White Paper Conference

Judicial Review: Shaping New Law into Solution-Focused Answers for Your Clients

Wed 18 April 2018

The Caledonian Club, 9 Halkin Street, London, SW1X 7DR

Is the civil law interpretation of proportionality causing the Court to become political and therefore harder to predict?

Jessica Simor QC

Introduction

1. So I've been set an exam question. Fair perhaps, at the time of GCSEs and A levels but this is definitely post-graduate level. This question is not however, only seasonally appropriate.

2. It has over the last few years become a question of immense importance for us all, not just as lawyers, but as citizens.

3. Last week, I went to hear Professor Susanne Baer, a Judge on the German Federal Constitutional Court talk about the rule of law and constitutionalism. She observed that whilst the concept of human rights is ancient and can be traced back millennia in many civilisations, the nebulous and difficult concept of the 'rule of law' and most importantly, the institutional role of Courts in upholding civil rights and preserving the rule of law, (which put very broadly, she called Constitutionalism), is a relatively new phenomenon – she considered its rise essentially to have taken place over the last half of the 20th century. Ominously, she noted its current decline and predicted its demise over the first half of the 21st. She urged her audience therefore, to fight for it for the simple reason that, as we all know, it is absolutely central to the preservation of democracy.

4. Her prediction of the decline of the rule of law was rooted in things that are happening now. In particular, Governments using the law, sometimes under the guise of so called 'legal reforms', to degrade and undermine democracy, Poland and Hungary for instance. For example, the Hungarian Government put an age limit on judges. Perfectly sensible – we have one here and it exists in many countries. But in Hungary, doing so enabled Orban to rid himself of 2000 judges only then to set up what on its face looks perfectly fair – an independent committee to appoint new judges – but in reality was a vehicle for his own people to be put in place; a first building block to the ending of the rule of law.

5. Judge Baer remarked on Orban having coined the phrase 'an illiberal democracy'. As she pointed out, such a concept is incompatible with the rule of law as we know it – liberal, meaning free, tolerant, willing to tolerate the ideas of others, enlightened, based on reason – all of these are core requirements the rule of law, underpinning democracy.

6. Democracy not only means more than going to the polls – such that to coin a phrase such as 'illiberal democracy' is to actively decide to bring democracy to an end – as she said: "*an illiberal democracy is not a democracy*". In espousing this, I hope uncontroversial view, she emphasised the relative newness of both 'Constitutionalism', and more importantly the institutional back-up that the Courts provide to it. Courts, through the application of Constitutionalism (or perhaps better in this jurisdiction – 'the rule of law') prevent the majority from destroying democracy.

7. So where does this take me in relation to the question I've been asked to address. As she pointed out, one of the core lines of attack on the rule of law is a wide spread scepticism of the role of judges. This comes from all quarters, some more 'respectable' than others. Sceptics challenge what they call 'legalism' – they say judges are 'activist', overstepping their mandate, – 'undemocratic' even. They argue that in a democracy power must rest with the representatives of the people – (and at the time of the *Miller* case, even with the executive). These statements are made not only by academics or media pundits but even by former Ministers. Ian Duncan Smith: said: '*Courts are in danger now of straying into Government business*"; "*I hope these 11 judges recognise the territory they are sitting in right now and hope they recognise this is not their business*"[1] Indeed even the Prime Minister criticised those bringing the Miller case saying that those who "*argue that Article Fifty can only be*

[1] http://www.dailymail.co.uk/debate/article-4007894/IAIN-DUNCAN-SMITH-s-crucial-judges-decide-fate-Brexit-scrutinised.html

triggered after agreement in both Houses of Parliament are not standing up for democracy, they're trying to subvert it."[2]

8. The Daily Mail put it like this:

> "*Do unelected judges (about which the public know almost nothing) have the right to supersede the wishes of the elected members of Parliament, and through them the Government?*
>
> *Because this question goes to the heart of how this country is governed, the media, and particularly newspapers such as this one, have started asking the question: who are these powerful people who dispense judgment on the way our constitution works?*
>
> *More importantly, what is known of their interests and motivation, and what previous views have they expressed?"*

9. The straight answer of course, is that yes, it is Judges who "dispense judgment on how our constitution works" – and who else could it possibly be?

10. But this answer, which seems so obvious to all of us as lawyers, can easily be undermined by those who find such a system inconvenient; its consequence being to limit the exercise of political powers. If you go to the Policy Exchange web-site, a think tank which although lacking any transparency in relation to its funding, is highly influential, you will find a project entitled "the Judicial Power project". It is run by someone called 'Professor Ekins'. On it, there is a list of 50 cases – most of them are core text book public law and human rights cases, which you learn about in college. In relation to each one, a bald criticism is given of judicial overreach. That project has also commissioned reports and articles from eminent Professors. One, done by Sir Noel Malcolm, a renowned Cambridge historian and expert on Hobbes, analyses the Strasbourg case law. He (not a lawyer but being widely respected) takes concepts such as proportionality and margin of appreciation and applying a reductionist approach concludes that they vague, unpredictable and alien; allowing judges (foreign judges) too much power. In that report in particular, there is a conflation of the *foreign* with the *judicial overreach* charge – something one also frequently come across in relation to the CJEU – indeed the proportionality concept is also often attacked as foreign (compared with good old Wednesbury). Sir Noel's conclusion is that

[2] Speech 2 October 2016.

we should also leave the Council of Europe because of this judicial overreach, which he says is potentially undemocratic.

11. So I would caution that as lawyers we need to be careful about conflation and confusion when it comes to rule of law concepts. What we are dealing with here is something much more fundamental than how a particular legal test is applied in a particular legal context. What we are dealing with is a sustained attack on the role of the judiciary within our institutional structures; a power struggle in effect and one that is core to the maintenance of a real democracy.

12. And that takes me to proportionality – how is that relevant to the more fundamental point – namely the difficult role that courts play in preserving the rule of law and therefore democracy?

13. I would argue that proportionality is now a core part of Constitutionalism. In that regard, it is important to consider the role of judicial review more widely. Judicial review is the means by which, in Britain, the acts of public bodies and the executive, are subject to 'legality-scrutiny'. We know that that includes ensuring that the policy, measure, act or decision is based on relevant considerations, that it is within the conferring power, not in breach of a legitimate expectation, in accordance with procedural fairness, in accordance with the statutory purpose, non-discriminatory and that it should be reasonable. We know that reasonableness involves different levels of scrutiny depending on the context.

14. Even prior to the HRA, where human rights were involved a higher degree of scrutiny was applied: for example, the *Sims case*, where the House of Lords held that a statute that infringed fundamental rights would be interpreted narrowly; clear and express words would be needed for the Court to accept an interpretation that infringed individual rights. The purpose of imposing such a requirement was to ensure that if politicians chose to deprive individuals of their rights, the political price was paid for doing so, that is, people knew and understood what was being done.

15. Indeed, it can fairly be said that proportionality and reasonableness at a certain point merge to become the same thing, depending on the margin of discretion applicable. Thus, it can be said that the requirement that decisions be proportionate, and not excessively onerous or harsh when less restrictive measures are available, is part of the general requirement for reasonableness in decision-making: See, for example, the approach taken

by the House of Lords in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.* [1998] 3 WLR 1260 HL(E). In that case, Lord Cooke derided the Wednesbury test as an unfortunate 'incantation' noting that it was *an apparently briefly-considered case, [that] might well not be decided the same way today; and the judgment of Lord Greene M.R. twice uses the tautologous formula "so unreasonable that no reasonable authority could ever have come to it."* He pointed out that: "*judges are entirely accustomed to respecting the proper scope of administrative discretions [and do] not need to be warned off the course by admonitory circumlocutions.*" Referring to the *Tameside Metropolitan Borough Council [1977] A.C. 1014,* he noted that in "*the five speeches in the House of Lords, the three judgments in the Court of Appeal and the two judgments in the Divisional Court The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock, at p. 1064, as "****conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt****." These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers.*"

16. This test, I would suggest is not far off a proportionality test applied with some margin of discretion.

17. And indeed interestingly, the concept of proportionality itself has been part of English law for centuries (albeit that we all accept the modern concept derives from German law). Professor Craig sets out the history of the use of that concept in a very interesting article called: "Proportionality and Judicial Review; a Historical Perspective" published in 2016, explaining that terms like 'proportionability', 'proportionable' and 'disproportionate' are found in both legislation and case law from the late 16th century onward. He says that he has found 763 uses of 'proportionably' and 1230 uses of 'proportionable' in statutes enacted since the mid-16th century. It was used particularly in regulatory legislation with the expectation that the courts would interpret the legislation in such a way as not to impose an excessive burden on individuals.

18. Indeed, he explains that it formed a free-standing basis for judicial review and on some occasions provided a legality condition for regulatory intervention. I found particularly interesting his point that this control of regulatory action emerged during the two centuries preceding Adam Smith's free market ideas, when there was significant

regulation of trades including leather, alcohol, iron and clot, wages, bankruptcy, poverty, unemployment, vagrancy, and use, morality police powers, tax and flood defences.

19. Whilst the coming centuries saw deregulation in trade, there was increased regulation in areas such as factories and health. So his historical research discloses that far from proportionality being a wholly foreign import, a proportionality type review has existed in this country since the mid-17th and moreover, was most commonly applied in non-rights based cases, ie economic cases, albeit it was also used in the context of police powers. Whilst there may have been semantic differences (the word proportionality itself is not used), and whilst no three stage test was applied, much more importantly the Courts were concerned to ensure that the regulatory burden placed on the individual was not excessive and that it was fair, given the nature of the regulatory schema.

20. I give only one example: *Rookes* case of 1598. In that case, the Commissioners of Sewers had a broad discretion as to the person or body to be charged with the cost of the repair of river banks for the sewers. They levied only the owner of the bank adjoining the sewer despite others benefiting from it. The Court held that to be unlawful on the basis of an excessive burden being borne by that one land-owner. This is remarkably similar to a modern proportionality analysis in the context say of A1/P1. He gives numerous other examples in this fascinating article.

21. It is wrong in my view therefore, to approach this issue on the basis that there is some bright line between proportionality and reasonableness. The question, as with most legal questions, is context dependent. Further, even if one were of the bent to reject all things foreign (you'll guess I'm not), it would be wrong to reject 'proportionality' as some foreign import. It is not. Indeed all it is, is a normative scheme for assessing the reasonableness of a course of action, in order to protect the citizen or business from state arbitrariness or excessive or unnecessary imposition of burden.

22. Now does that take the court into politics and thus somehow endanger democracy? This is, in my view, a question that is based on a false premise. Again, there is no bright line between politics and law. Rather a balance is to be sought between the role of legislature and executive as the makers and unmakers of law and policy and the role of the judiciary in upholding the rule of law so that the legislature and executive continue to operate democratically. Thus, where people argue that the proportionality test hands too much power to the judiciary in relation to government policies, I would argue that rather, it

hands a schematic tool to the judiciary to ensure that law remains democratic in the broader meaning of the term; the judges operate a constitutional or rule of law check on those who are elected.

23. Thus, proportionality provides a normative approach – at the very least a test that everyone understands for judges to assess whether decision makers are acting democratically (or constitutionally or within the rule of law).

24. Let us take a topical example – the Windrush generation. Now I don't know whether anyone from the Home Office is here but there will be rules or policies on evidence that civil servants are required to apply. If those rules require an individual who has been here since 1968 to prove where s/he was every year since then for example, that rule might on the face of it be within the Home Secretary's power. It might well not be Wednebsury unreasonable, but self-evidently it would be disproportionate. To find that, is in one sense a political finding, but equally, it would be a finding that maintains fairness of such a fundamental kind as to be considered essential in a 'rule of law democracy'.

25. Indeed, Lord Carnwarth in the Supreme Court in *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 (a case about asset freezing) emphasised the judicial support for the use of proportionality as a test in cases involving an interference with "fundamental rights", referring to the recent case of *Pham v Secretary of State for the Home Department* [2015] UKSC 19, in which the Supreme Court endorsed a more flexible approach in reviewing interference with important legal rights, he noted that given the fundamental rights infringed by asset freezing, the reasonableness standard expressed in the Wednesbury test, was inappropriate, regardless of whether those rights derive from the ECHR or common law.

26. I would predict that given this case and the case of *Pham*, the courts will increasingly apply either explicitly a proportionality test or a heightened scrutiny reasonableness test in JR even outside ECHR/EU cases.

27. As to the question I am asked about whether the application of the proportionality test will make cases less predictable, my response would be two-fold.

28. First, whatever the test, whether reasonableness or proportionality, or a merging of the two, judges will come to different views when applying it. Interestingly, Sir Noel

Malcolm's criticism of the ECHR jurisprudence (in his Policy Exchange pamphlet that I mentioned earlier) is that the results were not predictable and that they therefore infringed a requirement that law be 'certain'. But that is fundamentally to misunderstand how law works. Words require interpretation and how one interprets words and facts depends on one's character and experience. Ironically, if you wanted more consistency you would advocate a judiciary made up of people with a similar life experience. But it's generally accepted that consistency is less desirable than a reflection of our society and that diverse life experience is a better basis for a fair judiciary. So my first response is that it is in the nature of judicial review in general that if one reaches the point of litigation that is likely to be because the result is uncertain.

29. My second point would be that asking whether applying proportionality makes results more uncertain than applying rationality, depends on what 'rationality' test you are comparing it with. Of course, it's right that if Wednesbury is the test for a policy or decision, then it is more likely that a Minister will win the case. But that is only because the Wednesbury threshold of review so high (and indeed rarely applied nowadays – as I have said my view is that irrationality will increasingly merge with proportionality as a standard of review – the standard in all cases being context dependent). Whilst applying old-style Wednesbury therefore, a Minister could be confident that provided his policy or decision is not crackers, it's more likely than not to be 'reasonable' under the Wednesbury test. If one compares with the modern day reasonableness test, which is applied with different levels of scrutiny depending on context, the proportionality test is arguably a more rigorous staged test and therefore again, theoretically should provide a more predictable outcome.

30. Finally, I want to turn to the proportionality test itself. There are different concepts of proportionality in (1) EU law; (2) under the ECHR/HRA and (3) under the common (where it is developing). But again, even in relation to each of these, in practice, their application differs depending on factual context. Thus, within EU law for example, the concept applies with varying degrees of intensity depending upon the nature of the measure being challenged.

31. Proportionality is of course a general principle of EU law, first established in the *Handellgesellschaft* case. It applies irrespective of whether any right is at issue. That case concerned a challenge to the system of import and export licences. The principle can now

be found, since Lisbon in Article 5 (4) TEU: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." It is therefore a fundamental constitutional principle – limiting Governmental or institutional powers.

32. How it is applied has been significantly nuanced and developed according to context. For example, the level of scrutiny will differ depending on whether the act being reviewed is that of an EU institution, a Member State, and whether it involves an interference with a fundamental freedom. Put at its highest the test can be very strict – the minimum interference possible to achieve relevant objective.

33. Generally, there are three questions – although the second and third are sometimes rolled together:

    a. is the measure in question suitable or appropriate to achieve the objective pursued?;

    b. is the measure necessary to achieve that objective, or could it be attained by a less onerous method?

    c. Is the burden of the measure disproportionate to the benefit

34. The most frequent application of the proportionality principle, which is applied more strictly than where the challenge relates to an EU measure, is in the context of national measures that interfere with fundamental EU freedoms.

35. The priority is the protection of the internal market, related social values and exposing latent discrimination:

> *"In that context, the court, seeing itself as the guardian of the Treaties and of the uniform application of EU law, generally applies the principle more strictly. Where, however, a national measure does not threaten the integration of the internal market, for example because the subject matter lies within an area of national rather than EU competence, a less strict approach is generally adopted."*

36. In English law applying the ECHR a four-stage test for proportionality is set out in the *Bank Mellat v HM Treasury* *(No. 2) [2014] AC 700 (see Lord Sumption, for the majority at

[20] and Lord Reed, dissenting in the result but not, for present purposes the analysis, at [74]):

a. whether its objective is sufficiently important to justify the limitation of a fundamental right;

b. whether it is rationally connected to the objective;

c. whether a less intrusive measure could have been used; and

d. whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

37. It was said that the four-stage test required "an exacting analysis" of the fact of individual cases and the alleged justification for an interference with a Convention Right. But again, as we all know, context is everything. For example, in the context of tax (see the recent CA case of *R (on the application of Rowe and others) v Revenue and Customs Commissioners* [2018] STC 462, the Court will afford a far greater degree of deference.

38. I want to end by reference to a recent case that considered whether proportionality should now form a free-standing ground of judicial review (albeit that as I've already argued, in my view as a matter of practice it does already). In *Regina (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] 3 WLR 1665, in the Supreme Court noted that such a possibility had been canvassed in numerous cases, sometimes enthusiastically, for example, *Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410 e, and Lord Slynn of Hadley in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, para 51.* In that case however, the Appellants argued that the four-stage test identified by Lord Sumption and Lord Reed JJSC in Bank Mellat v HM Treasury (No 2) [2014] AC 700, paras 20, 74 should now be applied in place of rationality in all domestic judicial review cases. The Court rejected that submission. But it did so only on the basis that it was a five justice panel. It noted that such a change:

> *132* ***potentially has implications which are profound in constitutional terms and very wide in applicable scope.***

39. In explaining the difference between rationality and proportionality, Lord Neuberger said:

> *133 The move from rationality to proportionality, as urged by the appellants, would appear to have potentially profound and far reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest – see R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, para 27, per Lord Steyn.*
>
> *The answer to the question whether the court should approach a challenged decision by reference to proportionality rather than rationality may depend on the nature of the issue – see for instance the discussion by Gertrude Lübbe-Wolff in The Principle of Proportionality in the Case Law of the German Federal Constitutional Court (2014) 34 HRLJ 12."*

40. And Lord Kerr was to [273]-[278], emphasised what I have been saying, that

> *"273 It should also be understood that the difference between a rationality challenge and one based on proportionality is not, at least at a hypothetical level, as stark as it is sometimes portrayed. This was well expressed by Lord Mance JSC inKennedy v Information Comr (Secretary of State for Justice intervening) [2015] AC 455. At para 51, he said:*
>
> *"The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle…The nature of judicial review in every case depends on the context. The change in this respect was heralded by Lord Bridge of Harwich … in R v Secretary of State for the Home Department, Ex p Bugdaycay [1987] AC 514, 531 where he indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion, 'the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines'."*

41. Developing this theme and touching on the subject of the innate superiority of proportionality as a tool of review, Lord Mance JSC continued at para 54:

"both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance or benefits and disadvantages."

"96. In short, proportionality is – as Professor Dr Lübbe-Wolff (former judge of the Bundesverfassungsgericht which originated the term's modern use) put it in The Principle of Proportionality in the Case Law of the German Federal Constitutional Court (2014) 34 HRLJ 12, 16–17 – 'a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction', 'just a rationalising heuristic tool'. She went on, at p 16: 'Whether it is also used as a tool to intensify judicial control of state acts is not determined by the structure of the test but by the degree of judicial restraint practised in applying it.' Whether under EU, Convention or common law, context will determine the appropriate intensity of review: see also Kennedy v Information Comr [2015] AC 455, para 54."

276 Lord Sumption JSC expressed a similar views, saying at para 105 that "*although English law has not adopted the principle of proportionality generally, it has for many years stumbled towards a concept which is in significant respects similar, and over the last three decades has been influenced by European jurisprudence even in [2015] 3 WLR 1665 at 1737areas of law lying beyond the domains of EU and international human rights law*".

42. To conclude, I would say that when we hear people the question does a legal test make judges too political – we should take note – and query whether that is the right question. Public law more than ever before requires judges to take on the challenge of applying the principles of 'constitutionalism' or the 'rule of law' so as to ensure that law makers do not use their powers to undermine democracy itself. Judges tread a fine line but we should not shy away from the fact that in one sense at least, judicial power are necessarily political; they are necessarily political because their proper application ensures the maintenance of freedom that forms the bedrock of a true democracy.

Jessica Simor QC

17 April 2018.