

Proportionality and invariable baseline intensity of review*

Cora Chan**

One of the most contested issues in UK public law is how to calibrate the appropriate intensity of proportionality review in human rights adjudication. Here the challenge lies in formulating a theory of intensity of review that can both comply with the constitutional framework introduced by the Human Rights Act 1998 ('HRA') and accommodate courts' varying levels of competence in different areas of litigation. This article attempts to sketch such a theory in two steps. First, it argues that to fulfil the constitutional expectations brought about by the HRA, a minimum rigour of proportionality review should be observed. This baseline consists of requiring the government to demonstrate to the courts by means of cogent and sufficient evidence that a rights-limiting measure satisfies the distinct stages of the proportionality test. Secondly, this article highlights the ways in which compliance with this baseline can nonetheless accommodate the courts' varying levels of competence in different adjudicative contexts. In particular, courts can vary the intensity of review once the baseline level of review is reached and adjust the nature of the evidence required from the government.

INTRODUCTION

The use of proportionality as a standard of review in cases concerning the Human Rights Act 1998 ('HRA') has brought about both promises and anxieties. On the one hand, proportionality is expected to become the definitive framework for protecting human rights, offering more intense scrutiny of government decisions as compared to traditional standards of review. Yet on the other, there are concerns that such an inherently intrusive standard will enable courts to interfere with questions that they lack the institutional capacity or democratic legitimacy to decide. To allay these concerns, courts and academics have heralded that courts can apply proportionality with varying degrees of intensity or deference, exercising the level of control appropriate to the circumstances.¹ Proportionality has been presented as if it is a magic wand that can shrink or expand flexibly at the court's will.

*The wording of the title is adapted from the title of Julian Rivers' influential article, 'Proportionality and variable intensity of review' in (2006) 65 CLJ 174.

The search for a formal theory of intensity of review for applying the substantive theory of proportionality has hitherto focused on what factors should influence the strength of review in human rights cases.² An overlooked issue is the *extent* to which the intensity of proportionality review may vary; in particular, whether proportionality should be applied ‘infinitely cautiously’ where potential infringements of human rights are at stake.³ This is an important issue. If courts apply proportionality with scant rigour, there will be insufficient protection against human rights violations. The prevalent view on whether there is a limit to the flexibility of proportionality in rights review seems to be that such review can be extremely lax. In the name of deference, courts have allowed limitations of rights that are ‘not manifestly disproportionate’⁴ or have been terse in scrutinising the government’s case on proportionality.⁵ Some commentators have implied that rights review can be light-touch by

**Assistant Professor, Faculty of Law, University of Hong Kong. The author would like to thank Julian Rivers, David Feldman, Lusina Ho, Tony Carty, Peter Chau, Mingchiu Li, Ernest Lim, Eileen Lou, Javier Oliva, Scott Veitch, Po Jen Yap, the editors of *Legal Studies* and participants at the Society of Legal Scholars Conference held at University of Bristol, September 2012.

¹ Below notes 2 and 7; P Craig, *Administrative Law* 6th Edition (London: Sweet & Maxwell, 2010), pp 635-636; M Elliott, ‘The Human Rights Act 1998 and the Standard of Substantive Review’ (2001) 60 CLJ 301, at 313-315; M Elliott, ‘The HRA 1998 and the Standard of Substantive Review’ [2002] 7 JR 97, at 99; M Taggart, ‘Proportionality, Deference, Wednesbury’ (2008) NZLR 423, 465; *Mahmood v Secretary of State for the Home Department* [2001] 1 WLR 840 (‘*Mahmood*’), at [19]; *Farrakhan v Secretary of State for the Home Department* [2002] EWCA Civ 606 (‘*Farrakhan*’), at [64].

² Eg M Hunt, ‘Sovereignty’s Blight: Why Public Law Needs “Due Deference”’ in N Bamforth and P Leyland (eds) *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003) 337 and J Jowell, ‘Judicial Deference and Human Rights: a Question of Competence’ in P Craig and R Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford: OUP, 2003), p 67. The distinction between substantive and formal theories of proportionality was drawn in J Rivers, ‘Proportionality and variable intensity of review’ (2006) 65 CLJ 174 at 177; R Alexy, *A Theory of Constitutional Rights* (translated by J Rivers) (Oxford: OUP, 2002), pp 414-425. For other theories of deference, see A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: CUP, 2009) (‘*Constitutional Review*’), part II; A Kavanagh, ‘Defending Deference in Public Law and Constitutional Theory’ (2010) 126 LQR 222; AL Young, ‘In Defence of Due Deference’ (2009) 72(4) MLR 554; RA Edwards, ‘Judicial Deference under the Human Rights Act’ (2002) 65(6) MLR 859. Perhaps the sole dissent to the search for a theory of deference is TRS Allan, see his ‘Human Rights and Judicial Review: A Critique of “Due Deference”’ (2006) 65 CLJ 671; and ‘Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory’ (2011) 127 LQR 96.

³ T Poole, ‘The reformation of English administrative law’ (2009) 68 CLJ 142, at 147.

⁴ Eg *S and KF v Secretary of State for Justice* [2012] EWHC 1810 (Admin) (‘*S and KF*’) at [44]-[48]; *Aguilar Quila v Secretary of State for Home Department*; *Bibi v Same* [2011] UKSC 45 (‘*Quila*’) at [91] per Lord Brown (dissenting judge); *British Telecommunications Plc v Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin) (‘*British Telecommunications*’), at [234]; *Sheffield City Council v Personal Representatives of June Wall* [2010] EWCA Civ 922, at [33]; *Sinclair Collis Limited v Secretary of State for Health* [2010] EWHC 3112 (‘*Sinclair*’), at [94]-[96]; *Global Knafaim Leasing Ltd v Civil Aviation Authority* [2010] EWHC 1348 (Admin) (‘*Global Knafaim*’) at [65]; *SRM Global Master Fund LP* [2009] EWCA Civ 788 at [75]; *Federation of Tour Operators v HM Treasury* [2008] EWCA Civ 752, at [21]; *Cadogan v Pitts* [2008] UKHL 71, at [48]; *Trailer & Marina (Leven) Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 153 (‘*Trailer & Marina*’) at pp 847-848; *Ford v Press Complaints Commission* [2001] EWHC Admin 683 at [28].

⁵ Eg *Ghai v Newcastle City Council* [2010] EWCA Civ 59 (‘*Ghai*’), at [121]-[123]; *Animal Defenders International v Secretary of State for Culture, Media and Sport* [2008] UKHL 15 (‘*Animal Defenders*’) at [31]-[37]; *R (Gillan) v Metropolitan Police Commissioner* [2006] 2 AC 307 (‘*Gillan*’) esp at [62]-[65]; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 (‘*Roth*’), at [75]-[87], per

endorsing these judgments.⁶ Contrarily, a few authors have hinted that proportionality review cannot be very relaxed in human rights cases.⁷ Nevertheless, there has been little systematic analysis on what a baseline intensity of review may look like.

This article aims to debunk the widely shared misconception (at least among the judiciary) that proportionality can be applied with *any* intensity in *human rights* cases. While it may be true that proportionality, discussed as a general head of review for different subject matters, may be applied with a wide range of rigour,⁸ the intensity of proportionality review in *rights* cases in the U.K. should be determined within the constitutional framework set by the HRA. The challenge, then, is to formulate a theory of intensity of review that not only accommodates the courts' varying levels of institutional capacity and legitimacy in different contexts but also satisfies constitutional principles under the HRA. This article will attempt to sketch such a theory in two steps. First, it will argue that to comply with the rules of adjudication under the HRA, courts must observe a minimum intensity of proportionality review. It will show that courts have so far failed to observe this threshold, sometimes due to an indiscriminate import of the proportionality formulae of the European Court of Human Rights ('ECtHR').

Secondly, this article will propose how compliance with this baseline can nonetheless accommodate courts' varying levels of competence in different adjudicative contexts. In particular, once the minimum level of review is reached, courts can vary the intensity of review in accordance with the severity of the rights limitation, which is a function of the importance and nature of the right and the degree of limitation.⁹ Moreover, courts can adjust the nature of the evidence required from the government in different cases. It is hoped that by defining an invariable baseline intensity of review in rights cases and clarifying the ways in which proportionality review is variable, this article can contribute to resolving the apparent dilemma between protecting individual rights on the one hand and respecting majoritarian

Laws LJ (dissenting judge); *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40 ('*Wilson*'), at [70]-[78]; *Farrakhan* at [71]-[79].

⁶ See eg section 3 below, evaluating the theories of Rivers and Kavanagh.

⁷ M Elliott, 'Scrutiny of Executive Decisions under the Human Rights Act 1998: Exactly How "Anxious"?' [2001] 6 JR 166 at paras 13-15; Elliott, above n 1, JR at 99; CLJ at 311; R Clayton, 'Proportionality and the HRA 1998: Implications for Substantive Review' [2002] 7 JR 124, at para 44; G Phillipson, 'Deference, Discretion and Democracy in the Human Rights Act Era', (2007) 60 CLP 40, at 76; D Feldman, 'Proportionality and the Human Rights Act 1998' in E Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999), pp 122-124; M Fordham and T de la Mare, 'Identifying the principles of proportionality' in J Jowell and J Cooper (eds), *Understanding Human Rights Principles* (Oxford: Hart Publishing, 2002), p 60.

⁸ Eg In the EU, where proportionality is an independent head of review, it may justifiably be argued that proportionality review can range from 'not manifestly disproportionate' (eg where the Common Agricultural Policy is concerned) to strict necessity (eg where fundamental freedoms are restricted). Ellis, *ibid*.

⁹ Cf Rivers, above n 2 at 205.

democracy and the government's institutional competence on the other – a dilemma which the express reception of proportionality in human rights adjudication has exacerbated.

This article will proceed on two fairly uncontroversial assumptions. First, it is generally accepted in academia that UK courts are not bound to follow the ECtHR's proportionality analysis in assessing whether a rights interference is justified, where such analysis has been diluted by the margin of appreciation.¹⁰ It is widely accepted that courts are free in these instances to apply proportionality in a way that accords more protection to rights than that offered by Strasbourg.¹¹ As has been explored elsewhere, this position is supported by parliamentary intent.¹² This position is also intellectually appealing because the concerns of cultural distance that underlie the ECtHR's margin of appreciation concept has no application in domestic courts.¹³ This article seeks to devise a formal theory of proportionality using the adjudicative rules introduced by the HRA as an analytical framework. It is hoped that this will contribute to the construction of a home-grown theory of proportionality, which can fill the void that the 'disentangling' of the margin of appreciation aspects from Strasbourg jurisprudence would inevitably leave.¹⁴

Secondly, this article assumes that it is important to fulfil the constitutional expectations that the HRA has created. As will be seen, these expectations grew from a recognition of Convention rights as fundamental requirements of our democracy. Unless and until courts are

¹⁰ Whether domestic courts should incorporate the margin of appreciation when defining the scope of a right is more controversial, but is not relevant for present purposes. See *Marper v Chief Constable of South Yorkshire* [2004] UKHL 39 at [27].

¹¹ Judicial attitudes are more diverse. Contrast, eg *ProLife Alliance v British Broadcasting Corporation* [2002] 2 All ER 756 at [33]-[34] with *Ullah v Special Adjudicator* [2004] UKHL 26 at [20], *Ambrose v Harris* [2011] UKSC 43, and *S and KF* at [50]-[71]. Cf. H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford: OUP, 2006), pp 105-106, 144-153; G Phillipson, H Fenwick, 'Public protest, the Human Rights Act and judicial responses to political expression' (2000) PL 627, at 641-645; Feldman, above n 7, pp 120-125; Fordham and de la Mare, above n 7, p 82; I Leigh, 'Taking rights proportionately: judicial review, the Human Rights Act and Strasbourg' [2002] PL 265, at 272- 277; Sir John Laws 'The limitations of human rights' (1998) PL 254 at 258; R Masterman, 'Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?' (2004) PL 725; R Masterman, 'Aspiration of foundation? The status of the Strasbourg jurisprudence and the "Convention rights" in domestic law' in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: CUP, 2007), p 57; M Hunt, R Singh and M Demetriou, 'Is there a role for the "margin of appreciation" in national law after the Human Rights Act?' (1999) 1 EHRLR 15.

¹² See commentaries *ibid*.

¹³ *Ibid*.

¹⁴ This article will only sketch the basic structure of such a theory. Ideally, the theory should incorporate the central ideas of the Convention and principles specific to each right as well. Cf R Masterman, 'Taking the Strasbourg jurisprudence into account: developing a "municipal law of human rights" under the Human Rights Act' (2005) ICLQ 907; Fenwick and Phillipson, above n 11, p 146. The need for a domestic theory of proportionality will be more compelling if plans to widen the margin of appreciation in Strasbourg are implemented: eg Brighton Declaration, High Level Conference on the European Court of Human Rights. My arguments will not be affected by attempts to introduce a UK Bill of Rights, unless the Bill significantly reduces domestic courts' powers, which is unlikely.

prepared to forsake this view of rights – my analysis below will show that they clearly are not ready to do so – judicial candour and consistency call for them to faithfully fulfil these expectations.

This article focuses on the rigour with which proportionality should be applied in testing the justifiability of a measure *after* a prima facie limitation of rights has been established. I am non-committal on whether my arguments apply to the use of proportionality in other contexts.¹⁵ ‘Government’ will be used in this article to refer to the legislature *or* executive. In the following, I will first distinguish two senses of the ‘intensity of review’. Next I will underline three expectations that the HRA has created. I will then argue that to realise these expectations, a minimum intensity of review must be observed. This article will conclude by explaining how compliance with this baseline can remain responsive to context.

1. TWO SENSES OF ‘INTENSITY OF REVIEW’

In referring to the ‘intensity of review’, courts and academics oscillate between two senses of the term.¹⁶ In a broad sense, the intensity of review denotes the extent to which the court scrutinises the government’s decisions. Judges and academics are using the term in this sense when they describe proportionality as a standard that inherently allows for more ‘intense’ review than *Wednesbury* unreasonableness.¹⁷ The intensity of review in this sense is controlled by (1) the standard of review (e.g. *Wednesbury* or proportionality) and (2) the rigour or intensity *with which such standard is applied*, or intensity of review in a *narrow* sense. The intensity of review in both senses is variable and consists of a spectrum.

This article is interested in the narrow sense of the term, specifically, the rigour with which the standard of review in human rights adjudication – namely, proportionality – should be applied. Nonetheless, as the next section illustrates, how rigorous proportionality analysis in rights cases should be is affected by how intrusive the judiciary ought to be in the broad sense in that context. *Unless otherwise stated*, ‘intensity of review’ will be used in this article to denote the narrow sense of the term. Courts have controlled the intensity of proportionality review mainly through manipulating the following elements:¹⁸

¹⁵ For example, to test whether a right has been interfered with.

¹⁶ It is sometimes unclear in which sense the term is being used. Eg Kavanagh, *Constitutional Review*, 204, 259. I thank Julian Rivers for stressing the importance of highlighting the distinction between the two usages of the term.

¹⁷ Below n 20. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹⁸ Elliott proposes that courts can exhibit deference in two ways: (1) phrasing the proportionality questions in a less demanding way, or (2) making it easier for the government to satisfy them that the questions have been

- (a) Components of the standard of review: e.g. whether proportionality consists only of a single fair balance question or of an elaborate template of questions.
- (b) Burden of proof: whether it is for the government to prove that a rights limitation is proportionate, or for the litigant to prove that it is not.
- (c) Standard of proof: how certain the court should be that a rights-limiting measure is proportionate before sanctioning the measure e.g. beyond reasonable doubt (the criminal standard) or on a balance of probabilities (the civil standard).
- (d) Quantum and quality of evidence required to discharge the burden of proof: whether the party bearing the burden of justifying rights limitations must adduce cogent and sufficient evidence to do so, or may rely on assertions or presumptions that are not fully demonstrated by evidence.

2. CONSTITUTIONAL EXPECTATIONS UNDER THE HRA

The HRA has created new constitutional expectations regarding the rules of human rights adjudication. I will highlight three of them, drawn from judgments and academic writing on the subject.

First, it is expected that if there is a spectrum of intensity of review (in the broad sense), then human rights review should categorically fall on the most intense section of this spectrum, *and* such searching scrutiny is to be delivered through applying proportionality intensely (in the narrow sense).

Even before the inception of the HRA, courts have emphasised that common law rights attract the most anxious scrutiny on the sliding scale of *Wednesbury* unreasonableness.¹⁹ In *Daly* – the leading authority on the standard of review in human rights cases – the House of Lords confirmed proportionality as the standard of review and distinguished it from traditional standards of review such as *Wednesbury* unreasonableness and anxious *Wednesbury* scrutiny, which it considered as insufficient for protecting rights.²⁰ *Daly* conceives proportionality as a more intrusive and structured test. The intrusiveness is

answered satisfactorily. In my view, (a) corresponds to (1), whereas (c) and (d) correspond to (2). M Elliott, 'Proportionality and Deference: the Importance of a Structured Approach' in C Forsyth, M Elliott, S Jhaveri, A Scully-Hill, and M Ramsden (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: OUP, 2010), p 269.

¹⁹ Eg *R v Secretary of State for the Home Department Ex p. Brind* [1991] 1 AC 696; *R v Secretary of State for the Home Department Ex p. Leech* [1994] QB 198.

²⁰ *R v Secretary of State for the Home Department Ex p. Daly* [2001] 2 AC 532 ('*Daly*'), per Lord Steyn at [27]-[28]. This was handed down after the ECtHR's judgment of *Smith and Grady v UK* (1999) 29 EHRR 493, which confirmed that traditional standards of review are insufficient for protecting Convention rights.

guaranteed by courts ‘themselves’ deciding the ‘twin’ questions of whether the interference is necessary and proportionate. This penetrating inquiry is translated into a set of questions that infuses the test with structure. *Daly* endorsed the 3-stage *De Freitas* formula:

1. Whether the measure pursues a sufficiently important aim;
2. Whether the measure is rationally connected to the aim;
3. Whether the measure is no more than necessary to achieve the aim. This stage requires courts to consider whether there are alternatives that can achieve the aim to the same degree but encroach the right to a smaller extent.

Subsequent decisions expanded the notion of fair balance into a 4th limb:

4. Whether the benefits of the measure are overall worth the costs.²¹

Courts have frequently endorsed *Daly*’s approach to rights review²² and emphasised that human rights adjudication must be structured and stringent.²³ Many academics who argue that the strength of proportionality enquiry should vary across subject matters accept that rights invite the rigorous end of the scale.²⁴ Craig, for instance, contends that fundamental rights attract a searching proportionality analysis involving consideration of alternatives.²⁵ Likewise, Elliott argues that proportionality should be given ‘full weight’ in rights cases, which ‘will *always* involve “anxious scrutiny”’, although ‘the precise degree of anxiety... will vary [with context]’.²⁶ The expectation has all along been that a rigorous and structured proportionality test should apply, to enable a high degree of scrutiny in human rights cases.

The second expectation is that once a *prima facie* limitation of rights has been established, the government bears the burden of justifying it.²⁷ Traditionally, the litigant bears the burden of showing that public conduct fails the requisite standard. Scholars describe the shift in onus in rights cases as signifying a shift in culture: from one of authority to one of

²¹ Eg *Huang v Secretary of State for the Home Department* [2007] UKHL 11 (*‘Huang’*), at [19]; recent application in *Regina (F (A Child)) v Secretary of State for the Home Department* [2011] 1 AC 331, at [17].

²² Eg *Begum v Denbigh High School Governors* [2006] UKHL 15 (*‘Begum’*), p 116 ; *Farrakhan* at [65]; *Huang* at [13]; *ProLife Alliance v British Broadcasting Corporation* [2004] 1AC 185 (*‘ProLife’*) at [133]; *Sinclair*, at [68]; *R v Shayler* [2003] 1 AC 247 (*‘Shayler’*) at [33]-[79]; *Ponting v Governor of Whitemoor Prison* [2002] EWCA Civ 224, at [64]-[71], [108]-[109]; *Samaroo v Secretary of State for the Home Secretary* [2001] EWCA Civ 1139 (*‘Samaroo’*), at [15]-[17]; *Roth* at [51]-[52], [181], [193].

²³ Eg *Naik v Secretary of State for the Home Department* [2011] EWCA Civ 1546 (*‘Naik’*) at [88]; *Ahmed v Her Majesty’s Treasury* [2010] 2 AC 534, at 591-593; *Begum*; *Mahmood* at [16]-[19], [39]; *A v Secretary of State for the Home Department* [2005] 2 A.C. 68 (*‘Belmarsh’*) at [44]; *ProLife* at [12]; *R v Secretary of State for the Home Department es p. Turgut* [2001] 1 All ER 719 at 729; *South Bucks District Council v Porter* [2003] 3 All ER 1 (*‘Porter’*) at [58].

²⁴ Below notes 25-26; Taggart, above n 1 at 477-478; Clayton, above n 7 at para 44.

²⁵ Craig, above n 1, pp 628-629.

²⁶ Emphasis added. Elliott, above n 1 JR at 99; CLJ at 311, 336.

²⁷ Recently confirmed in *Quila* at [44]; *AB (Jamaica) v Secretary of State for Home Department* [2008] 1 WLR 1893 at [7]. See also Taggart, above n 1 at 439; Fordham and de la Mare, above n 7, pp 27, 88.

justification.²⁸ Under the latter, courts are no longer expected to give the government the benefit of the doubt or to take it on blind trust.

The third expectation is that courts are now guardians of rights. The case law and scholarship is replete with acknowledgements of this constitutional role.²⁹ The HRA is an express democratic mandate for courts to police the compatibility of legislative and executive acts with individual rights.³⁰ Courts are given new powers of interpretation, reviewing legislation and issuing declarations of incompatibility. There is no doubt that under the HRA courts are empowered to pronounce the contours of a rights-based democracy, notwithstanding Parliament's ultimate power to defy these pronouncements.³¹

All three expectations are premised on the normative significance of human rights. A rigorous and structured proportionality test is necessary and desirable for protecting these rights. Feldman suggests that in order to give 'central importance' to Convention rights, the proportionality enquiry should ask whether the measure is 'sufficiently narrowly drawn and accurately aimed' at its purpose and whether the measure is overall balanced.³² Craig contends that consideration of alternatives is necessary since the 'very denomination of an interest as a fundamental right means that any invasion... should be kept to a minimum'.³³ Moreover, allocating the burden of justification to the government reflects the importance of rights in situations where the case for and against finding a rights violation is equally strong or it is uncertain which side is stronger.³⁴ Finally, vesting the power to protect rights with an independent and impartial branch of the government is necessary to give practical effect to rights.³⁵ It is therefore natural that the enactment of the HRA – the express Parliamentary recognition of Convention rights as requirements of British democracy – has created expectations of these rules.

3. BASELINE INTENSITY OF REVIEW

²⁸ Allan, above n 2 CLJ at 694; Edwards, above n 2 at 866; Kavanagh, above n 2 *Constitutional Review* p 242; Hunt, above n 2, p 340. See also D Dyzenhaus, 'Law as justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal on Human Rights* 11; HC debs, 21 October 1998, vol 317, col 1357; C O' Cinneide, *Human rights and the UK constitution* (The British Academy, 2012) pp 16, 24.

²⁹ Eg *Roth* at [27]; *Naik* at [46]-[48], [64]; *Belmarsh* at [42]-[44]; Lord Steyn, 'Deference: a tangled story' [2005] PL 346; Jowell, above n 2.

³⁰ The Lord Chancellor explained that the Bill was designed to give courts 'as much space as possible to protect human rights': HL Debs, 3 November 1997, vol 582, col 1227.

³¹ Jowell, above n 2, p 70; T Hickman, *Public Law after the Human Rights Act* (Oxford: Hart, 2011), p 23.

³² Feldman, above n 7, pp 122-124.

³³ Craig, above n 1, p 629. See also Jowell, above n 2, p 79.

³⁴ A Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: CUP, 2012), pp 443-446.

³⁵ For accounts of why courts are suited to guarding rights, see eg J Raz, 'Disagreement in Politics' 43 *Am J Juris* 25 (1998); D Feldman, 'Human Rights, terrorism and risk: the roles of politicians and judges' [2006] PL 364. Cf J Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999).

To fulfil these three expectations, a minimum intensity of review comprising three *corresponding* characteristics must be observed.

(a) Full proportionality analysis

To realise the first expectation that a rigorous and structured proportionality analysis would be applied to protect human rights, courts must at least determine whether a rights-limiting measure passes the 4-stage proportionality enquiry explained in section 2, including the 3rd and 4th stages on whether the measure is no more than necessary and overall proportionate.³⁶ The first two stages of the proportionality enquiry on legitimate aim and rationality are threshold questions that are implicit in traditional standards of review. The 3rd and 4th stages are the crunch questions that guarantee the *extra* scrutiny in human rights review. Traditional standards were rejected in the rights context precisely because they are unable to offer such extra protective force. In adjusting the rigour of proportionality analysis to suit the context, courts should bear in mind that at the dawn of the HRA, they have already rejected lower standards of review and placed rights on the highest section of the spectrum of judicial interference. It would be a ‘striking irony’ to *re-open lower zones of the spectrum* in implementing Parliament-ordained rights, just as the ordinary common law has sealed off these zones to safeguard fundamental rights.³⁷

Judges have generally recognised that proportionality review should be searching and structured in rights cases, but many fail to see that they themselves have flouted this expectation by blunting the proportionality test in the following ways, sometimes as a result of blindly importing Strasbourg’s margin of appreciation:³⁸

- (1) By-passing one or more stages of the proportionality enquiry, often the 3rd and 4th stages.³⁹

³⁶ This position is supported by some commentators. See eg Fordham and de la Mare, above n 7. Hickman cautions that if we do not give structure and content to proportionality, then the expectations of proportionality being ‘intrusive, precise and sophisticated’ would be defied. T Hickman, ‘The substance and structure of proportionality’ [2008] PL 694, at 716.

³⁷ Cf Allan’s criticism of ‘due deference’, above n 2 CLJ 672.

³⁸ A recent example is *S and KF*.

³⁹ *Wilson*, per Lord Hobhouse; *Shayler* at [80]-[85], [99]-[118], arguably skipped third and fourth stages; *Samaroo* at [19]-[20], skipped 3rd stage; *Farrakhan*, skipped all stages; *Marper v Chief Constable of South Yorkshire* [2003] 1 All ER 148 at [42], assumed answer to 3rd stage.

- (2) Merging all four stages of the enquiry into one general question of whether the government has struck a fair balance or whether the measure is reasonable or permissible.⁴⁰
- (3) Intervening only when the measure is manifestly disproportionate.⁴¹
- (4) Asking whether the measure can reasonably be considered as proportionate.⁴²
- (5) Diluting the ‘no more than necessary’ question to whether the means is reasonably necessary to achieve the aim.⁴³

If one were to remain faithful to the rigour and structure expected of proportionality review in rights cases, these forms of deference must be rejected.

The structured character of proportionality is much attenuated through (2), which resembles the single unstructured test of reasonableness asked in the pre-HRA era.⁴⁴ (2)-(4) amount to applying a standard of review lower than and different from proportionality. (2) is reminiscent of the intuitive test of *Wednesbury*. The House of Lords’ judgment in *ProLife* can be interpreted as exhibiting (2). The majority remarked that the court could not interfere with the BBC’s decision to ban the litigant’s election broadcast unless it was unreasonable and should not carry out the balancing exercise between rights.⁴⁵ Some academics seem to have endorsed such light-touch review. When explaining that the intensity of review should vary with the seriousness of the rights limitation, Rivers argues that the relaxed form of judicial scrutiny in *ProLife* would be ‘appropriate’ for ‘relatively minor’ violations of rights but not for the *ProLife* case itself, which involves a serious inroad into the important right to political free speech.⁴⁶ However, even less severe violations of something as important as human rights do not justify reintroducing the form of non-penetrating and unstructured review found in *ProLife*. While Rivers’ idea of varying the intensity according to the severity of rights interference is helpful (as will be discussed in section 4(b)), his theory is ultimately deficient due to the lack of a baseline intensity that guarantees effective protection of individual rights.

⁴⁰ *A v Secretary of State for the Home Department* [2002] HRLR 45 (SIAC), p 1290; *ProLife*; *Belfast City Council v Miss Behavin’ Ltd* [2007] UKHL 19 at [16] per Lord Hoffmann; *Wilson* per Lord Hobhouse; *Global Knafaim*.

⁴¹ See above n 4.

⁴² *Mahmood* at [37]; *Samaroo* at [30]-[33]; *Ismet Ala* at [41]-[44].

⁴³ *Trailer & Marina* at 847; *Wilson* per Lord Nicholls; *Sinclair* at [77]-[82], [94]-[96]; *S and KF* at [47].

⁴⁴ See criticisms in eg I Leigh, ‘The standard of judicial review after the Human Rights Act’ in Fenwick, Phillipson and Masterman (eds), above n 11, p 199; Fenwick and Phillipson, n 11, p 102.

⁴⁵ *ProLife* at [8], [16], [51], [58], [73], [77].

⁴⁶ Rivers, above n 2, at 206.

Regarding (3), just as unreasonableness and *Wednesbury* unreasonableness are in truth different standards of review, disproportionality and manifest disproportionality are really different standards. As section 2 shows, post-HRA, it is expected that an interference with rights is only allowed if it is not disproportionate. The test is for disproportionality rather than manifest disproportionality. Given the importance of human rights, which the reception of proportionality in rights cases seeks to recognise, there is no normative reason why a measure that encroaches rights can be sustained if it is not manifestly disproportionate, though disproportionate.⁴⁷

As regards (4), testing for whether a measure can reasonably be considered as proportionate is very different from asking whether it is proportionate.⁴⁸ Regarding the former, the court need only enquire whether a reasonable person can consider it as proportionate. Yet for the latter, the court must itself answer the substantive question. Recent judgments have rightly rejected (4) as being redolent of the traditional reasonableness test and insufficient for protecting rights.⁴⁹

(1) and (5) lower the rigour of review to a standard far below that expected of proportionality in rights cases. The ‘no more than necessary’ test ensures that rights are infringed to the smallest extent possible. If this question is watered down to one of reasonable necessity, a rights-limiting measure may be adopted even when there is a less intrusive measure.⁵⁰ The overall proportionality test ensures that the benefits of a measure are overall worth the costs to a democratic society. If both the ‘no more than necessary’ and overall proportionality tests are omitted, then we would be left with the first two threshold questions on legitimate aim and rationality, which exemplify a ‘purified idea of *Wednesbury*’.⁵¹ If either or both of the ‘no more than necessary’ and overall proportionality tests are abbreviated, much of the protective force expected of rights review will be lost. Kavanagh and other supporters of ‘due deference’ argue that courts should give varying degrees of weight to the government’s views.⁵² Kavanagh in particular supports exhibiting such deference through the reasonable proportionality and fair balance formulae.⁵³ While the idea of giving weight to the government’s views is useful (as will be discussed in section 4(c)),

⁴⁷ Cf Elliott, above n 18, p 283.

⁴⁸ Cf the distinction between standard of legality and standard of review drawn in Hickman, above n 31, p 99.

⁴⁹ Eg *Daly*; *Huang*.

⁵⁰ Also, such dilution conflates the question of means with that of ends and is inimical to structured review: Elliott, above n 18, pp 270-280.

⁵¹ Rivers, above n 2 at 198.

⁵² Kavanagh, Young, Hunt, above n 2.

⁵³ Kavanagh, above n 2, *Constitutional Review*, p 240.

these formulae for exhibiting deference reduce the rigour of scrutiny to a level below that appropriate for rights cases.

One may object that the different formulations in the HRA of the level of necessity required for curtailing rights should be reflected in different designs of the proportionality test. The ‘no more than necessary’ and ‘overall balance’ tests should only be applied to test interferences with highly important rights like the right to life, which, according to the HRA, may only be curtailed when ‘absolutely necessary’ (article 2). More relaxed proportionality tests in the form of (1)-(5) should apply to less important rights such as the right to peaceful enjoyment of possessions, which may be restricted when ‘in the public interest’ (article 1 of protocol 1).

My reply is as follows. I do not dispute that the HRA contains a hierarchy of rights. However, as discussed, judges and scholars unequivocally accept that rights categorically attract the most stringent examination. *In pronouncing this stance*, courts and academics made no distinction between different rights in the HRA.⁵⁴ In contrast, they stressed that the Convention is not an exhaustive statement of rights;⁵⁵ all the rights therein are fundamental and deserve to be guarded zealously, even if some deserve to be guarded more jealously than others. One must not forget that even the right to property has traditionally been considered a fundamental right.⁵⁶ It is undisputed that the different levels of importance of rights listed in the HRA should be reflected in different intensities of review, but each review should comply with a baseline intensity that can ensure that all of these rights are adequately protected. Post *Daly*, it is recognised that an exact and structured proportionality review forms part of this baseline. This view is in line with the text of the HRA. As Greer argues, even property rights should be given procedural priority over other interests, because the wording of article 1 of protocol 1 insists that deprivations are not allowed unless proven to be in the public interest. Greer rightly maintains that even in relation to interferences with this right, the government must demonstrate that alternatives have been properly considered and the interference is

⁵⁴ Although Lord Steyn ended his judgment in *Daly* with the remark that the intensity of review would depend on the subject matter in hand even in cases involving rights (at [28]), still it is clear from his tone that any variation in the intensity of review should take place *within* the rigorous and structured framework of review envisaged in the earlier parts of his judgment. See also cases in above n 22-23.

⁵⁵ See eg Lord Steyn, ‘2000-2005: Laying the foundations of human rights law in the United Kingdom’ (2005) EHRLR 349, 352; *Brown v Stott* [2003] 1 AC 681 at 703D; *Roth* at [71]; *Anufrijeva v Secretary of State for the Home Department* [2004] 1 AC 604 at [27].

⁵⁶ See eg M Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart, 1997), p 184. Courts have sometimes applied the strict necessity formula to scrutinise interferences with article 1 of protocol 1, see eg the judgments of the High Court and Court of Appeal in *Roth*.

proportionate.⁵⁷ To realise expectations of intense proportionality review in rights cases, courts should interpret the diverse textual formulations of the necessity test as calling for varying intensities of review *beyond* a minimum threshold intensity.

(b) Government discharging burden with sufficient and cogent reasons

The other two components of the baseline intensity concern the standard of proof that the government must meet in demonstrating the proportionality of a rights-limiting measure and how the government should meet its standard of proof. Let us examine the latter first. The HRA is silent on this issue, but if the second constitutional expectation of the HRA fostering a culture of justification is to be fulfilled, courts must observe a second requirement in the baseline intensity: demanding the government to demonstrate the proportionality of a rights limitation with sufficient and cogent reasons.⁵⁸

It would be useful at this point to expound the distinction between first- and second-order reasons,⁵⁹ which I have elsewhere explored in detail.⁶⁰ First-order reasons are those that relate to the merits of the *particular* case in question, based on which the court makes its own determination of rights. Second-order reasons are concerns of institutional capacity or democratic legitimacy, which do not affect the court's own substantive determination of the merits but which act as 'reweighting' reasons.⁶¹ If a court defers to the government on second-order grounds, it will be treating the government's case as stronger than what the court, on its own balance of first-order reasons, considers it to be.⁶²

Both first- and second- order reasons, *if properly established*, can qualify as cogent reasons for supporting the government's case. It is self-explanatory why this is so in relation to first-order reasons. Why second-order reasons can count as cogent reasons is more controversial and will be justified in section 4(c). For the moment, I will explain why second-

⁵⁷ S Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23 OJLS 405 at 428.

⁵⁸ For a detailed exposition of what 'cogent and sufficient reasons' require, see P Daly, 'Wednesbury's Reason and Structure' [2011] PL 237, at 251-253.

⁵⁹ Kavanagh, above n 2, LQR at 230; S Perry, 'Second-order Reasons, Uncertainty and Legal Theory' 62 S Cal L Rev 913 (1988-89); J Raz, *Practical Reasons and Norms* (London: Hutchison, 1975) ch.1.

⁶⁰ C Chan, 'Deference, expertise and information-gathering powers' LS (article first published online: 25 October 2012; DOI: 10.1111/j.1748-121X.2012.00259.x).

⁶¹ As opposed to exclusionary reasons. Kavanagh, above n 2 LQR at 223, 233; Young, above n 2, at 555; Hunt, above n 2; Perry, above n 59, at 932; cf J Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1988) ch 3; P Soper, *The Ethics of Deference* (Cambridge: CUP, 2002) pp 38-47; D Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M Taggart (ed) *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) p 286.

⁶² Perry, above n 59, at 932; Kavanagh, above n 2 LQR at 233.

order claims of institutional competence and legitimacy do *not* qualify as cogent reasons if they are *not* backed by evidence. The government proves its case solely with first-order reasons of institutional competence when it can adduce reasons and evidence to persuade the court on the merits that it is correct.⁶³ It relies on second-order reasons of superior *intelligence-gathering ability* when it claims that there is useful information to support its case but it cannot reveal such information to the court.⁶⁴ It relies on second-order claims of superior *expertise* when it claims that it has *general* expertise in deciding this *kind* of issue (eg national security questions) but is unable to persuade the court on the merits of the *particular case in question*.⁶⁵ These second-order claims can only be validly established if the government body can adduce evidence, such as its institutional features, qualifications and past performance, to persuade the court that it indeed possesses the said general expertise or useful intelligence.⁶⁶ Likewise, a second-order claim of superior democratic legitimacy in making a certain decision can only be established if the government can produce evidence, such as the degree of public participation in the decision-making process, to show that the decision was indeed democratically made.⁶⁷ If a court grants second-order claims without probing their evidential basis, it would be granting *mere assertions* or *presumptions* about the government's superior institutional competence – neither of which can count as cogent second-order reasons.

It is undisputed that the government must prove its claims with sufficient and cogent evidence.⁶⁸ Courts have made references to the government having to proffer 'substantial' 'objective' justification,⁶⁹ 'cogent',⁷⁰ 'relevant' and 'sufficient' evidence.⁷¹ Yet some judges fail to see that they breached this standard when they deferred in the following ways:

- (i) Granting claims of proportionality when there is no or insufficient evidence to support them.⁷²

⁶³ Examples of the government being able to persuade the court using first-order reasons include: *Re E (a child)* [2008] UKHL 66; *Surayanda v the Welsh Ministers* [2007] EWCA Civ 893, esp at [51]-[81], [112].

⁶⁴ Eg in *Farrakhan and Gillan*.

⁶⁵ Eg in *Belmarsh*, on whether there was an emergency threatening the life of the nation.

⁶⁶ On how courts can perform the probing exercise, see eg Chan, above n 60, sections 3-4; T Poole, 'Courts and Conditions of Uncertainty in "Times of Crisis"' (2008) PL 234.

⁶⁷ An example of the government arguably being able to do so is *Countryside Alliance v Attorney General* [2008] AC 719 ('*Countryside Alliance*').

⁶⁸ Craig, above n 1, p 643; Feldman, above n 35, at 382; A Tomkins, 'National security and the role of the court: a changed landscape?' (2010) 126 LQR 543, at 566; Edwards, above n 2, at 880; Clayton, above n 7, at paras 33-35.

⁶⁹ Eg *Mahmood* at [39]-[40]; *Samaroo* at [30]-[32];

⁷⁰ Eg *Ghaidan* at [19].

⁷¹ Eg *Naik* at [48].

⁷² Eg *Wilson* per Lord Nicholls; *Ghai* esp at [121]-[123]; *Aguilar Quila v Secretary of State for Home Department* [2009] EWHC 3189 (Admin); *British Telecommunications* esp at [203]-[234].

(ii) Adding weight to the government's case on the basis of mere assertions or presumptions about superior institutional capacity or legitimacy i.e. granting untested second-order claims of superior competence.⁷³

(i) relates to the sufficiency of evidence, whereas (ii) relates to cogency.⁷⁴ An example of (i) is found in the High Court's approach in *Quila*,⁷⁵ where the government argued that increasing the minimum age requisite for the grant of a marriage visa to 21 was proportionate to the prevention of forced marriages. The court ruled that the measure was proportionate, mainly because it granted the government's judgment that the problem of forced marriage was a pernicious one. The court's evaluation of the nexus between the measure and the aim and whether the measure was narrowly tailored was most cursory. As the appeal judgments demonstrate, abundant evidence suggested that the measure was irrational and over-inclusive.⁷⁶

(ii) is typically displayed in cases where the government asserts that it has useful intelligence that cannot be revealed to the court, i.e. it relies on second-order grounds of superior intelligence-gathering abilities. The Court of Appeal in *Farrakhan*⁷⁷ and Lord Scott in *Gillan*⁷⁸ exhibited this type of deference when they accepted the government's assertions of useful secret intelligence without probing the reliability of the intelligence-gathering body and the need to conceal evidence. In these cases, the courts gave extra weight to the government's views because of mere assertions of useful information.

Another example of (ii) is where the court grants second-order claims of expertise or legitimacy without testing their evidential basis. In *Belmarsh*, when deciding whether there was an emergency threatening the life of the nation, the majority of the House of Lords granted the government's case although they had 'great doubt' on the merits, partly because they presumed that the latter possessed *general* expertise in making national security judgments. The court did not explain why they were confident that such expertise existed despite 'widespread scepticism... [over] intelligence assessments since the fiasco over Iraq

⁷³ Eg *Farrakhan* at [78]; *Gillan* at [62]-[64]; *Animal Defenders* at [33]; *Belmarsh* (on whether there was an emergency threatening the life of the nation); *ProLife* at [74]-[81]; *Baiai v Secretary of State for the Home Department* [2006] 4 All ER 555 at [50]-[51] (Cf the CA's correct approach in the same case: [2007] 3 WLR 573); *Trailer & Marina* at 846-848, 858; *Ghai* at [121]-[123]; *Ford* at [25]-[35].

⁷⁴ The two forms of deference are not distinct. (ii) implies (i). Courts deferring through (i) often also relies on (ii) to find in favour of the government.

⁷⁵ *Quila* (High Court) above n 72.

⁷⁶ CA's judgment: [2011] Fam Law 232 at [52]-[62]; Supreme Court's judgment: above n 4 at [49]-[58], [74]-[76].

⁷⁷ At [78].

⁷⁸ At [62]-[64].

weapons’.⁷⁹ Likewise, in *Animal Defenders*, Lord Bingham attached significant weight to the government’s view that the statutory ban on political advertising was a proportionate interference with political freedom of expression, because he presumed the ability and legitimacy of Parliament in striking the balance: ‘it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that... judges, will be more so.’⁸⁰

In the above-mentioned cases, courts granted measures that interfered with important rights such as rights to free speech, marry, private life, or non-discrimination, or derogations from the obligation to safeguard the right to liberty, when there is insufficient evidence to demonstrate the justifiability of the measures, or on the basis of untested assertions or presumptions. Granting the government’s claims in this manner amounts to exercising a leap of faith – lightening or reversing the government’s burden of proof.⁸¹ Rivers was therefore calling for judicial abdication when he envisaged that it would be legitimate for courts in cases of minor violations of rights to ‘simply accept the assertion’ of the government, or be ‘very unwilling to question [its] view’.⁸² In a similar vein, despite Kavanagh’s emphasis that we should not presume courts to be institutionally inferior,⁸³ her asking courts to defer whenever they are in doubt and endorsing the court’s approach to deference in *Gillan*, *Farrakhan* and *Belmarsh*⁸⁴ effectively invite courts to presume that the government is institutionally more competent whenever the courts are uncertain. These attitudes upset the justificatory burden and culture in the HRA era.

(c) Proving proportionality on a balance of probabilities

The third requirement of the baseline intensity concerns the standard of proof that the government must meet in proving that a prima facie limitation of rights is proportionate.

⁷⁹ *Belmarsh* at [26], [29], [94], [116], [154], [166], [226].

⁸⁰ *Animal Defenders* at [33].

⁸¹ Chan, above n 60, section 3; Allan, above n 2 CLJ; J McBride, ‘Proportionality and the European Convention on Human Rights’ in Ellis (ed), above n 7, p 29; J Kokott, *The Burden of Proof in Comparative and International Human Rights Law* (Hague: Kluwer Law International, 1998), p 42; M Kazazi, *Burden of Proof and Related Issues* (The Hague: Kluwer Law International, 1996), p 371.

⁸² Rivers, above n 2, at 203; J Rivers, ‘Constitutional Rights and Statutory Limits’ in M Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford: OUP, 2012), p 253.

⁸³ Kavanagh, above n 2, LQR at 226; *Constitutional Review*, pp 175, 182, 219; A Kavanagh, ‘Constitutionalism, counterterrorism, and the courts: changes in the British constitutional landscape’ (2011) I-Con 172, at 175-176.

⁸⁴ Kavanagh, above n 2 LQR at 233-235; *Constitutional Review*, pp 214-218. J King made a similar point in ‘Institutional Approaches to Judicial Restraint’ (2008) 28(3) OJLS 409 at 411-414, 425-426.

Courts have resisted applying the concept of the standard of proof in assessing whether the government has discharged its onus of justifying a rights limitation.⁸⁵ In their view, the concept only applies to proof of facts, not to justification of judgments on evaluative questions such as whether a measure is proportionate.

I acknowledge that the kind of evidence required to prove a fact may differ from that required to prove the soundness of a judgment. Yet the idea of the court being certain of a proposition to a requisite degree is applicable to evaluative as much as it is to factual questions. In fact, UK courts have applied the concept of the standard of proof to questions of evaluation.⁸⁶ Canadian courts have established that the government must prove to the civil standard that a prima facie interference with rights is proportionate.⁸⁷ In the U.S., courts apply a standard of proof intermediary to the civil and criminal standards, known as ‘clear and convincing evidence’, to test whether an interference with constitutional rights is justified.⁸⁸ Although UK courts have not expressly adopted the terminology of standard of proof in HRA cases, their references to claims of proportionality having to be ‘convincingly established’⁸⁹ or ‘persuasive’,⁹⁰ or having been ‘on balance’⁹¹ established, indicate that a similar concept is at work.

I suggest that the third component of the baseline requires the court to be satisfied on a balance of probabilities that a rights-infringing measure is proportionate before sanctioning it. If the arguments for and against proportionality are equally strong or the court is uncertain which side is stronger, then the burden of proof, which signifies the importance of rights in the case of a tie or uncertainty, demands the court to rule against the government.

If courts are to fulfil the third constitutional expectation of them acting as guardians of rights, they must at least be satisfied that a rights-limiting measure is on balance

⁸⁵ *Rehman v Secretary of State for Home Department* [2003] 1 AC 153 at [22], [48], [56]; *Quila* at [44]; *A v Secretary of State for the Home Department (No 2)* [2005] 1 WLR 414, at [33]-[34], [368]-[370]. Scholars have rarely applied the concept of standard of proof in their analysis of the HRA. An exception is Greer, below n 94.

⁸⁶ In *B v S* [2006] 1 WLR 810, the CA applied a standard between the civil and criminal standards to assess whether certain treatment was a medical necessity so as not to constitute inhuman or degrading treatment. Recently, in *Mustafa Moussaoui v Secretary of State for the Home Department* [2012] EWHC 126 (Admin); *BA v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin); *Hassan Abdi v Secretary of State for the Home Department*; [2008] EWHC 3166 (Admin), the courts applied the civil standard to decide whether the claimants would have been detained in any event irrespective of the unlawful policy.

⁸⁷ *R v Oakes* [1986] 1 S.C.R. 103 at [71].

⁸⁸ *Santosky v Kramer* 102 S Ct 1388 (1982); *Addington v Texas* 441 US 418 (1979); cited in CMA McCauliff, ‘Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?’ 35 Vand L Rev 1293 (1982).

⁸⁹ *Samaroo* at [39]; *Naik* at [48].

⁹⁰ *Belmarsh* at [43]; *Secretary of State for the Home Secretary v JJ* [2006] EWHC 1623 (Admin) at [79].

⁹¹ *F v G* [2012] I.C.R. 246 at [48]; *S v The Secretary of State for the Home Department* [2007] EWHC 1654 (Admin) at [44]; *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin) at [65].

proportionate before permitting it. The standard of proof reflects the comparative social costs of erroneous rulings. It is designed to minimize errors regarding interests that we consider vital.⁹² Where a party has at stake ‘an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by... placing on the other party [a higher standard of proof].’⁹³ In a typical case brought under the HRA, once a prima facie interference with rights has been established, two considerations are pitted against each other: an unjustified interference with an individual right versus a potential harm to public interest. Given the importance of human rights and the certainty of the limitation, the former consideration ought to attract some threshold weight. Courts as guardians of rights should consider the consequences of the former at least as grave as that of the latter, hence my suggestion of the balance of probabilities as the bottomline standard of proof. I cannot see how courts can claim to protect rights if they do not even need to be persuaded on balance that an interference is justified.

Greer suggests that UK courts should adopt the U.S.’ intermediate standard when rights in articles 8-11 of the Convention are involved because these rights are important.⁹⁴ This may be justified and I reserve my arguments on this. In section 4(b) I will argue that the standard of proof may increase when graver rights violations are engaged. Nonetheless, in formulating a baseline intensity I have in mind the scenario of a minor interference with a less important right set in opposition to the likely satisfaction of an important public interest, where the civil standard seems most appropriate. An example would be the regulation of strategies of tobacco retailing, which arguably sets a modest interference with tobacco companies’ monetary interests up against a substantial increase in public health. The property right involved, though relatively less important than some rights, is still an important value and deserves some threshold weight to be protected by the civil standard, though a higher standard may overstate the relative cost of a mistaken ruling against the litigant.

Unlike deviations from the first two requirements of the baseline, UK courts’ departures from this requirement have been less overt. Courts have never expressly said that they had granted the government’s claim of proportionality despite not being persuaded on balance that it is established. Yet there have been instances where courts hinted that they had granted

⁹² M Redmayne, ‘Standards of Proof in Civil Litigation’ (1999) 62 MLR 167 at 169; Kokott, above n 81, pp 25-27; McCauliff, above n 88, pp 1319-1322.

⁹³ *Speiser v Randall* 357 US 513 (1958) 525-526.

⁹⁴ S Greer, “‘Balancing’ and the European Court of Human Rights: a contribution to the Habermas-Alexy debate’ (2004) CLJ 412 at 430-434.

the government's case notwithstanding grave doubts.⁹⁵ Also, writers such as Kavanagh, in asking courts to defer when the merits are balanced, are effectively advocating that the government need not prove its case on a balance of probabilities.⁹⁶ It is therefore important to remind courts that to live up to their role as protectors of rights, they cannot grant limitations of rights unless they are on balance persuaded that such restrictions are proportionate.

4. THE VARIABILITY OF PROPORTIONALITY

So far I have argued that the constitutional framework of the HRA demands courts to apply proportionality with a minimum degree of rigour. It may be objected that compliance with this threshold across *all* human rights cases cannot accommodate courts' varying levels of institutional capacity and legitimacy in diverse cases involving different issues and degrees of limitation of rights, as well as differences in the importance and nature of rights. This section will explicate why adherence to the proposed baseline can remain fully sensitive to variations in the adjudicative context.

(a) Variability in the substantive theory of proportionality

First, the substantive theory of proportionality itself, which states that the more serious the violation of rights, the weightier must the countervailing consideration be, has already partly accommodated differences in contextual factors like the importance and nature of the right and the degree of interference.⁹⁷ An interest that qualifies as a legitimate aim in relation to one right may not so qualify with regards to a more important right.⁹⁸ A measure that is least intrusive of a right and overall proportionate may not be so if a more serious limitation of the right is involved. There is thus an in-built sensitivity to the adjudicative context within the substantive theory of proportionality.

(b) Variable intensity of review beyond baseline

⁹⁵ *Belmarsh*, above n 79.

⁹⁶ In contending that courts should defer unless they are 'sure' of a substantial rights violation, and whenever they are in doubt, Kavanagh effectively endorses deference when the case for and against proportionality is balanced. King made a similar point. Above n 84.

⁹⁷ The oft-cited judicial statement of 'the more important the right, the greater the justification required' can be interpreted as referring to the substantive theory of proportionality or an institutional theory about how rigorously to apply this standard.

⁹⁸ *Rivers*, above n 2, at 195-196.

Secondly, adjusting the intensity of review beyond the baseline offers additional sensitivity to context. My proposed formal theory of proportionality consists of an invariable baseline intensity as well as a formula for varying the intensity above this threshold.

As guardians of rights, courts should vary the intensity of review in accordance with the seriousness of the rights limitation. This highly intuitive position can be explained by considering the rationale behind the standard of proof discussed earlier on. The more serious the encroachment of the right, the graver the consequences for the litigant, and the more the fundamental values of our society are at stake, thus the higher the social cost of a mistaken ruling against the litigant. Courts should weigh this cost against the possible cost of an erroneous ruling against the government. If the former outweighs the latter, then a higher than civil standard of proof should apply. As protectors of rights, courts ought to be particularly concerned to see that the former is not lightly sanctioned. The seriousness of the rights violation should therefore be the prime concern guiding the court's determination of the standard of proof above the baseline threshold. It is impossible to enumerate all the specific circumstances that will attract a higher than baseline standard of proof. Suffice it to say that courts should vary such standard mainly according to the severity of the limitation of rights.

This conclusion is not novel. Rivers similarly concludes that since courts as guardians of rights, they should vary the intensity of review according to the severity of the rights limitation: 'the more serious a limitation of right is, the more evidence the court will require that the factual basis of the limitation has been correctly established'⁹⁹ and the more 'the court will demand that the authority puts procedural resources into answering the relevant questions reliably'.¹⁰⁰ However, he arrived at this conclusion via a different line of reasoning – one which is unsatisfactory. His logic resembles a 'prior probability' approach:

If there is only a minor limitation of rights, all that is needed to justify it is a minor gain, or the chance of a major gain. Either of these is *inherently probable*, so the court need not be excessively sceptical about claims that they are present. However, as the seriousness of the limitation of rights increases, so that the inherent probability of

⁹⁹ Ibid.

¹⁰⁰ Ibid at 203-206.

sufficient outweighing gains decreases, and so the decision-taker has to work harder to persuade the court...¹⁰¹

It is unclear why a minor gain in public interest is inherently probable while a major gain is inherently not.¹⁰² For Rivers' reasoning to stand, we at least need more information on the prevalence of minor and major gains in public interests. Common sense tells us that how probable a gain in public interest is depends on many factors including the kind of interest concerned, and that there is no necessary correlation between the extent of gain and the probability of attaining the gain. Some major gains in public interest are frequently achieved (e.g. improving public hygiene), while some minor gains therein may be rare (e.g. making the country safer from nuclear attacks). As it stands, Rivers' reasoning is insufficient to ground his conclusion of varying the rigour of review in accordance with the seriousness of the rights violation. The above analysis relying on the rationale behind the standard of proof provides an alternative explanation of this intuitive conclusion.¹⁰³

(c) Variable nature of evidence

Supporters of due deference may object that my prescription for varying the intensity of review does not adequately accommodate the government's superior institutional capacity and legitimacy to decide *particular* issues.¹⁰⁴ According to my theory so far, it is the seriousness of the rights interference rather than the capacity and legitimacy of the court vis-à-vis the government body in deciding a particular issue that directly controls the rigour of scrutiny on that issue. The objection goes, that these considerations do not necessarily map onto each other. The court may lack the relative expertise or legitimacy to decide an issue in a case that involves a grave violation of rights. A theory that calls for searching review in such a case is insensitive to the limits of judicial function and capacity.

¹⁰¹ Emphasis added. J Rivers, 'Proportionality and discretion in international and European law' in N Tzagourias, *Transnational Constitutionalism* (Cambridge: CUP, 2010), p 121.

¹⁰² My arguments are formulated based on Redmayne's criticisms of the prior probability approach to accounting for an intermediate standard of proof. Above n 92, at 184-186.

¹⁰³ Arguably, Rivers alluded to this alternative reasoning. See Rivers, above n 2, 205-206: '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.'

¹⁰⁴ The need for courts to accommodate the government's superior competence in adjudicating particular issues is the main concern fuelling the construction of theories of due deference. See eg Young, Kavanagh, Hunt, above n 2; King, above n 84.

This objection is ultimately invalid, but it is an important one as it exposes that Rivers' formula for varying the intensity of review, standing alone, cannot satisfactorily quench the principal concern that triggers deference: courts may lack the ability or legitimacy to decide specific issues in a case. I wish to supplement Rivers' theory by highlighting a third element of variability in the doctrine of proportionality: the *nature* of the evidence (i.e. first- or second- order) that can demonstrate the proportionality of a measure is variable; the government may prove the proportionality of a rights limitation through adducing first- or second- order reasons, or a combination of both kinds of reasons. Courts can take into account the government's superior institutional competence and democratic credentials in deciding particular issues, *without having to relax the intensity of review nor compromise the baseline intensity of review*, by adding appropriate weight to the government's case on the basis of *second-order reasons* that are *established by evidence*.

Let us first examine how courts can accommodate the government's superior institutional competence. This issue comes into play when the court faces epistemic uncertainty and is most relevant in the 3rd stage of the proportionality test, which involves a factual inquiry of whether a measure is least restrictive of a right. If the government can demonstrate its superior institutional competence by producing cogent first-order reasons to show that the measure is the least restrictive means,¹⁰⁵ then so be it. Where the government is unable to do so, owing to, say, its inability to reveal intelligence information, but claims that it deserves deference because it possesses superior intelligence-gathering abilities (i.e. relying on second-order reasons of institutional competence), then the court apparently suffers from an information deficit.¹⁰⁶ According to my suggested baseline of review, before the court may trust that the alleged useful intelligence exists, it should probe whether the government indeed possesses reliable intelligence-gathering capacity that warrants deference. The court can examine the institutional features and past performance of the intelligence agencies to see if they are likely to honestly and reliably return useful intelligence this time.¹⁰⁷ If the court is satisfied that the government's claim of useful secret intelligence is well-founded, then the court may, on the basis of such established second-order reason, add weight to the government's case of the measure being least intrusive.¹⁰⁸ The amount of weight to be added should depend on how reliable the claim of institutional competence is. In short, the

¹⁰⁵ For examples, see above n 63.

¹⁰⁶ For examples, see above n 64.

¹⁰⁷ On how courts can perform this exercise, see above n 66.

¹⁰⁸ The courts in *Quila* (CA), *Porter*, and *Belmarsh* (on the issue of whether the measure was proportionate) properly insisted on reasoned justification and ultimately refused to give weight to the government's claims of expertise.

government may discharge its onus by presenting first- and/or second- order reasons. What matters is that these reasons must be cogent and not based on mere suppositions or assertions, and that they must overall be sufficient to show that the measure is on balance no more than necessary.

The question of relative democratic legitimacy comes into play when value judgments have to be made and is most relevant in the 4th stage of the proportionality analysis, which asks whether the benefits of the measure outweigh the costs. The government may be able to convince the court that the gains outweigh the costs to a democratic society using first-order logic alone, say, by explaining what the qualities of a democratic society are and why the measure enhances the most important of these qualities to a large extent while harming less important qualities to a smaller extent. If the government can do so, then so be it. However, the government may be unable to do so, and may simply insist that courts should respect the former's view of how the balance should be struck because it is a view that is arrived at through a procedure that is more democratic than the judicial process (i.e. the government relies on second-order reasons of democratic legitimacy). When this happens, I propose that before the court may add weight to the government's case by virtue of such second-order reasons, the court should scrutinise the decision-making procedure to see if a balance had indeed been struck and to assess the extent to which the decision-making body was democratically returned and the decision-making process had incorporated public participation.¹⁰⁹ If the court is satisfied that the decision indeed bears the stamp of democratic approval, this established second-order reason of legitimacy can add weight to the government's case of proportionality.¹¹⁰ The degree of weight to be added should depend on how democratic the decision-making process is. What ultimately matters is the court must be satisfied on cogent reasons that the gains outweigh the losses.

This proposal of asking courts to accommodate the government's superior competence by taking into account second-order reasons is similar to the suggestions of due deference supporters, who argue that courts should give appropriate weight to second-order reasons.¹¹¹ However, my proposal differs from or supplements their theories in one crucial respect: second-order reasons *themselves* need to be established by cogent evidence. This point was not fully addressed in,¹¹² was omitted in,¹¹³ or, as demonstrated in section 3(b), is inconsistent

¹⁰⁹ Cf Hunt, above n 2, p 354.

¹¹⁰ Arguably, the House of Lords in *Countryside Alliance* (at [36]-[52]) properly scrutinised the government's second-order claim of democratic legitimacy before giving it due weight.

¹¹¹ Eg above n 2, Kavanagh LQR, at 233-235; Young, at 566, 570, 573; King, above n 84, at 438-9.

¹¹² Hunt, above n 2.

with,¹¹⁴ their theories. Nonetheless, this simple point would be indispensable for any theory of deference to be compatible with the ethos of justification under the HRA.

I acknowledge that it is not entirely uncontroversial to claim that judicial consideration of second-order reasons complies with constitutional principles under the HRA. The keenest opponent to due deference – Trevor Allan – insists that adjudication should proceed on the basis of first-order reasons alone. If a court gives weight to second-order reasons, it would abdicate its duty to enforce its ‘own best judgment of a party’s legal rights’.¹¹⁵ Denying a claimant its rights merely ‘in virtue of his comparative ignorance or lack of special qualifications’ goes against ‘adjudication as an institutional expression of the influence of reasoned argument’.¹¹⁶ Judicial impartiality is breached, because allowing the government to rely on considerations that are extraneous to the case gives the government an unfair advantage.¹¹⁷ The culture of justification is impaired as the government is not required to prove its case with reasons specifically applicable to the case.¹¹⁸ On the other hand, Jowell does not oppose deference on grounds of institutional capacity but rejects that on grounds of democratic legitimacy.¹¹⁹ The argument goes, that the HRA has given the independent judiciary a constitutional mandate to guard rights against majoritarian intrusion. If courts pass the buck back to the majority by deferring to the democratic will when adjudicating rights, they would abdicate their duty to protect rights.

I am aware that my brief reply below is insufficient to do justice to the sophisticated arguments of these authors, but space prevents a fuller reply, which I have proffered elsewhere.¹²⁰ Here I will put forward the gist of my case on why my proposal of giving weight to second-order reasons established by evidence is consistent with post-HRA constitutional principles. Let us look at institutional competence first. Rationality requires courts to give weight to the views of a body that is more likely to be correct. Courts defer to expert opinion all the time. In adjudicating claims of rights, second-order reasons of superior expertise or intelligence-gathering abilities, if established, tell the court whether the government is more likely to be correct, and thus assist the court in making, rather than compel it to set aside, its ‘own best judgment’. The reasoned nature of adjudication and the

¹¹³ Young, above n 2.

¹¹⁴ Kavanagh and King, above n 84. See Chan, above n 60, section 3(c).

¹¹⁵ Allan, above n 2 LQR, at 100-101, 109; CLJ, at 688

¹¹⁶ Ibid CLJ, at 692-693.

¹¹⁷ Ibid at 676.

¹¹⁸ Ibid at 694.

¹¹⁹ Above n 2; J Jowell, ‘Judicial Deference: Servility, Civility or Institutional Capacity?’ [2003] PL 592.

¹²⁰ Chan, above 60.

culture of justification are not compromised, because second-order reasons themselves need to be established by cogent evidence. The court does not give the government a special advantage by allowing it to rely on second-order reasons, since the government bears the burden of establishing these reasons. Under these arrangements, the court's scrutiny remains as intense; the government's task of proving the justifiability of a measure remains as onerous.

Turning now to the giving of weight to democratic legitimacy. When deciding whether an interference with rights is justified in a democratic society, courts need to make a value judgment of what a democratic society requires. It is true that the role of courts as guardians of rights requires them to ultimately make this judgment themselves. Yet in doing so courts must bear in mind that Britain itself is a democratic society and the values of its people would be relevant to this judgment, just as the values of other modern democracies would be. Under my proposal, the court does not relinquish its role to protect individual rights by giving appropriate weight to the value judgments reflected in democratically made decisions, because these judgments form only one part of, and are not dispositive of, the normative enquiry.

CONCLUSION

The HRA has altered the constitutional game. To fulfil the new rules, there must be a limit to the elasticity of proportionality. Courts should observe a minimum intensity of review that requires the government to demonstrate to the court by cogent and sufficient reasons that a rights limitation on balance satisfies the distinct stages of the proportionality enquiry. At the same time, proportionality review should remain sensitive to the court's varying levels of institutional competence and legitimacy in different adjudicative contexts. Courts can preserve this sensitivity by modifying the intensity of review beyond the suggested minimum level of review and accepting second-order reasons of superior institutional and constitutional competence that are established by evidence.

A commentator once warned, 'We are at a crossroads, proportionality can either become [a] fig leaf... [or] a powerful normative and predictive tool in public law.'¹²¹ Indeed, proportionality can replicate traditional review in all but in name or it can become the definitive tool for protecting individual rights. Courts have gone some way down the former

¹²¹ Hickman, above n 36, at 716.

path. It is hoped that my proposals have provided some steer for a u-turn, restoring vigilant judicial oversight of our basic rights and freedoms.