The Burden of Proof under the Human Rights Act

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Introduction

In the era of the Human Rights Act 1998 ("HRA"), courts are expected to check that a prima facie limitation of qualified rights passes the four-stage proportionality test, i.e. it is 1. in pursuit of a legitimate aim, 2. rationally connected to the aim, 3. no more than necessary for achieving the aim, and 4. overall balanced.[1] The adoption of proportionality as a standard of review has led to concerns that courts, in applying this inherently intrusive standard, would interfere with questions that they lack the expertise or legitimacy to decide, or otherwise inappropriately intrude into the state's policy-making spheres. To allay these concerns, courts have relaxed their intensity of review in various ways, including bypassing certain stages of the proportionality test or merging all stages of the enquiry into a general question of whether the measure is reasonable or permissible.[2]

I have elsewhere argued that such dilution of the standard of review in human rights cases is not justified.[3] This paper focuses on evaluating one particular way in which courts have relaxed their intensity of review, namely, shifting the burden of proof. The HRA itself does not stipulate where the burden of proof lies. The orthodox position is that the litigant bears the burden to show a prima facie limitation of right, but once he can do so, the onus falls on the public authority to demonstrate that the limitation passes the four-stage proportionality test.[4] In practice, however, courts have sometimes required the litigant to demonstrate disproportionality of the rights limitation.[5] There is some support of this shift in onus in academia. For example, in a recent

*This article is in part a rejoinder to Julian Rivers, "The Presumption of Proportionality" *Modern Law Review* (forthcoming). The author would like to thank Julian Rivers for his insightful paper and helpful comments, as well as Sharon Siu for her research assistance.

[1] *Huang v Secretary of State for the Home Department* [2007] UKHL 11 [2007] 2 AC 167 at [19]; recent application in *Regina (F (A Child)) v Secretary of State for the Home Department* [2010] UKSC 17 [2011] 1 AC 331 at [17].

[2] Eg *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 [2007] 1 WLR 1420 at [16] per Lord Hoffmann; *Farrakhan v Secretary of State for the Home Department* [2002] EWCA Civ 606 [2002] 3 WLR 481; *R v Shayler* [2002] UKHL 11[2003] AC 247 at [80]-[85], [99]-[118].

[3] Chan, "Proportionality and invariable baseline intensity of review" (2013) 33(1) *Legal Studies* 1. For a recent criticism of judicial dilution of the structure of review, see Anthony Vaughan, "Minimum interference versus rationality: the new battleground in HRA proportionality?" [2013] JR 416.

[4] Recently affirmed in *Aguilar Quila v Secretary of State for Home Department; Bibi v Same* [2011] UKSC 45 [2012] 1 AC 621 at [44]. Widely endorsed in academic writing, see eg Lester, Pannick and Herberg, *Human Rights Law and Practice*, 3rd edn (Butterworths, 2009), paras 3.12-3.13; Clayton and Tomlinson, *The Law of Human Rights*, 2nd edn, Volume I (OUP, 2009), para. 6.188; Fordham and de la Mare, "Identifying the principles of proportionality" in Jowell and Cooper (eds), *Understanding Human Rights Principles* (Hart, 2002), pp. 27, 88. Leading case in Canada on this issue: *R v Oakes* [1986] 1 SCR 103.

[5] Courts usually couple such shift in burden with an attenuation of the standard of review. Examples of cases where courts presume a measure to be proportionate unless shown to be manifestly unreasonable: *Aguilar Quila v Secretary of State for Home Department; Bibi v Same* [2011] UKSC 45 [2012] 1 AC 621 per Lord Brown (dissenting judge); *British Telecommunications Plc v Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin) at [234]; *Sheffield City Council v Personal Representatives of June Wall* [2010] EWCA Civ

paper, Julian Rivers explains the practical difficulties faced by the state in establishing that a measure passes the final two stages of the proportionality analysis, and proposes that in some contexts, once the public authority can demonstrate a legitimate aim and rationality, the burden should shift to the litigant to establish that the measure is more than necessary or overall imbalanced.[6]

This article seeks to defend the position that the state should always bear the burden of proving that a prima facie limitation of right passes all stages of the proportionality enquiry. Although this position is widely assumed, there has been little discussion of the rationale underlying it.[7] This article will expound such rationale and argue that the practical concerns driving the transferral of a persuasive burden can be accommodated by placing an evidential burden on the litigant.

Framework for allocating burden of proof

The burden of proof is used in this paper to denote the persuasive burden of proof. The party bearing this burden shoulders the risk of non-persuasion, i.e. he will lose if both sides of the case are equally strong, or the court is uncertain which side is stronger. This burden is to be distinguished from the evidential burden, which is the onus of adducing evidence to show that an issue is a live issue in a case.[8]

The burden of proof should be allocated primarily by reasons of principle – societal judgments over the proper relationship between the parties and who should bear the risk of uncertainty in a case; and secondarily, by practical considerations over the relative ease with which the parties can prove a point.[9]

For example, in criminal cases, the burden on the prosecution to prove the defendant's guilt reflects society's views that the state must demonstrably justify any use of coercion against citizens and it is generally worse to convict an innocent man than to let a guilty man go free. Courts have allowed reverse onuses in rare occasions where the presumed value of protecting the defendant does not hold or not hold as intensely, e.g. when the consequences of conviction are less serious. Reverse onuses have also been sanctioned where the state faces practical difficulties in proving a particular element of the offence, which the defendant can prove with relative ease. Nevertheless, practical concerns are secondary in allocating the burden of proof, since they would usually have to be coupled with a reduction in the presumed value of protecting the defendant, and if they can be relieved using an evidential burden, courts will not allow the

922 [2011] WLR 1342 at [33]; *Sinclair Collis Limited v Secretary of State for Health* [2010] EWHC 3112 (Admin) [2011] UKHRR 81 at [94]-[96].

[6] These contexts are cases involving clash of rights, arbitrary but unavoidable distinctions of degree, minor limitations of rights in pursuit of important but diffuse public goods, decisions made under proportionate legal rules or procedurally-rigorous judgments of proportionality by well-qualified bodies. See Rivers, "The Presumption of Proportionality" *Modern Law Review* (forthcoming).

[7] An exception is Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP, 2012), ch 16.

[8] For the distinction between these two burdens, see eg Dennis, *The Law of Evidence*, 4th Edition (Sweet & Maxwell, 2010), 451-452.

[9] Eg Ashworth, "Four threats to the presumption of innocence" (2006) *International Journal of Evidence & Proof* 241, 249-267; and n 10 below.

persuasive burden to shift.[10] This makes sense as the importance of protecting the defendant is not attenuated even when practical concerns are at work.

The burden of proof in human rights cases should similarly be allocated primarily by reasons of principle and secondarily by practical concerns. If there are sound reasons of principle for placing the burden of justification on the government, such burden should only shift where this rationale is diminished. Practical concerns alone should not serve to alter the persuasive burden if they can be accommodated by placing an evidential burden on the litigant.

The case for the state bearing the onus

Proper relationship between state and individual

The HRA represents Parliament's commitment to protect a limited list of rights that are considered fundamental to a democratic society. The priority of these rights over competing public interests is manifested in various ways in the Act, ranging from according absolute protection to certain rights, to allowing only necessary limitations on other rights.[11] The inception of the HRA has instigated a shift in culture, from that of authority to that of justification. Under this culture, legitimacy for the state's coercive actions must be earned rather than presumed.[12] The state ought to justify proposed rights limitations with sufficiently strong reasons.[13] This translates, *substantively*, into the four-stage proportionality test which sets the standard for sufficiently strong reasons[14] – a standard that is higher than traditional standards of judicial review – and *procedurally*, a burden on the government to bear the risk of not being able to persuade the court that these reasons exist. The link between proportionality and justification has often been assumed.[15] Yet this link is not inherent and is predicated upon placing the burden of proving proportionality on the public authority.

Imposing an absolute burden on the state may be challenged on three grounds of principle. First, the categorical importance of rights over competing public interests does not hold where

[10] See eg ibid, 269; Hamer, "The Presumption of Innocence and Reverse Burdens: A Balancing Act" (2007) 66(1) CLJ 142; Stumer, The Presumption of Innocence (Hart, 2010), ch. 2.

[11] Greer, "Constitutionalizing Adjudication under the European Convention on Human Rights" (2003) 23 OJLS 405, 414.

[12] Dyzenhaus, "Law as justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 *SA J Hum Rts* 11; Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 CLJ 671 at 694; Edwards, "Judicial Deference under the Human Rights Act" (2002) 65(6) MLR 859 at 866; Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP, 2009) p. 242; Hunt, "Sovereignty's Blight: Why Public Law Needs 'Due Deference'" in Bamforth and Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart, 2003) 337, p. 340. See also House of Commons Debates, 21 October 1998, vol 317, col 1357.

[13] Eg Feldman, "The Human Rights Act 1998 and constitutional principles" (1999) 19 LS 165, 204. Also Forst, "The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach" (2010) 120(4) *Ethics* 711; Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4(2) *Law & Ethics of Human Rights* 142, 142-143, 150.

[14] Eg Möller, *The Global Model of Constitutional Rights* (OUP, 2012), ch 7; Alexy, *A Theory of Constitutional Rights* (OUP, 2002), ch 3. In Chan, n 3 above, I offered a detailed account on why courts should assess rights limitations using the 4-stage proportionality framework.

[15] See eg Cohen-Eliya & Porat, "Proportionality and the culture of justification" (2011) *American Journal of Comparative Law* 263.

apparently minor limitations of rights are involved.[16] These situations can be abundant, given the court's tendency to define rights generously to cover even interests that are apparently trivial, such as the right to smoke in a high security psychiatric hospital[17] or the right to hunt foxes.[18] In these cases, the normative significance of a prima facie limitation of right,[19] and hence the rationale for imposing a burden of non-persuasion on the government, seems attenuated. My response is three-fold.

First, as explained, the categorical importance of rights over public interests is itself manifested in the HRA and represents a constitutional settlement. Secondly, rights in the HRA are fairly specifically-worded. As compared to other constitutions (or quasi-constitutions), such as the German Basic Law, which entrenches broader rights like a general right to free development of personality and protection of human dignity, the scope of interests protected by the HRA is more confined; by and large, interests protected by the HRA are considered significant in some way.

Thirdly, at least one theory of rights can explain why even apparently trivial violations of rights deserve rigorous scrutiny. Under this theory, rights do not protect interests that are judged important by one particular standard; rather they protect interests that are crucial for citizens to live truly autonomous lives – to pursue their *own* conception of the good.[20] The right to hunt foxes might seem trivial to most people, but may be important to *me*. A comprehensive protection of interests reflects the state's respect for every citizen's equal right to pursue their projects.[21] According to this theory, there is no such thing as an unimportant limitation of right; every limitation, however minor, and however trivial the right may seem, is an interference with citizens' autonomy and has to be fully justified.

The second challenge is that the categorical importance of rights over competing interests does not hold where the competing interest is another right.[22] The asymmetry in importance between rights and public interests wanes and it is unclear why the right that the state is defending should always bear the brunt of non-persuasion.

My response is, this is a special type of case in which the public authority and the litigant should *each* bear a burden of non-persuasion. The litigant's interest at stake is not rendered any less significant by the fact that another right is involved. The justificatory culture would still require the state to demonstrate the proportionality of the proposed limitation of right. Nevertheless, the strength of the competing interest at stake imposes on the litigant a special burden of justifying the proportionality of the remedy he is seeking.[23]

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[16] Rivers argues that in some cases of minor limitations of rights, the litigant should bear the burden of establishing lack of necessity or imbalance, n 6 above.
[17] *CM, Re Judicial Review* [2013] ScotCS CSOH 143.
[18] *R (On the Application of Countryside Alliance & Anor) v Attorney General & Anor* [2007] UKHL 52 [2008] 1 AC 719.
[19] For the "devaluation of moral currency" of rights, see eg Webber, *The Negotiable Constitution* (CUP, 2009) ch 4.
[20] For a recent exposition of this theory, see Möller, n 14 above, ch 4.
[21] Ibid.
[22] Rivers argues that in these cases the burden should rest on the litigant to show that there is a demonstrably better way of resolving the clash of rights, n 6 above.
[23] Fenwick and Phillipson, "Breach of Confidence as a Privacy Remedy in the Human Rights Act Era" [2000] 63(5) MLR 660.

Thirdly, my opponent may argue that the government should enjoy a presumption of constitutionality, and the burden of showing unconstitutionality of a measure should fall on the litigant. However, any such presumption is spent once the litigant establishes a prima facie case of rights limitation.[24]

Practical considerations

Rivers suggests that since the government faces practical difficulties in proving that a measure is no more than necessary and overall balanced, the court should recognise a presumption of proportionality in some circumstances, with the effect of placing the burden on the claimant to show lack of necessity or imbalance. Rivers highlights four practical difficulties faced by the state.[25]

First, it is empirically easier to prove that there is *one* less intrusive but equally effective measure (an "existential") than that *all* other measures are either more intrusive or less effective (a "universal").[26] Secondly, due to the inadequacy of our moral knowledge, it is easier to identify an imbalanced situation than balanced situation. Thirdly, where Sorites paradoxes are raised, it would be difficult for the government to affirmatively prove necessity. For example, in a case like *British American Tobacco*,[27] it would be arduous for the government to show that health warnings that are a tiny bit smaller than the mandated size would be less effective. Finally, it might be difficult for the government to prove necessity and balance where the precise level of public benefit that a measure would bring is speculative.

These reasons do not provide valid grounds for shifting the persuasive burden in any circumstances. The fact that it is difficult for the public authority to prove necessity and balance does not necessarily mean that it would be any easier for the litigant to disprove these elements. So even if generally it is difficult for the public authority to discharge its burden, we cannot conclude that generally it would be any easier for the litigant to discharge a reverse burden. Due to the litigant's inferior resources, means of access to information and expertise in policy-making, he will often not be in a position to tell what alternatives are available, how effective they are, and how the costs and benefits of a measure compare.[28] In cases like *British American Tobacco*, it might be difficult for the government to prove that smaller health warnings are less effective, but it might be equally, if not more, difficult for the litigant, with no knowledge and expertise in policy-making, to show that a smaller warning is just as effective.

Admittedly, in some situations it might be extremely difficult for the public authority to prove that *all* other alternatives are less effective or more intrusive, and a lot easier for the litigant to point to one potentially less intrusive and equally effective alternative. In these situations, the disparity in ease of proof can be accommodated by placing an evidential burden on the applicant to introduce a less intrusive alternative. Such evidential burden is lighter than the persuasive burden. If we assume that the standard of proof is that on a balance of probabilities (and I leave

[24] Barak, n 7 above, p 446.
[25] Rivers, n 6 above. Rivers also highlighted institutional concerns with imposing an absolute burden of proof on the state.
[26] See Saunders, "The Mythic Difficulty in Proving a Negative" (1984-85) 15 *Seton Hall L Rev* 276.
[27] *R (British American Tobacco) v Secretary of State for Health* [2004] EWHC 2493 (Admin).
[28] A similar point was made in Barak, n 7 above, 443.

open this question of the standard of proof[29]), the evidential burden is discharged once the court is satisfied that it is *possible* to conclude that the suggested alternative is on balance less intrusive and equally effective; whereas the persuasive burden is only discharged if the court *actually* so concludes.

This evidential burden would be able to mitigate the government's challenge in Sorites paradoxes. If the litigant is able to raise less intrusive alternative as a live issue, the public authority should dismiss it on a balance of probabilities. Sorites paradoxes are more common than we think. Examples cited are often of arguably minor restrictions of rights (as in a tobacco company's right to commercial speech) but these paradoxes also arise where more important rights, such as the right to liberty, are involved (as in whether an 8-hour curfew of a terrorist suspect is necessary for protecting national security, or would a 7-hour-and-59-minute curfew be equally effective.) Experience tells us that courts are willing to approach Sorites paradoxes sensibly. If an evidential burden on the litigant in these cases is institutionalised, courts will likely assess whether this burden has been discharged with sense and proportion.

Finally, uncertainty of policy effects is a pervasive feature of rights adjudication and should affect the *nature* and *quality* of evidence required of the government to prove proportionality rather than the burden of proof itself. Courts have been cognizant of the speculative effects of policies and have not required the attainment of a public benefit to be proved with certainty. Nonetheless, the degree of uncertainty of such attainment should discount the weight of the public benefit.

Impact on substantive rules

It is furthermore noteworthy that a shift in the burden of proof, which is a *procedural* rule, can have the effect of modifying the *substantive* standard for assessing rights limitations, i.e. the four-stage proportionality test. Shifting the burden onto the litigant to disprove necessity and balance operates to dilute this rigorous, structured test when the litigant is unable to discharge his burden due to lack of information and expertise. In these situations, the government can get by without having to demonstrate necessity and balance at all. In such cases, there is *de facto* no judicial guard against public decision-making that omits the necessity and balance tests; in effect there is no difference between skipping these two stages of analysis and recognising a presumption of necessity and balance. In fact, here the court's supervision will only have comprised the legitimate aim and rationality thresholds, which are implicit in traditional *Wednesbury* standards – such standards having been unequivocally rejected by jurists as insufficient for protecting rights.[30]

Conclusion

The proper relationship between the state and individual in the post-HRA era calls for placing the burden squarely on the state to justify any prima facie infringement of rights. Practical

[29] For discussions on the standard of proof, see Greer, n 11 above; Kokott, *The Burden of Proof in Comparative and International Human Rights Law* (Kluwer Law International, 1998), ch 1(II), ch 2(I).
[30] Leading authority on this point: *R v Secretary of State for the Home Department Ex p. Daly* [2001] UKHL 26 [2001] 2 AC 532 per Lord Steyn at [27]-[28].

difficulties faced by the state in demonstrating necessity and balance should not serve to modify this rule. Where it is much easier for the litigant to prove lack of necessity, the government's challenge in proving necessity can be assuaged by placing an evidential burden on the litigant to raise less intrusive alternative as a live issue. Insistence on this procedural rule of the burden of proof together with the substantive proportionality standard is indispensable for effective judicial supervision over a rights-based democracy.