

Proportionality and Constitutional Review

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Aparna Chandra has produced an insightful and clear analysis of the way in which proportionality has been applied in some recent cases by the Supreme Court in India.¹ There is a very significant body of literature exploring the way in which proportionality is, and should be applied, when courts undertake constitutional review.² This includes literature that is critical or sceptical about the application of this test for review at all. Space precludes general exegesis on these issues. This short comment is nonetheless designed to raise and challenge a number of issues that are central to these debates.

1. Proportionality Review

There is a general assumption in the literature that insofar as common law regimes exercised judicial control over discretion, it was done through reasonableness review and that proportionality was unknown in, for example, the UK prior to its introduction via EU and ECHR law.³ It has indeed been argued that it would be constitutionally improper for the courts to render this concept generally applicable as a tool of judicial review in the UK, this argument being predicated in part at least on the

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¹ Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere' (2020) 3(2) *U of OxHRHJ* 55.

² Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002); Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73; Aharon Barak, *Constitutional Rights and Their Limits* (CUP 2012); Vicki Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017).

³ Paul Craig, 'Proportionality and Judicial Review: A UK Historical Perspective' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law, European and Comparative Perspectives* (Hart 2017) Chapter 9.

assumption that it is an alien import to be largely confined to the areas from which it is said to owe its origins, viz ECHR and EU law.

This is wrong. The reality is that proportionality-type review existed in the UK from the seventeenth century onwards, and it was most commonly applied in non-rights-based cases. We did not have the classic three-part proportionality inquiry, and indeed if you search the legal database for the word proportionality you will get no hits. This is, however, because a range of different words were used in the context of judicial review actions, direct and collateral, including proportionable, proportionability, disproportion and proportionate. The semantic difference should not, however, conceal the substantive similarity: the courts were concerned to ensure that the regulatory burden placed on an individual was not excessive and that it was fair given the nature of the regulatory schema. Proportionability was used in four ways.

First, it was commonly an express condition in much legislation dealing with regulatory issues that were economic, social, and criminal and those that involved the defence of the realm. The courts regularly heard cases and decided whether the challenged action was proportionable. Second, it was a tool of statutory interpretation that was used where there was no mention of the term in the statute. Thus, the courts lent against the interpretation of a statute where it would place a disproportionate burden on a particular party. Third, proportionability was a free-standing principle of judicial review dating back to the late sixteenth century, as exemplified by the seminal decision in *Rooke's* case, given in the twilight of the Elizabethan age, five years before James I took the throne.⁴ Fourth, proportionability was also used to determine the legitimacy of regulatory intervention, such that a toll imposed for the repair of a bridge or highway had to be proportionable to the benefit.

In its modern incarnation, proportionality is a three or four-part structured test for assessing the exercise of discretionary power but does not come with any *a priori* or in-built level of intensity. The intensity with which it is applied is decided by the courts and will vary as between different types of case. There is no particular intensity of review built into the test. This is evident from the application of proportionality in German and EU law.⁵ The latter jurisprudence powerfully demonstrates the variable intensity with which proportionality review can be used. The intensity of review is indicative of the degree of control that the courts believe is fitting for the particular type of case. Some rights are more important than others, and not all cases concerning the same right are of

⁴ (1598) 5 Co Rep 99b.

⁵ Gertrude Lubbe-Wolff, 'The Principle of Proportionality in the Case Law of the German Federal Constitutional Court' (2014) 39 Human Rights Law Journal 12; Paul Craig, *EU Administrative Law* (OUP 2016) Chapters 19-20.

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equal significance. The courts must then exercise creative judgment as to the level of proportionality review that is most appropriate for that type of rights-based challenge.

This will play out, as Chandra correctly notes, in both substantive and evidentiary terms. There is a symbiotic connection between these two dimensions. Thus, if a court is minded to engage in intensive substantive proportionality review it will be more minded to demand more evidence to substantiate the contested decision. By the same token, the more evidence that is seen by the court, the greater the likelihood that it will feel that it has the information from which to make an informed decision on the substance of the case.

There is much discussion in the literature as to what level of intensity of review courts are and should be deploying when using proportionality review. The literature is often critical of the courts in this respect. The critique may take the form of arguing that the courts were too intrusive, or that they were not intrusive enough. The criticism may take a rather different form, as exemplified by Chandra’s analysis of the Indian case law, to the effect that the courts indicated that they were minded to review intensively, but this was not in reality what they did in the instant cases.

2. Reasonableness Review

We should nonetheless be mindful of the fact that questions concerning the relevant intensity of review, and as to whether the courts are doing what they say they are doing, are not confined to proportionality. They are equally present when reasonableness review is deployed.

These twin issues are readily apparent from the case law. The *Wednesbury* test was unsatisfactory in both respects. It was expressly premised on the assumption that a decision must be so unreasonable that no reasonable public body would have made it, with the dismissal of the teacher for the colour of her hair as the backdrop example. That approach is, however, doubly problematic: almost no claimant would ever win, since the test constitutes an almost insurmountable barrier;⁶ and it is predicated on an untenable normative assumption, which is that all interests that are not rights are to be treated in the same way. The reality was that the courts manipulated the test, so as to afford relief in cases that were felt to be

⁶ It is of course possible to find cases that come within broader tests of rationality review, although they become more akin to proportionality. See the meaning accorded to rationality by Lady Hale in *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69. The point made in the text is as to whether it is possible to satisfy a test framed in the terms articulated by Lord Greene and Lord Diplock.

deserving, even though the impugned action could not readily be regarded as so unreasonable that no reasonable public body would have taken it.

The modern case law has been more honest, in recognizing that the meaning of reasonableness review can vary depending on the nature and importance of the interest affected.⁷ This perforce means that the courts would have to exercise choice, explicitly or implicitly, as to the more particular meaning to be ascribed to such review in different types of cases. The intensity of reasonableness review would not be the same for the disability claimant or the person at risk of torture if deported, as it would be in cases where the interest was of lesser importance. Choice concerning the intensity of reasonableness is therefore no less necessary than it is for proportionality review.

Nor should we assume that balancing is absent from reasonableness review. That is untenable. UK law is premised on the assumption that you only get to such review if you have surmounted the legality hurdle, comprised of propriety of purpose and relevancy. Thus reasonableness review occurs on the assumption that relevant considerations have been taken into account, and it is the weight to be accorded to those interests that is integral to the determination of whether the contested decision is sustainable.⁸ Low intensity review renders it more difficult for the claimant to prove the imbalance, but does not change the nature of the exercise. It follows that if reasonableness review is deployed in rights-based cases it will, as made clear in the UK case law, be more intensive, and the balancing that is presently undertaken through proportionality would not disappear if such review were conceptualized in terms of reasonableness.

3. Constitutional Review and Disagreement

The existence of disagreement is central to the argument against strong constitutional review.⁹ There is force in the argument, and it will be considered further below. There is, nonetheless, a danger of reductionism. There is a tendency for public lawyers to reason as if the problem of moral

⁷ *Kennedy v Charity Commission* [2014] UKSC 20 [51]; *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [94], [109]-[110].

⁸ Paul Craig, 'The Nature of Reasonableness Review' (2013) *Current Legal Problems* 1, 5-8.

⁹ Jeremy Waldron, *Law and Disagreement* (OUP 1999); Jeremy Waldron, 'The Core Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007).

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disagreement was, in some way, particular to the constitutional terrain. This does not withstand examination.

If the premise against constitutional review is that courts should not be involved in cases where there are contentious value assumptions or difficult balancing exercises then the premise is unsustainable, since it would destroy adjudication across private as well as public law. The disagreement endemic within pluralistic democratic societies concerning the more particular meaning to be ascribed to abstract concepts such as liberty, equality and security in public law, is matched by analogous disagreement in private law on these and related issues.

This is attested to by the debates about theory in, for example, contract, tort, restitution and crime, where commentators discuss the values that should underpin the subjects. Courts in private law routinely develop doctrine that is reflective of defensible, albeit contestable, normative assumptions and will often balance competing values. Judicial doctrine within criminal law is premised on conceptions of moral responsibility and justifiable excuse. Contract law is shaped by considerations relating to matters such as consent, autonomy, bargain and the like. Tort theorists debate as to whether the law should be informed by corrective or distributive justice, or some admixture of the two, and if so, what precisely that mix should be. Similar academic debates and judicial discourse are apparent in areas as diverse as restitution and trusts.

It might be argued by way of response that the disagreement that besets the realm of public law is more ‘significant’ than that applicable within private law. This argument must, however, be sustained, not merely stated. It is not readily apparent that the disagreement that besets private law, criminal law and international law is less ‘significant’ than that which pertains within public law. Thus, if the criterion of significance is judged by the number of times that an individual engages with the relevant body of law, then contract and tort are almost certainly more ‘significant’ than public law. If, by way of contrast, the criterion is the importance of the relevant body of rules for freedom from incarceration, then the legal criteria used to determine criminal guilt and defences are more important.

If disagreement within the realm of public law is felt to be more ‘significant’ than in other legal spheres, then this is for consequentialist reasons. Strong constitutional review leads to the invalidation of legislation, preventing the legislature from attaining its desired end when there may be disagreement concerning the meaning to be accorded to the contested right, whereas in other instances where there may be disagreement, it is open to the legislature to have the last word. There is force in this dimension of the argument. It is however the very reason why courts show deference or respect to the legislature and executive when engaged in

constitutional review and is the rationale for the varying intensity that is prevalent in constitutional adjudication.

4. Constitutional Review and Arrogation

The core argument against strong constitutional review is premised in part on legitimate disagreement as to the meaning of rights. It is also predicated, less obviously, on the assumption that the power of constitutional review has been arrogated by the courts, in circumstances where there is no express warrant for this in the founding constitutional document, and no basis for it in legislative choice. This is the tableau against which debates concerning constitutional review in the US are conducted, since there is no express provision for such review in the US Constitution, with the consequence that the legitimacy of the reasoning in *Marbury v Madison* has been contested ever since the decision was made. We should, not, however regard the contingent historical circumstance of constitutional review in the US as the empirical norm. The reality is that in a great many countries there is express provision for constitutional review in the constitution, or in primary legislation duly enacted by the sovereign legislature.¹⁰

Those opposed to constitutional review might think that structural or rights-based constitutional pre-commitment policed by courts is bad constitutional design, and that the argument based on pre-commitment¹¹ is fraught with conceptual and theoretical difficulty.¹² They might consider that expression of such choice through primary legislation is scarcely less bad, and that not every decision made by a democratically elected legislature necessarily enhances democracy, in outcome terms at least. They are perfectly entitled to such views.

There is, nonetheless, a very real tension here, given that disagreement is the driving force behind Waldron and Bellamy's argument, leading to the preference for democratic choice as opposed to judicial decision. This disagreement can perforce affect a plethora of issues concerning constitutional content, including whether constitutional review is desirable. Such disagreement can likewise impact views about the wisdom of any

¹⁰ Tom Ginsburg and Mila Versteeg, 'Why do Countries Adopt Constitutional Review?' (2013) *Journal of Law, Economics and Organization* 1.

¹¹ Stephen Holmes, 'Pre-commitment and the Paradox of Democracy' in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (CUP in collaboration with the Maison des Sciences de l'Homme 1988) Chapter 7.

¹² Waldron, *Law and Disagreement* (n 9) Chapter 12; Jon Elster, *Ulysses Unbound, Studies in Rationality, Precommitment and Constraints* (CUP 2000) Chapter 2.

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particular piece of legislation. Where there is express provision for constitutional review in the constitution or legislation, it provides the clearest evidence as to how this particular aspect of constitutional design should be resolved within that polity. It follows that express provision for constitutional review carries with it constitutional legitimacy, unless and until the constitution is amended. The fact that particular commentators believe such steps to be unwise in no way undermines this. It attests to the very disagreement that pervades choices about the optimal way of dealing with such issues.

This is more especially so, given that the reasons why the framers of a constitution, or the legislature, chose some form of constitutional review are commonly eclectic. Thus, the constitutional framers might have believed that constitutional pre-commitment policed by the judiciary is optimal as a matter of principle. They might have thought that it was warranted by contingent historical circumstance of that particular country, where political forces had hitherto been imperfectly democratic or worse. They might have disagreed with, for example, Bellamy’s argument, concerning the relationship between rights and majority rule. The contrary argument, that there should be some rights-based constraints policed by a court in a constitutional democracy, has been advanced from a liberal perspective by Rawls¹³ and Dworkin,¹⁴ and from a republican perspective by Pettit,¹⁵ Sunstein¹⁶ and Michelman.¹⁷

We should, moreover, be mindful of the fact that constitutions are not necessarily drafted with philosophical acuity but are the result of the complex interplay of a range of forces that affect the content of the resulting document. There may be many provisions thereof that are philosophically contentious, but that does not serve to deny their constitutional legitimacy until they are amended or repealed, and much the same is true for legislation. There may, as noted above, be a range of political and historical considerations that influence the decision to opt for strong constitutional review in a particular system. There is, in addition,

¹³ John Rawls, *Political Liberalism* (CUP 1996).

¹⁴ Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (OUP 1996). See Christopher Eisgruber, *Constitutional Self-Government* (HUP 2001); Lawrence Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (YUP 2004).

¹⁵ Philip Pettit, *Republicanism, A Theory of Freedom and Government* (Clarendon Press 1997).

¹⁶ Cass Sunstein, ‘Interest Groups in American Public Law’ (1985) 38 *Stanford Law Review* 29; Cass Sunstein, ‘Beyond the Republican Revival’ (1988) 97 *Yale Law Journal* 1539.

¹⁷ Frank Michelman, ‘Foreword: Traces of Self-Government’ (1986) 100 *Harvard Law Review* 4.

the ongoing philosophical disagreement as to the relationship between rights and majoritarian democracy.

5. Constitutional Review and Incommensurability

There is a temptation to think that issues of normative choice and balancing are more common and complex in public as opposed to private law, thus fuelling conclusions that we should conceive of the limits of adjudication differentially in this regard. There is a kindred temptation to think that the ways of dealing with such issues are somehow more tractable in the realm of private as opposed to public law, thereby lending further support to the same conclusion. Both temptations should be resisted.

There is no sound foundation for claims that issues of normative choice and balancing are more common and complex in public as opposed to private law. There is an interesting inquiry as to the relationship between normative choice and balance, more especially balance of incommensurables. Space precludes detailed analysis.¹⁸ Suffice it to say for the present that the former does not necessarily entail the latter, but may often do so. It is thus perfectly possible for the normative choice to be between two or more different foundational precepts that will shape a rule or body of legal doctrine. It is equally possible for the normative choice to express the result, explicitly or implicitly, of a range of incommensurable values.

There is moreover no *a priori* reason why a normative choice that does not involve the balancing of incommensurables will be less contestable than one that does. It is in any event the case that issues of normative choice pervade just about every rule in private as well as public law, most certainly every rule of any significance. This is precisely what we unpack when we think about the soundness of common law doctrine in any area. Nor is there any reason to conclude *a priori* that the issues are necessarily more complex, as judged by any dimension that the word might bear, in public law as opposed to private law. We can all think of morally foundational issues that arise in the context of judicial review, which can affect the life or liberty of particular individuals, as well as many cases that do not raise concerns of this nature. We can however readily consider issues of analogous importance that arise in areas such as crime and tort, while recognizing that they also regulate matters of less significance.

¹⁸ See Cass Sunstein, 'Incommensurability and Valuation in Law' (1993-94) 92 Michigan Law Review 779; Cass Sunstein, Symposium on Law and Incommensurability (1998) 146 University of Pennsylvania Law Review 1169.

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The idea that such issues can be resolved in a more tractable manner in private as opposed to public law should also be resisted. There are doubtless different ways in which courts can address the balancing of incommensurable values, but these differences do not pan out neatly on a private-public law divide, nor is one such technique unequivocally ‘better’ than another. The choice of techniques includes: the ad hoc balancing of the relevant factors in each case, as exemplified by the duty concept in negligence and by the determination of the particular hearing rights that should be accorded to the claimant in public law; a modified version of this approach whereby the balancing is undertaken with different intensity for different kinds of case, as epitomized by proportionality review; formulation of a doctrinal rule that embodies the chosen result of the balancing, as in the context of the rules for nuisance, defamation or restitutionary relief for mistake of law; or the division of the specified area so that its component parts reflect the different balances struck, as illustrated by the sub-divisions within economic torts.

These are different juridical techniques that cut across the public-private divide, and they each have different merits and demerits. It might be felt that it is better in terms of legal certainty for the result of the balancing to become part of the rule, which can then be applied evenly thereafter. This is however dependent on the issue, whatsoever it might be, being amenable to embodiment in a rule-like format, which will not be the case if the number of variables is too broad or too fact-specific. Even where this is not so, there can be other less obvious disadvantages to rule-type formulations. Thus, where the balancing is not readily apparent on the face of the rule it is common for the rule to take on a canonical nature and for the balancing that underpins it to be forgotten, such that it is not reassessed. This is in effect what happened in relation to the rule concerning restitutionary relief for mistake of law prior to recent judicial reforms and is also what occurred in relation to the remoteness rules in tort since the 1960s.