less to one interest such as national security. But balancing is unavoidable. The optimising conception of proportionality recognises this difficulty by admitting a first, highly general, assessment of balance, in the context of the legitimate aim test, and then by removing any question of balance from stages two and three, delaying any further assessment to the final stage, when it is faced separately and openly.

At first sight, the state-limiting conception of proportionality seems to give greater protection to rights because it is based upon a strongly anti-utilitarian notion of rights. However, in practice, paradoxically, it is weaker. Legislative objectives are hardly ever found insufficiently important and the essential core rarely comes into play. Proportionality therefore reduces to necessity. At the hands of some of the judiciary, this can include a degree of balancing, but its normal formulation as a "least drastic means" test creates a tendency towards testing for mere efficiency. This assumes that whatever is takes to achieve a government aim is justified. But sometimes the game is not worth the candle.

[77] Thus, it is an open question whether the House of Lords would have agreed with the High Court of Israel that aspects of the security fence policy were unlawful (see above note 30).

V. Discretion: Deference and Restraint

Discretion is hidden in complex ways in the interstices of the law.[78] In the context of proportionality, the language of discretion and judicial deference is often used interchangeably.[79] At one level, this is unproblematic. If we are considering the overall balance of power between courts and other public bodies, then wider legislative and executive discretion and enhanced judicial deference both have the effect of reducing the intensity of review and thus the role of courts within the State. However, the two are not true counterparts. This can be seen by reference to two possible conceptions of Convention rights under the Human Rights Act, both of which have been rejected by the courts.

Under the "reasonableness-conception" of Convention rights the question of proportionality is for the primary decision-taker, whether legislative or executive, and the role of the court is simply to ensure that the view taken by the primary decision-taker is not so unreasonable as to warrant judicial intervention. So the question is not whether the decision, rule or policy within the scope of a prima facie Convention right is actually proportionate, but whether a reasonable decision-taker might think that it is. At an early stage, Lord Phillips M.R. took this view,[80] but the approach was later disapproved by the House of Lords[81] on the grounds that it was simply a version of the old heightened scrutiny test as set out in cases up to *R.* v. *Ministry of Defence ex parte Smith*.[82] This test had been rejected as inadequate by the European Court in *Smith and Grady* v. *United Kingdom*.[83] The effect of adopting it would be to proceduralise Convention rights, making them merely mandatory considerations in the process of decision-taking, and denying their nature as substantive outcome-related rights. Public bodies would have the power to determine the law intended to bind them. But Convention rights are legal rights, and courts are constitutionally required to make up their own minds as to what the law requires. Executive failure to consider whether a limitation of rights is proportionate may be a ground of review,[84] but limiting rights disproportionately certainly is.[85]

[78] D. Galligan, *Discretionary Powers* (Oxford 1986), especially ch. 1.
[79] See, for example, *R* v. *DPP ex parte Kebilene* [2000] 2 A.C. 326, *per* Lord Hope at 381.
[80] *R. (Mahmood)* v. *Secretary of State for the Home Department* [2001] 1 W.L.R. 840 at 857.
[81] *R. (Daly)* v. *Secretary of State for the Home Department* [2001] 2 A.C. 532, *per* Lord Steyn at 547.
[82] [1996] Q.B. 517. See, in particular, *R* v. *Secretary of State for the Home Department ex p Bugdaycay* [1987] A.C. 514; *R* v. *Secretary of State for the Home Department ex p Leech* [1994] Q.B. 198.
[83] (1999) 29 E.H.R.R. 493.
[84] See note 104 below.
[85] Lord Nicholls comes close to resurrecting a reasonableness conception of Convention rights in *R. (Williamson)* v. *Secretary of State for Education and Employment* [2005] 2 W.L.R. 290 and *A* v. *Secretary of State for the Home Department*: "Parliament must be regarded as having

The reasonableness-conception of Convention rights is an example of considerable judicial deference. In the absence of manifest unreasonableness, the court defers to the public authority's view of the law. And to the extent that there is judicial deference at all within the doctrine of proportionality something similar will apply on a smaller scale. When, for example, a court is faced with an executive factual assessment that failure to read a prisoner's medical correspondence risks a certain detrimental effect on prison security, and when the court accepts the assessment as correct because it is incapable of judging otherwise, it is deferring to another body.[86] Deference incorporates other non-judicial bodies in determining the content of definitive Convention rights. It does not necessarily imply a subordination of courts to those bodies; rather it is grounded in institutional competence.[87] It certainly implies some sort of discretion on the part of the body to which the courts defer, but it would be wrong to understand this discretion as freedom of choice. Rather, it is the authority to determine what is the case for certain purposes. The executive does not choose what the effect of a failure to read prisoner correspondence will be on prison security, even though its view may be unchallengeable within a range of reasonableness. It has the authority to make what the courts can accept is a sound judgement of fact.

Thus in *South Bucks District Council* v. *Porter*,[88] the House of Lords confirmed that when considering whether to issue an injunction to enforce a planning order, the court had to consider all the relevant factors in asking whether the injunction would be proportionate. However, it was still right to defer to the local authority on questions of "planning policy," such as the designation of an area as green belt. Quite how this interaction of proportionality and deference occurs requires further clarification. The point for now is that some relevant matters still lie within the competence of planning authorities, even though the court's responsibility is to make a decision in respect of proportionality.

The alternative "correctness-conception" of Convention rights assumes that the doctrine of proportionality provides just one right

attached insufficient weight to the human rights of non-nationals. . ." [2005] 2 W.L.R. 87 at 131.

[86] See *R. (Szuluk)* v. *Governor of HMP Full Sutton* [2004] EWCA Civ 1426, at para. [26].

[87] Lord Hoffmann expresses concern about the servile connotations of deference in *R. (Pro-Life Alliance)* v. *BBC* [2004] 1 A.C. 185 at 240, but the word should be read as related to the practice of deferring rather than the attitude of being deferential.

[88] [2003] 2 A.C. 558.

answer to every decision within the scope of Convention rights.[89] Some, at least, of the impetus behind the move to identify a discretionary area of judgement on the part of other public authorities lies in the perceived need to prevent the collapse of supervisory jurisdiction into a fully-fledged review of the merits of every case. It will be argued below that proportionality is flexible: in certain circumstances it might produce just one legally correct answer, but it need not. Assuming for the moment that there are cases in which there are two or more proportionate decisions, rules or policies open to the legislature or executive, the nature of the resulting discretion will be the more familiar one of choice. It should be possible to establish the set of options which are legally acceptable because they are all proportionate. The attitude of the judiciary to the option that has in fact been chosen is not one of deference, but restraint.[90] There is no intrinsic reason why a judge could not make a choice as well, but such a choice would be illegitimate. Their role is to secure legality, not correctness. This is implicit in the normal assumption within judicial review is that one is testing for *disproportionality*.[91]

Restraint may operate both in respect of trivial matters and wide-ranging political choices. As an example of the first, one could consider *R.* (*on the application of British American Tobacco UK Ltd*). v. *Secretary of State for the Home Department*,[92] which concerned a challenge to new restrictions on tobacco advertising. The court pointed out that there may well be several possible "arbitrary" decisions (such as fixing detailed limits on tobacco advertisements) which are all proportionate and with which the court should not interfere. This is an instance of the identification of a range of proportionate and hence permissible rule options open to an executive body under delegated legislative powers. By contrast, in *Williamson*,[93] Lord Nicholls pointed out that Parliament had the discretion to select from a number of different ways of reconciling alternative views as to the best interests of children in the context of discipline and punishment. His Lordship implies that they would all have been proportionate.

[89] This fear clearly lay behind the rejection of proportionality in *R. v Secretary of State for the Home Department ex parte Brind* [1991] 1 A.C. 696 especially on the part of Lords Roskill and Lowry.

[90] Conor Gearty, *Principles of Human Rights Adjudication* (Oxford 2004), at pp. 119–120, similarly distinguishes deference to authority (in his example an Act of Parliament) from restraint deriving from competence as in "areas where the executive is rightly the lead agent (*e.g.* foreign policy)."

[91] *R. (Alconbury Developments Ltd)* v. *Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295, *per* Lord Clyde at 355.

[92] [2004] EWHC 2493 (Admin).

[93] *R. (Williamson)* v. *Secretary of State for Education and Employment* [2005] 2 W.L.R. 590.

Lord Hoffmann has argued that some discretion is inevitable. In *Home Secretary* v. *Rehman*,[94] the House of Lords had to consider the correct approach of the Special Immigration Appeals Commission in reviewing decisions of the Home Secretary to refuse indefinite leave to remain on national security grounds. His Lordship pointed out that even though the Commission had full jurisdiction to decide questions of fact and law it was subject to two inherent limitations.[95] The first arose from the fact that it was exercising a judicial function and had to respect the separation of powers. This meant that matters of judgement and policy, such as what action was needed in the interests of national security, were not for the court to determine. The second limitation arose from the nature of the appellate process, which requires proper deference to the primary decision-taker in establishing facts and evaluating risks.

The difficulty with this analysis lies not in its identification of discretion as such but in the assumption that one can identify classes of subject-matter which are immune from judicial questioning.[96] As T.R.S. Allan has recently written: "Free-standing principles of judicial deference—detached from analysis of specific legal duties and constitutional rights—reproduce the dubious distinctions characteristic of general doctrines of justiciability."[97] He concludes, "A general principle or independent doctrine of judicial deference is capable of undermining the protection of legal and constitutional rights, and when such a doctrine is invoked in the context of national defence or security such rights are likely to be eliminated."[98] Deference or restraint may well be appropriate, but it would be surprising if such appropriateness could be determined solely by reference to the subject-matter under consideration without reference also to the rights at stake. It is not obvious that a court engaged in reviewing for proportionality should not take evidence itself and make up its own mind on all disputed matters of fact and evaluation. Our problem is knowing the extent of proper judicial oversight in checking that other bodies have engaged appropriately in proportionality analysis.

[94] [2003] 1 A.C. 153.
[95] *Ibid.*, at 191.
[96] Lord Steyn has recently questioned Lord Hoffmann's approach on these grounds in "Deference: a tangled story" [2005] P.L. 346. Murray Hunt also criticises spatial metaphors, as in the "discretionary area of judgement", for similar reasons: "Sovereignty's Blight", in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-layered Constitution* (Oxford 2003), 337.
[97] T.R.S. Allan, "Common Law Reason and the Limits of Judicial Deference" in D. Dyzenhaus (ed.) *The Unity of Public Law* (Oxford 2004), 295.
[98] *Ibid.*, pp. 305–6.

VI. Deference and Restraint Within Proportionality

Quite apart from its compatibility with European Convention case law, one advantage of the optimising conception of proportionality is that the distinct contribution of each stage makes it much easier to adopt an orderly approach to questions of institutional competence (deference) and legitimacy (restraint).

A. Threshold Criteria: Means Capable of Pursuing Legitimate Aims

The first two stages of proportionality review function as threshold criteria which mark out a domain of reasonable courses of action: any decision not capable of pursuing a legitimate aim is patently unreasonable. These two threshold criteria on their own leave a wide discretion to public authorities.

Convention rights appear to distinguish carefully in the context of different rights between the types of public interest which may legitimately be pursued. For example, it is legitimate to pursue national security, public safety and economic well-being to the detriment of privacy, but only national security and public safety to the detriment of freedom of expression, and only public safety to the detriment of freedom of religion.[99] Life may only be limited in very narrow circumstances set out in the Convention.[100] In fact, this appearance misleads on account of catch-all aims such as "the rights and freedoms of others" and the possibility of limitations being justified by positive state duties to protect other Convention rights. As we have seen, other human rights catalogues do not attempt to distinguish contextually, but create a general power to limit rights for reasons of public good. Nevertheless, the point holds true that although rights may be limited to pursue a wide range of public and private interests, that range is not unlimited, and the limits vary according to the right in question. There is in this sense a hierarchy of rights,[101] from those at the top which may never, or hardly ever, be limited, such as life and freedom from torture, through middle-ranking rights, such as freedom of religion, expression, assembly, association, and the right to privacy, to lower-ranking rights such as property. This does not mean that serious deprivations of property, for example, do not require correspondingly weighty reasons. It means that the sorts of reasons which will count as potentially justifying limitation are much wider. It would be possible to justify deprivations of property by reference

[99] Compare the second paragraphs of article 8 with articles 10 and 9, respectively.
[100] Article 2.
[101] The Court has started to use the idea of a hierarchy of rights: *Streletz, Kessler and Krenz* v. *Germany* (2001) 33 E.H.R.R. 31 at p. 785.

to the relief of poverty; it would not be possible to justify deprivations of life by reference to the same interest.

The first stage of proportionality review thus represents a very crude balancing exercise between rights and public interests at the highest level of generality. The function of setting the range of legitimate aims in the context of individual rights is pre-eminently judicial. There is great value in courts articulating these most general limits. However, legislative and, within the limits of their powers, executive bodies enjoy a very wide discretion at this point to act for all sorts of reasons. The function of the court is simply to filter out those cases in which public bodies limit rights for the sake of a public interest incapable ever of justifying that limitation.

The frequency of cases involving an illegitimate aim will depend to a large extent on the question whether public bodies should be permitted to salvage older policies which were subjectively implemented for reasons now deemed unacceptable, but which can still be justified by reference to other legitimate purposes.[102] For example, it has been suggested that the restriction on prisoners' voting rights does not pursue a legitimate aim because at the time of its original enactment its purpose was to ensure the "civil death" of prisoners.[103] However, it is arguable that the question of legislative purpose should be determined objectively, not subjectively, since a policy which could be objectively justified is constitutionally acceptable. It is a waste of resources to strike down or question a rule which could be re-enacted in exactly the same terms but by legislators thinking appropriate thoughts while doing so. Of course, if the older unacceptable aim affects the terms of the law, those terms are likely to be found incapable of, or unnecessary in, achieving the new legitimate aim. We may also value the proceduralisation of Convention rights sufficiently to require legislatures to reconsider older subjectively illegitimate policies.[104]

The second stage of proportionality considers whether the decision, rule or policy under review is capable of pursuing the legitimate aim identified by the public authority. There must be a chain of justification from the decision back to the most general public interest identified at the first stage. Obviously, the question

[102] It would seem that Canadian courts take a subjective approach. See Edwards (above note 11) at 861–862. A good example is provided by Canadian restrictions on Sunday trading, which were enacted to encourage people to attend church. See *R* v. *Big M Drug Mart* [1985] 1 S.C.R. 295.

[103] Edwards (above note 11), p. 862.

[104] The European Court points in this direction when it states in *Hirst* v. *United Kingdom (no. 2)* (2004) 38 E.H.R.R. 40 at p. 841: "The Court would observe that there is no evidence that the legislature in the United Kingdom has ever sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners." The question raises complex *Pepper* v. *Hart* issues, discussed—with a clear preference for an objective approach—in *Wilson* v. *First County Trust Ltd. (no. 2)* [2004] 1 A.C. 816.

whether a decision is capable of being justified by a rule is amenable to much more precise analysis than the question of whether a policy is capable of pursuing a legitimate aim. But in both cases the question is one of capacity, or potential contribution. It is not whether the decision is correct, given the rule, let alone whether the policy is correct given the public interest. Clearly there is considerable scope for discretion at every stage as one traces back the chain of justification.

This discretion is important, because it recognises the contribution legislative and executive bodies make to the specification of the public interest. In reviewing the proportionality of mandatory life sentences for murder, Lord Bingham accepted the denunciatory (or symbolic) effect of the mandatory sentence as a legitimate policy specification of the public interest in punishing crime.[105] This choice then feeds through into the later stages of proportionality review, in that it informs the conception of the public interest that is to be pursued in the least intrusive way possible. Another good example of the importance of accurately specifying the public interest is provided by *R. (Williamson)* v. *Secretary of State for Education and Employment*.[106] Parents of privately educated children argued that a blanket ban on corporal punishment in all schools breached their religious rights. The proper scope of article 9 Convention rights does not interest us here. The interesting point for present purposes is how the proportionality question is considered. Lord Nicholls pointed out that the measure was capable of protecting children from violence, since "corporal punishment *may* have harmful effects" (original emphasis).[107] This implies that there is acceptable corporal punishment and excessive corporal punishment, and that the blanket ban is justified because it guards against excessive punishment. Banning all corporal punishment can therefore only be necessary if there is no less intrusive way of preventing excessive corporal punishment. But there was no evidence, or even allegation, from the executive that the existing criminal law limits needed supplementing by this blanket ban. By contrast, Baroness Hale's judgment considered a different aim: the prevention of "institutional violence."[108] Preventing institutional violence is a specification of the legitimate aim of protecting the rights and interests of children. While a blanket ban on corporal punishment in schools is only merely *capable* of preventing criminal violence on

[105] *R* v. *Lichniak* [2003] 1 A.C. 903.
[106] [2005] 2 W.L.R. 590.
[107] *Ibid.*, at 604.
[108] *Ibid.*, at 617.

children, it is both *capable and necessary* if one is to prevent institutional violence. To this extent Baroness Hale's reasoning is tighter. The question then ought to have been whether the gain in preventing institutional violence outweighed the cost to parental conceptions of their children's best interests. In that the cost to parental rights was not quantified, this final question of balance was avoided, or at least assumed, in typical British judicial fashion.

Given the very wide range of purposes for which states may act, and the wide range of decisions, rules and policies which may contribute in some way to those purposes, the first two stages of proportionality can helpfully be cast negatively as a public duty to avoid illegitimate aims and ineffective means. They represent a purified idea of Wednesbury reasonableness. Any decision limiting rights which passes these criteria is not completely irrational, although it may well be underinclusive, only partially effective, harsh or excessive. It is part of the proper function of the court to be satisfied that all state action within the scope of Convention rights fulfils these two threshold criteria. The wide discretion that remains is akin to the liberty left to individuals to act within the scope of the criminal law. What matters is a clear identification of the boundaries. Questions of deference and restraint should not be raised.

B. Necessity

The test of necessity asks whether the decision, rule or policy limits the relevant right in the least intrusive way compatible with achieving the given level of realisation of the legitimate aim. This implies a comparison with alternative hypothetical acts (decisions, rules, policies, etc.) which may achieve the same aim to the same degree but with less cost to rights. This requires us to be able to rank ordinally various states of affairs according to their level of realisation of the public interest. Of the set of those ranked equally in respect of the legitimate aim, public bodies are required to select that which ranks highest in terms of its realisation of the relevant right.

The test of necessity thus expresses the idea of efficiency or Pareto-optimality.[109] A distribution is efficient or Pareto-optimal if no other distribution could make at least one person better off without making any one else worse off. Likewise an act is necessary if no alternative act could make the victim better off in terms of rights-enjoyment without reducing the level of realisation of some other constitutional interest.

[109] Robert Alexy, *A Theory of Constitutional Rights*, p. 105 n. 222 and pp. 398–9.

This gives rise to both judicial restraint and deference. First, there is the discretion inherent in the power of the public authority to select any necessary act, which means the power to select any level of realisation of a legitimate constitutional interest. As far as the test of necessity is concerned, Parliament could seek a policy of "total national security" (whatever that might mean) so long as the resultant loss of civil liberties was as small as it need be to achieve that end. In relation to any two rights or interests, there is a large set of necessary acts. This discretion is inherent in the structure of proportionality and is enjoyed by every decision-taking body. Judges should not be choosing which necessary decision, rule or policy to adopt, *i.e.* what level of the public interest to realise. They should exercise restraint. For it is pre-eminently the role of Parliament to select the appropriate level of realisation of the public interest.[110]

In practice, we often do not know how much any particular act will achieve its end. Decisions, rules and policies are necessarily speculative in part. Some formal devices reduce this uncertainty. Most significantly, we assume that laws which are designed to operate to the detriment of a right-holder will so operate, but that laws which are designed to achieve certain desirable public interests may not. For example, a ban on religious hate speech designed to promote religious harmony is assumed to restrict speech (because it imposes a legal obligation not to say certain things) even if we know it will be ignored. But we will not assume that it will actually promote religious harmony. Evidence of failure on this score is relevant to the question of necessity.[111] The major exception to this "rule of law" approach to limitations of rights lies in the responsibility of the United Kingdom for potential breaches of rights by third parties, as in deportation cases.[112] This too is a matter of factual prognosis.

The "rule of law" approach to limitations of rights means that the ordinal ranking of limitations of rights is relatively straightforward to carry out. A ban on all hate speech is broader than a ban on religious hate speech, which is broader than a ban on hate speech against certain religious groups, etc. However, the ordinal ranking of alternative hypothetical decisions (rules, policies) according to their contribution to the public interest will be more controversial. A claimant may suggest an alternative policy which all agree would be less onerous, but the public body will typically

[110] There is implicit in this position a principle limiting Parliament's power to confer wide discretion on executive bodies, which cannot be developed here.
[111] For this reason, the law is better defended on grounds of formal religious equality.
[112] *Ullah* v. *Special Adjudicator* [2004] 2 A.C. 323.

deny that it achieves the same level of the aim being pursued, that it is as effective. If the public body is correct, the claimant will have failed to show by the example that the decision in question was not necessary. It is at this point that deference to the primary decision-taker potentially comes into play. In order to know how effective a policy might be, the court is reliant on others. Deference on grounds of institutional expertise seems particularly appropriate in the relationship between judiciary and executive bodies. To the extent that there is expertise, judges are correct to rely on the executive as part of "getting it right."

C. Fair Balance

The final stage of the proportionality test requires courts to assess whether the degree of attainment of the legitimate aim balances the limitation of interests necessarily caused by the act in question. It is a type of cost-benefit analysis which brings the aim and the right into relationship with each other. This requires the court to quantify the gain and the loss respectively. If the loss (cost to rights) is greater than the gain (value of achieving aim) there is a net loss and the act is unbalanced and thus disproportionate, having failed at the final hurdle. It is vital to realise that the test of balance has a totally different function from the test of necessity. The test of necessity rules out inefficient human rights limitations. It filters out cases in which the same level of realisation of a legitimate aim could be achieved at less cost to rights. By contrast, the test of balance is strongly evaluative. It asks whether the combination of certain levels of rights-enjoyment combined with the achievement of other interests is good or acceptable.

Now it is a basic assumption of the doctrine of proportionality that increasing infringements of a right require proportionately greater realisations of other values to outweigh them.[113] Where a right is already considerable attenuated, even small further limitations require great additional gains to the public interest to be worthwhile. By contrast, in the context of efficiency/necessity, levels of realisation of legitimate aims are never infinite: there will be a factual maximum even if a right is totally denied. In fact, as a general rule, the more one limits a right to achieve a certain end, the less the marginal return will be. This means that the more a Convention right is infringed, the smaller the return on the public interest is likely to be as a matter of fact, but the greater the return needs to be to justify the decision.[114]

[113] Robert Alexy, *A Theory of Constitutional Rights*, pp. 102–9.

[114] This can be represented graphically by superimposing an indifference curve (balance) onto an efficiency curve (necessity). Where the former is above the latter, the state of legal regulation

We should therefore think of the doctrine of proportionality as bringing two sets of possible states of legal regulation into relationship with each other. There is the set of necessary states of legal regulation in which the limitation of rights is as small as it can be for each level of realisation of the public interest. And there is the set of balanced states of legal regulation in which the net gains to the public interest adequately compensate for the loss to rights. The relationship between these two sets of states of legal regulation can be controlled by the court. For while the set of necessary states of legal regulation is fixed by the world as it is, the set of balanced (sufficiently optimised) states of legal regulation is a matter of constitutional choice. An idealistic court could set very high standards, always seeking the one right decision, rule or policy. A pragmatic court could accept that nearly all necessary decisions, rules or policies bring about a sufficient net realisation of constitutional values.

Talk of quantification of costs and benefits, is, of course, metaphorical. It is not possible to assign numbers to infringements of liberty or levels of national security. Indeed, it is tempting at this point to suggest that the values which have to be balanced against each other are incommensurable. If the constitutional interests represented in Convention rights—life, liberty, equality, property, privacy, security, procedural fairness, security, economic well-being, etc. cannot be brought into relationship with each other at all, then this final stage of the proportionality test must fall away as a rational test. It is, however, important to reiterate that the test of necessity could still be carried out, since this requires only ordinal rankings within one value.

However, we probably do not believe in complete incommensurability between constitutional values. Few would view with indifference a massive loss of liberty for a marginal gain in national security. Our problem is not that the values are incommensurable, but that relative assessments can only be carried out in a crude manner. This is why the final stage of proportionality review must be cast as a duty to avoid unbalanced solutions. It permits the court to intervene to the extent that the relevant interests are commensurable and result in a recognisable net loss. It follows that the discretion to select from the set of necessary decisions, rules or policies identified at the third stage has fourth-stage limits, which are controlled by the court.

is desirable but impossible. See further J. Rivers, "Proportionality, Discretion and the Second Law of Balancing", in G. Pavlakos and S. Paulson (eds.), forthcoming.

VII. Variable Intensity of Review

We have seen that although the first two stages of proportionality review imply a wide discretion for public authorities in respect of the aims they pursue and the means they adopt to pursue them, there is no distinctive role here for concepts of deference or restraint. The pursuit of a legitimate aim by suitable means represents a pair of judicially-policed threshold conditions. We have also seen that judicial deference may be appropriate towards executive evaluations of the impact of alternative decisions, rules and policies, where that is based on authoritative institutional expertise, and that restraint is appropriate in particular towards parliamentary choices of the level of public interest to realise. The final question is how all this relates to ideas of variable intensity of review.

The language of variable intensity of review originally arose in the context of a comparison between Wednesbury unreasonableness and proportionality. In *Daly*, Lord Steyn argued that a decision might be reasonable, and thus pass the looser Wednesbury test, but then fail to be proportionate. Proportionality sets the level of intensity of review.[115] Indeed, in most contexts in which a discussion of variable intensity arises, the assumption is that to test for proportionality is the most intense form of review, and its appropriateness is indicated by the presence of Convention rights. The idea that there are different degrees of review up to the point of proportionality has also found support in cases outside the human rights context, and in particular in relation to the role of the court in testing the factual basis of executive decision-taking.[116]

However, the courts have also had to deal with "strict proportionality"[117] or have made judgements that a decision is "not so disproportionate."[118] The penultimate sentence of Lord Steyn's judgement in *Daly* is usually overlooked. After having cited Laws L.J. to the effect that "the intensity of review in a public law case will depend on the subject matter in hand," his Lordship went on to state: "that is so even in cases involving Convention rights."[119] A few very recent cases have seen judges accepting counsel's argument that proportionality itself might be applied with more or less

[115] *R. (Daly)* v. *Secretary of State for the Home Department* [2001] 2 A.C. 532, *per* Lord Steyn at 547–548. Lord Bingham makes a similar point in *A* v. *Home Secretary* [2005] 2 W.L.R. 87 at 115 when he states that proportionality requires "greater intensity of review."

[116] *Runa Begum* v. *Tower Hamlets London Borough Council* [2003] 2 W.L.R. 388, *per* Lord Hoffmann at 404. See the discussion of Carnwath L.J. in *Office of Fair Trading and Others* v. *IBA Heathcare Ltd.* [2004] EWCA Civ 142, paras. [88]–[100].

[117] As in *A* v. *Home Secretary* [2005] 2 W.L.R. 87.

[118] As in *R. (Fisher)* v. *English Nature* [2005] 1 W.L.R. 147.

[119] [2001] 2 A.C. 532 at 548.

rigour.[120] Of course, strictly speaking, it is not proportionality itself that varies in intensity—all limitations of rights must be proportionate. The question is rather whether judicial deference and restraint in the application of proportionality are matters of degree. If they are, then proportionality is not simply an upper limit to the intensity of review; it is itself a "flexi-principle,"[121] and it makes sense to talk of variable intensity of review within the doctrine of proportionality.

The idea of variable judicial restraint is straightforward. We have seen that restraint operates to preserve to non-judicial bodies a range of necessary/efficient options. That range is limited by the final stage of proportionality review, and those limits are subject to judicial control. A large degree of restraint means that the court will be very unwilling to question the view of the primary decision-taker that what is necessary to achieve a certain level of public interest is also balanced. A moderate degree of restraint means that the court will want to check that the costs and gains are indeed roughly commensurable. A small degree of restraint will reduce the set of necessary decisions to a minimum; the court will need to be convinced itself that the decision, rule or policy in question, even though necessary, really is the best way of optimising the relevant rights and interests. The tendency of British courts to suppress the final stage of proportionality review means that in practice they are excessively restrained.

The question of what variable deference might mean is slightly more complex. Recall that the occasion for deference is the court's acceptance that its judgement is more likely to be correct if it relies on some other authority's assessment of some relevant matter. It is about relative institutional competence. In respect of any question, it might seem that the court is competent or not. How could deference be a matter of degree? The answer lies in the confidence the court can place in the competence of the other body. It could simply accept the assertion of the public authority; it could demand such assertions under oath; it could require the authority to reveal the factual basis for its judgements; it could require a certain degree of rigour in the fact-finding process. In short, the degree of deference means the extent to which the court will demand that the authority puts procedural resources into answering the relevant questions reliably, and exposes that process to judicial scrutiny. To

[120] *E.g. R* (*on the application of British American Tobacco UK Ltd.*) v. *Secretary of State for the Home Department* [2004] EWHC 2493 (Admin), *per* McCombe J. at paras. [26]–[37].

[121] Michael Supperstone and Jason Coppel, "Judicial review after the Human Rights Act" (1999) 3 E.H.R.L.R. 301 at 315.

defer is not simply to accept another person's assessment, it is to accept that the other person's assessment is sufficiently reliable.

More controversial is the question of the factors which indicate a relatively low or high intensity of review. The matter has received its longest judicial consideration so far in the judgment of Laws L.J. in *International Transport Roth GmbH* v. *Home Secretary*.[122] While his Lordship dissented from the majority of the Court of Appeal that the strict liability penalty scheme for transporting illegal immigrants was in breach of Convention rights, it would appear that his reasoning as regards deference commanded their support. Laws L.J. identified four principles: (1) greater deference should be paid to Parliament than to subordinate legislative or executive acts; (2) there is less scope for deference in the case of unqualified, or apparently unqualified, rights; (3) greater deference should be paid when a matter lies within the constitutional responsibility of the executive (*e.g.* defense of the realm) than within the constitutional responsibility of the courts (*e.g.* criminal justice); (4) greater deference should be paid where the question turns on matters of executive expertise (*e.g.* macro-economic policy). Lester and Pannick refer to these four principles and identify three further factors drawn from other cases which may affect the intensity of review: the importance of the right at stake, the degree to which it is interfered with, and the existence of common ground between states party to the European Convention.[123]

The principles Laws L.J. enunciates require some clarification. In the case of the first principle, while the idea that Parliament has a special role in balancing interests and choosing policies is acceptable, there is no particular reason to give deference to Parliament in matters of factual appraisal and prognosis, unless the legislation in question emerges from a reliable process of pre-legislative fact-finding, consultation and expert opinion. In the case of the second principle, the reason apparently unqualified rights would seem to offer less opportunity for deference is that reasons for redefining the scope of the right to exclude what would otherwise appear to be in breach of the right have to be very strong indeed. And the difficulty with the third and fourth principles is that the subject–matter of cases does not necessarily fall on a spectrum from court expertise and responsibility to legislative/executive expertise and responsibility. Rather, cases

[122] *International Transport Roth GmbH* v. *Secretary of State for the Home Department* [2003] Q.B. 728 at 765–767.
[123] A. Lester and D. Pannick, *Human Rights: Law and Practice*, 2nd ed. (London 2004), p. 97.

emerge in which the stakes are high on both sides of the deference equation.

This became clearly apparent in *A* v. *Home Secretary*. The alleged need to detain foreign terrorist suspects without trial fell foursquare within the traditional competence and expertise of the executive, and the decision to authorise such detention was a matter of balancing a large number of important individual and collective interests which it is typically Parliament's role to do. Yet at the same time the infringement of individual rights involved could hardly be more serious. What is the court to do?[124] The way out of the impasse is to distinguish the grounds for deference from its proper extent. That certain matters fall within executive expertise is a reason for deferring, but not a reason for deferring *greatly*. To defer greatly is to refuse to question in any way the assertion of another. But where the stakes are high one wants to be sure that the public authority really has directed its attention to the proper object of inquiry in a reliable way.

Once one distinguishes the grounds of deference and restraint from their extent, it becomes possible to control the intensity of review by reference solely to a single characteristic of cases. If courts are to be the guardians of rights, that characteristic must be the seriousness of the limitation of the Convention right in question, which is a function both of its intrinsic importance (life is more important than liberty, which is more important than property, etc.) and the degree to which enjoyment of the right is denied.[125] This does not mean that the court increasingly displaces the executive and the legislature in matters of factual expertise and policy-choice. Rather, it means that the more serious a limitation of rights is, the more evidence the court will require that the factual basis of the limitation has been correctly established, and the more argument it will require that alternative, less intrusive, policy-choices are, all things considered, less desirable.

It is vitally important to distinguish this institutional or formal principle from the substance of proportionality itself.[126] The doctrine of proportionality requires that the more seriously a right is limited, the greater must be the gain to the public interest to

[124] This perplexity is clearly expressed in the judgment of Lord Nicholls [2005] 2 W.L.R. 87 at 131.

[125] These are respectively the fourth and fifth factors identified by Lester and Pannick.

[126] Laws L.J. appears to conflate the two doctrines in *R. (Mahmood)* v. *Secretary of State for the Home Department* [2001] 1 W.L.R. 840 at 849. Lord Bingham seems to make the same mistake in taking the seriousness of the rights-infringement in *A* v. *Home Secretary* merely as a reason for engaging in intensive review, not as setting a substantive requirement of overwhelming competing public interest. The shift from substance to form appears between paragraphs 36 and 37 at 110. This judicial tendency is also noted and deplored by Mark Elliott, "The Human Rights Act 1998 and the Standard of Substantive Review" [2002] J.R. 97.

justify it. Variable intensity of review states that the more seriously a right is limited, the more argument and evidence the court needs to be convinced that the justification is indeed as strong as it is alleged to be. It is this formal principle which ultimately guarantees the character of Convention rights as judicially-protected rights and not simply as relevant interests.[127]

What might this mean in practice? It suggests, for example, that the majority decision in *R (Pro-Life Alliance)* v. *BBC* is suspect.[128] The issue of banning the Alliance's election broadcast was admittedly complicated both by the fact that it involved a positive right of access to broadcasting media, rather than a limitation of a negative right, and by the failure to include the relevant statutory rule within the target of the action. Nevertheless, there was agreement among the judges that to prevent the broadcast of a lawful party's only televised election broadcast during a General Election was a serious limitation of an important form of expression (political speech). If so, it was not only necessary that in the view of the BBC the ban should contribute significantly to a very important public interest. That is the substantive question which any rational decision-taker must address. It also behoved the court to test rigorously the quality of the BBC's decision. This required it to consider (a) how sure the BBC could be that less intrusive regulation such as late night screening would not avoid offence to the same extent as a ban and (b) whether avoiding the additional offence caused by full screening as opposed to soundtrack-only screening really was important enough to justify the admittedly substantial cost to rights. Instead, the court relied heavily on the assessments of the chief political adviser to the BBC, merely noting in passing her expertise and experience. Such considerable deference and restraint would only have been appropriate for relatively minor infringements of rights, which this was not.

VIII. Conclusion

In deciding cases under the Human Rights Act 1998, British courts have been so far both unwilling to address the question of balance between rights and public interests, and at risk of an unstructured appeal to discretion which leaves the strictness of review uncontrolled and unpredictable.

[127] This also shows how it is possible to maintain a "priority of rights" approach that mediates between "rights as trumps" and collectivist models. See Steven Greer, "Constitutionalizing Adjudication under the European Convention on Human Rights" (2003) 23 O.J.L.S. 405 at 410–413.

[128] [2003] 2 W.L.R. 1403.

Judicial caution is appropriate. The doctrine of proportionality is not simply a legal device to assist judges in regulating legislative and executive incursions on rights. It better understood as a rational device for the optimisation of interests. Given the wide coverage of state action provided by Convention rights, this means that judicial enforcement of proportionality could indeed result in a substantial field of merits-based review. Judicial deference and restraint are both practically required and constitutionally appropriate as expressions of the different institutional competences and legitimacy of governmental powers in the joint project of rendering rights definitive. Our challenge has been to develop a general theory of discretion that preserves both the specifically judicial function of protecting fundamental legal rights and the proper contribution of legislative and executive bodies in determining the content of law.

The basic solution is to join the doctrine of proportionality to an equally general doctrine of variable intensity of review. The former structures the substantive inquiry into the justifiability of a limitation of the enjoyment of a right; the latter structures the formal allocation of responsibilities to the various powers of government for carrying out the substantive inquiry.

Both doctrines are guided by the seriousness of the limitation of rights in the case in question. Where there is a minor limitation of a less important right, the gain to the public interest need not be large, and courts will ordinarily accept the appropriate executive body's assessment of the degree to which the public interest is furthered and admit a range of possible policy choices. By contrast, where the limitation of rights is substantial and the right is important, the gain to the public interest must also be substantial. Furthermore, review will also be more intense: the executive will have to demonstrate that its assessments of the public interest are as reliable as they can be, and persuade the court that the cost to rights really is worth it. In the case of the most serious limitations of rights, the court's constitutional duty is to ensure to its own satisfaction that the decision is correct all things considered.