

The origin of wednesbury unreasonableness law constitutional administrative essay...

[Law](#)



The principle of proportionality ordains that administrative measures must not be drastic than is necessary for attaining the desired result. The doctrine is applied by both the ECtHR and ECJ, and so it has infiltrated UK law to a significant extent. Many may argue that a concept like 'proportionality' has long been operating covertly in English administrative law under the label of irrationality or Wednesbury unreasonableness. However, the truth is that although principles of proportionality and unreasonableness/irrationality cover a great deal of common ground, a clear difference has emerged in judicial decisions and theoretical analysis. In discussing the topic I would start from the emergence of proportionality to the present day situation of the ground.

THE ORIGIN OF WEDNESBURY UNREASONABLENESS

Previously, where a body was awarded subjectively worded powers, the courts used to adopt 'hands-off' approach, as they were reluctant in intervening those administrative actions [Liversidge v Anderson]. However, some control over decisions that were within the four corners of the public body's power was, however, felt to be warranted and legitimate. This was the rationale for the substantive meaning of unreasonableness. *Association of Provincial Bank Houses v Wednesbury Corporation*, was the case that marked the occasion when the basic principles of unreasonableness were reaffirmed and elaborated. In his judgment, Lord Greene had to go on to consider the extent of the court's power to intervene. In doing so, he provided the test for unreasonableness, which stated that whether an authority had acted, or reached a decision, in a manner 'so unreasonable

that no reasonable authority could ever have come to it'. It was outside the four corners of the power that parliament had given to the decision maker and it was therefore right and proper for the courts to step in. There are a number of cases where the concept of unreasonableness was used as a ground of JR. Roberts v Hopwood , Tameside MBC Bromley LBC v GLC; Wheeler v Leicester CC .

UNDERPINNING THE WEDNESBURY CONCEPT OF UNREASONABLENESS

However, the test of unreasonableness has always been difficult to pin down because it is such a subjective concept and opinions can obviously vary widely on whether a particular decision is reasonable or not. Another aspect discussed in British Airways Board v Laker Airways, was that it would be very difficult for the courts to intervene on grounds of unreasonableness if the matter concerned relations to higher political and constitutional affairs. Also the courts have adopted the view that the test of unreasonableness does not provide sufficient protection for convention rights [ex p Smith and Other]. In the build up to the incorporation of the European Convention of Human rights (ECHR), the domestic courts began to develop a more rigorous application of the test for unreasonableness, in those cases touching upon the fundamental rights of the citizen [ex p Bugdaycay]. Lord Diplock therefore, in GCHQ reclassified the modern grounds of review and preferred to employ the term ' irrationality' to describe ' Wednesbury unreasonableness'.

IRRATIONALITY

Lord Diplock in defining 'irrationality' stated that 'it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'. The important point is that he suggested that it could stand on its own as an accepted ground of review, and so become a genuine extension of the ultra vires principle. However, it was criticised by Walkers' Excellent Critic 1995, as in his redefinition his Lordship emphasised not only illogicality but also immorality. However, there is some doubt as to whether Wednesbury unreasonableness and irrationality indeed are the same thing. For example, Ex p Handscomb, where it was considered whether a decision could be challengeable on grounds of both irrationality and Wednesbury unreasonableness. Nevertheless, despite some doubts about the superiority of the term 'irrationality' as a ground of review over Wednesbury unreasonableness, it is for sure that the later on falls far below the standard that public bodies are expected to display.

THE REVOLUTION OF IRRATIONALITY BY WAY OF PROPORTIONALITY

Meanwhile, there was another alternative to the Wednesbury approach developed in English law by means of doctrine of proportionality, which is a firmly established principle of Community law and also of ECHR. For instances, in cases governed only by domestic law, the English courts are reluctant to recognise proportionality as a distinct ground of review except in the cases where Community law rights or obligations are raised [Stoke-on-Trent City Council v B&Q plc]. The live question was, therefore, whether they

will proceed to apply proportionality as an independent head of review in cases which do not have a Community law element. Paul Craig in his "Impact of Community Law on Domestic Public Law" cited a number of reasons as to why this development is likely to occur. The first reason why this is so is a consequence of the changing judicial attitudes to fundamental rights, especially after the incorporation of European Convention of human rights. The second reason why proportionality is likely to emerge as an independent head of review is in cases where the allegations is that is the punishment or penalty which is disproportionate to the offence committed. The third reasons why proportionality is indeed likely to emerge as a distinct principle within domestic administrative law is that it does contain a more structured methodology through which to decide whether an exercise of discretion should be struck down, as compared with the blunt tool (dull) of Wednesbury unreasonableness. While the court had been modifying Wednesbury in cases that touched upon fundamental rights as recognised by the common law, this approach was essentially exceptional. The proportionality principle, however, has the potential to turn that 'exception' into 'the rule' when ECHR points arise. After the incorporation of ECHR, a very higher standard of review was required in domestic law in order to deal with the fundamental rights issues. For example, in *Lustig-Prean and Beckett*, the court, in the course of finding that the ban on homosexuals serving in the UK armed forces amounted to a violation of article 8, agreed with the submission that there had been a violation of article 13 in that JR had not provided an effective domestic remedy in respect of Convention rights, because the threshold set by domestic courts for proof of irrationality

had been placed so high and the standard of Wednesbury was so low, it had effectively denied the applicants prospect of remedy. As it seemed, Wednesbury unreasonableness turned out to be almost useless in terms of fundamental rights and irrationality would not seem strong enough to deal with this higher perception of law, the much awaited principle of proportionality was eventually purchased by the courts to assist irrationality [ex p Daly].

Definition

The doctrine of proportionality provides that action will be unlawful if it is disproportionate in its effect, or relative to what is required [ex p Hook]. In other words, there should be reasonable proportion between the administrative objective and the means used to achieve it. Under the doctrine, courts are typically required to assess whether, firstly, the restriction on the right is rationally connected to a given objective, which must be authorised by law, secondly, it is no more than is necessary to obtain the objective and finally, the objective is sufficiently important to justify limits to a fundamental right. For example, in ex P Assegai, the decision to dismiss a school governor and ban him from attending meetings and entering local authority premises was held disproportionate to the nature of the complaints made. The doctrine struggled a lot to come into the view, as the domestic courts always used to refuse proportionality as a free standing ground of JR [ex p Brind], but it received its most significant recognition in English administrative law, when Lord Diplock in GCHQ upheld the potential importance of proportionality. In a telling passage, Lord Ackner

said that for the judges to use proportionality as a ground for JR would be a step towards the incorporation of the convention rights by the back door.

Proportionality and HRA

After incorporating the ECHR into the domestic law it has become apparent and clear the proportionality is distinct from unreasonableness or irrationality as a ground for JR. This was established in *R (Dale) VS S, for Home Department*. According to red light theorist, proportion of individual rights should be primary objective of JR; proportionality carries the additional attraction of requiring that administrative actions should be the least restrictive if fundamental human rights compatibility with the object being pursued. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is unreasonable [*ex p Smith*].

Limitations

Proportionality is a well structured and meritorious ground that not only can challenge the legitimacy of an action, but also the substance inferred in it. Therefore, in the context of HRA, this exceptional ground of proportionality has become unanimous. However, the difficulty arises where it goes beyond its boundaries set out by Lord Bingham in *Daly*. There are a number of case laws, which indicated that in a matter of highly constitutional status, the ground cannot go beyond its limits, as executive and parliamentary importance will be preferred in such circumstances. Parliamentary preference was in evidence in *A & Ors v Home Secretary*. The central issue in this case of *Belmarsh detainees*, was the proportionality of the government's

response to the threat posed by global terrorism after the attacks in New York, Washington and Pennsylvania on 11 September 2001. The 'Belmarsh detainees' has been recognised as a case of high constitutional significance. The House of Lords clearly regarded liberty as within its constitutional responsibility. It will be remembered that notwithstanding Lord Atkin's famous dissenting judgment that proclaimed the importance of liberty, faced with threats to national security (in wartime), the House of Lords sided decisively with the executive branch and not the right of the individual, and it seems that it will continue to do so. However, the SOS was to succeed on appeal to the CA, where it was emphasised that decision makers in such cases enjoy a discretionary area of judgment. Highlighting how the SOS is democratically accountable for his decisions and in the best positions to make value judgments in cases of this kind, the CA held that it was thereby, and legitimately, required to confer a wide margin of discretion upon the Minister [R (Farrakhan) v Home Secretary].

Relationship with the Other Grounds

Irrationality can never reach the same result as would proportionality do. Irrationality deals with the question of legality whereas proportionality takes into account other moral factors. So, decision reached by any of them will be completely different from another. In contrast to irrationality and Wednesbury, is often understood to bring courts much closer to reviewing the merits of a decision. Admittedly, there are some case laws in which judges have classified an irrational action as disproportionate but in these cases, the disproportionality has been so great to classify the action so

manifestly absurd that parliament had never intended while conferring the executive discretion [Ex p Hook].

Proportionality – a Separate Ground?

The main reason why the HL was reluctant to accept the proportionality principle in *Brind* was a concern that the principle would widen the scope for judicial intervention in merit questions. This was a view shared by the then shadow Lord Chancellor, Lord Irvine of Lairg, when he warned of the dangers of judicial activism, and in particular argued that there is no escape from an acceptance that a proportionality test would lower the *Wednesbury* 'threshold of unreasonableness'. One point to be addressed in this context is the nature of the relationship that *Wednesbury* now has with proportionality. If later one is applied in EU and HRA cases, then what role does this leave for *Wednesbury*? Is *Wednesbury* obsolete, or can it, as a principle that exists on a sliding scale, co-exist with proportionality principle that likewise provides a variable standard of review? There are two main approaches to this question, each having some judicial and academic support. The first proposes that the courts should retain the traditional grounds of review and would allow these traditional grounds to continue to function in cases that are not embraced by EU law and ECHR. This approach envisages that *Wednesbury* and proportionality will often achieve similar outcomes as a matter of practice and that there is therefore nothing prejudicial in using the principles within their respective spheres of influence [Laws 1998 and Elliott 2001]. The second view favours the development of a single test of public law illegality founded solely upon the proportionality principle. This approach, which considers that *Wednesbury* should now be regarded historical rattan than

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contemporary worth. For instance, Lord Slynn stated that even without reference to the HRA 98 the time has now come to recognise the proportionality as a part of English Administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law [Alconbury]. In my view, Proportionality can be regarded as a superior concept to Wednesbury or irrationality, as the principle's emphasis on balance and justification, which is taken to offer a 'more structured methodology'. But, it seems that especially by way of an application under proportionality, the courts are now questioning the professionalism of the administrators, as they seem to be the controller of the executive decision makers. Are judges any better placed by 'training, experience and knowledge' to know where to draw line than professional administrators? This was the question that put up in ex p B and if the answer turns out to be positive one then the doctrine of separation of powers would be dishonoured. It should be noted that the role in the court in JR proceedings has not become one of substituting its view for that of the primary decision maker, but it does have an enhanced role in assessing the legality of the decisions of public bodies where Convention rights are in issue. As Lord Clyde observed in ex p Holding and Barnes and ex p Alconbury, the courts will be careful not to jeopardise (put at risk) the constitutional balance between the role of the courts and the role of the executive.

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