

**The London School of Economics and Political Science**

**A Structural, Institutionally Sensitive  
Model of Proportionality and  
Deference under the Human Rights  
Act 1998**

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## **Declaration**

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## **Abstract**

Proportionality is used by the UK Courts when reviewing the Convention-compatibility of the activities of the other branches of government. There are two related problems with the current analysis of proportionality. First, there has been a heavy emphasis on the division of constitutional space between the judiciary and the other branches of government. This focus on spatial conceptions of institutional responsibility has distracted attention from the structure of the relationship between proportionality and deference. The second problem is that there has been insufficient attention paid to the manner in which the test is affected by the distinctions between the different governmental institutions which can be judicially reviewed under the HRA. The individual stages of proportionality are based on certain premises about the institution being reviewed. This needs to be explicit if a sophisticated understanding of proportionality is to be developed.

I plan to overcome these two problems by setting out a structural, institutionally sensitive model of proportionality and deference. The model is structural in that it takes account of the operation of deference *within* the process of proportionality. The model is institutionally sensitive in that it takes account of the differences between the institutions which the courts can review under the HRA. The model is based on the work of Alexy, but adapted for the UK context and developed to make it institutionally sensitive. I trace the operation of this structural model through three institution-specific case studies in order to establish its relevance in the UK. The case studies concern administrative decision-making in immigration cases, rule-making in criminal justice cases and judgments concerning both administrative decisions and legislation in housing cases. This diverse range of subject matter provides the basis for proving the applicability of the structural, institutionally sensitive model, which overcomes the two related problems with the existing analysis.

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## *Chapter 1: Two related problems*

The principle of proportionality is now a standard test used by the UK Courts to assess whether governmental activity violates many of the individual rights set out in the European Convention on Human Rights ('the Convention'), which was incorporated into domestic law by the Human Rights Act 1998 ('the HRA').<sup>1</sup> The concept of proportionality is closely related to the self-restraining judicial principle that when the courts engage in judicial review they should pay some deference to the judgment of the original decision-maker.

To date, there has yet to be a sophisticated analysis of proportionality and deference under the HRA. It is my contention that such an analysis has been prevented by two problems. The first problem is the 'spatial metaphor'<sup>2</sup> and the second problem is lack of what I call 'institutional sensitivity.' The spatial metaphor describes deference as something which is in opposition to proportionality rather than something which can be integrated into it. The lack of institutional sensitivity arises from a failure adequately to recognise that there are differences between the institutions of government which are

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<sup>1</sup> See *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 and *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45. *Daly* was concerned with the right to correspond with legal representatives and *R v A* was concerned with the right to fair trial.

<sup>2</sup> This phrase was coined by Murray Hunt. See Hunt, M. 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in Bamforth, N. and Leyland, P. (eds.) *Public Law in a Multi-layered Constitution* (Oxford: Hart Publishing, 2003).



subjected to proportionality review under the HRA. Some of those differences can have a significant effect on the operation of proportionality and deference.

These two problems are closely related to one another. The failure to overcome a spatial model of the relationship between proportionality and deference has hampered attempts to make deference more institutionally sensitive. Conversely, the failure to develop an institutionally sensitive model of proportionality has undermined the understanding of the various stages of the proportionality test in a manner which further entrenches the spatial metaphor. It is not possible to solve one of these problems without also solving the other.

In this thesis, I am seeking to address both problems. In this introductory chapter I give a detailed explanation of the difficulties caused by the spatial metaphor and the lack of institutional sensitivity. In the remainder of the thesis, I set out a structural model of proportionality and deference which I argue gives a sophisticated account of the relationship between the two, and in particular overcomes the weaknesses in the spatial metaphor. I develop this model to take account of relevant institutional characteristics of governmental bodies which are judicially reviewed under the HRA; thus making the model 'institutionally sensitive'. This institutional sensitivity enables me to show the manner in which the specific features of a governmental body being reviewed can impact upon the operation of the proportionality test under the HRA. I then show that the model can be seen to work in existing HRA case law in three thematic case studies. The application of the model in these case studies will show that there is an order to the existing HRA case law that has not always been previously evident.

Before explaining the two problems with which this chapter is concerned, I will briefly set out the parameters of proportionality and deference under the HRA.

## 1.1: JUDICIAL REVIEW UNDER THE HRA – PROPORTIONALITY AND DEFERENCE

The possible introduction of proportionality into UK law was mooted for some time prior to the HRA<sup>3</sup> but the absence of a fundamental rights document impeded it.<sup>4</sup> The proportionality test has been used for some time by the European Court of Human Rights (‘the ECHR’) when interpreting the Convention.<sup>5</sup> The House of Lords has accepted that the Convention requires the use of the proportionality test.<sup>6</sup> It is therefore understandable that it was imported into the UK in the aftermath of the passage of the HRA. The courts have confirmed that (for the time being at least) proportionality is not an independent head of review and it is only applicable where a Convention right is engaged.<sup>7</sup>

Most Convention rights can be limited by the state, provided that the limitation meets the standard of proportionality.<sup>8</sup> The proportionality test entails a series of questions, which a reviewing court will ask when examining the Convention compatibility of a government measure which infringes a Convention right. While the precise formulation

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<sup>3</sup> *Council of Civil Service Unions v Minister of State for the Civil Service* [1985] AC 374; *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696; *R v Ministry of Defence ex parte Smith* [1996] QB 517. See also Jowell, J. and Lester, A. ‘Beyond Wednesbury: Substantive Principles of Administrative Law’ [1987] PL 368; and Jowell, J. and Lester, A. ‘Proportionality: Neither Novel Nor Dangerous’ in Jowell J. and Oliver, D. (eds.) *New Directions in Judicial Review* (London: Stevens, 1988).

<sup>4</sup> See de Búrca, G. ‘Proportionality & Wednesbury Unreasonableness: The Influence of European Legal Concepts on UK Law’ in Andenas, M. *English Public Law and the Common Law of Europe* (London: Key Haven, 1998); and Elliott, M. ‘The Human Rights Act 1998 and the Standard of Substantive Review’ (2001) 60 CLJ 301.

<sup>5</sup> See *Sunday Times v UK* (1979-80) 2 EHRR 245; *Handyside v UK* (1979-80) 1 EHRR 737.

<sup>6</sup> *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 AC 185, at 202 per Laws LJ.

<sup>7</sup> See *Association of British Civilian Internees – Far Eastern Division v Secretary of State for Defence* [2003] EWCA Civ 473. Although it has been recognised that proportionality might eventually become an independent head of review, the House of Lords has recently declined to decide this issue conclusively: see *Somerville v Scottish Ministers* [2007] UKHL 44; [2007] 1 WLR 2734, per Lord Hope and Lord Rodger.

<sup>8</sup> It is generally accepted that proportionality does not apply to Articles 2, 3 4 & 7 of the Convention. See further Palmer, S. ‘A Wrong Turning: Article 3 ECHR and Proportionality’ (2006) 65 CLJ 438. However, this has been disputed by Simon Atrill: see Atrill, S. ‘Keeping the Executive in the Picture: A Reply to Professor Leigh’ [2003] PL 41.

of the test by the UK courts has not always been consistent, it now seems clear that there are four questions to be asked of an impugned measure by the reviewing court:

1. Was the objective of the measure sufficiently important? (legitimate objective)
2. Was the measure rationally connected to the objective? (rational connection)
3. Did the measure go no further than was necessary to achieve the objective? (minimal impairment)
4. Was a fair balance struck between the rights of the individual and the interests of the community? (overall balance)<sup>9</sup>

In two early cases (*Daly v Secretary of State for the Home Department*<sup>10</sup> and *R v A (No 2)*<sup>11</sup>) the House of Lords applied a proportionality test which consisted solely of the first three questions.<sup>12</sup> However, there was a parallel strand of case law, going back to cases such as *Samaroo v Secretary of State for the Home Department*,<sup>13</sup> which applied the fourth question as the central plank of proportionality. The House of Lords has recently affirmed that all four questions are contained in the proportionality test.<sup>14</sup> As I will show in later chapters, the focus on particular stages of the test can be necessitated by the institutional characteristics of the body being judicially reviewed.

This multi-stage proportionality test can be applied by the courts to all other branches of government where the activities of those branches intrude upon Convention rights. The HRA gives courts a limited power of judicial review of legislation. The Courts can

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<sup>9</sup> *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139.

<sup>10</sup> [2001] UKHL 26; [2001] 2 AC 532.

<sup>11</sup> [2001] UKHL 25; [2002] 1 AC 45.

<sup>12</sup> This three-part proportionality test was set out by Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, at 80, and this formulation was cited with approval by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 and *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45.

<sup>13</sup> [2001] EWCA Civ 1139.

<sup>14</sup> *Huang v Secretary of state for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, at 187. See generally Beatson, J., Grosz, S., Hickman, T., Singh, R. and Palmer, S. *Human Rights: Judicial Protection in the United Kingdom* (London: Sweet & Maxwell, 2008), at 202-206.

either interpret a statute in accordance with the Convention<sup>15</sup> or make a declaration of incompatibility and remit the matter to Parliament for clarification.<sup>16</sup> A declaration of incompatibility does not affect the continued operation of the statute. It is entirely for Parliament to decide whether or not to remedy the incompatibility. Where the challenged measure is an action of a public body other than Parliament, the courts will be able to overturn the decision on human rights grounds.<sup>17</sup> It is noteworthy that in the *Daly* and *R v A* cases, the House of Lords introduced an identical proportionality test for review of both administrative action and legislation.<sup>18</sup> The courts have different powers in relation to each and there are significant institutional differences between administrative bodies and Acts of Parliament. However, a uniform test was used for both.

The introduction of a concrete set of fundamental rights in the HRA raised important questions regarding the role of judicial power in the UK. There has been heated academic debate regarding the very existence of a judicial power to oversee the activities of other branches of government.<sup>19</sup> It is understandable that the extent to which courts can use the HRA to scrutinise the other branches of government is also controversial. The courts have come to accept that when they engage in HRA-based judicial review they should pay some deference to the judgment of the original decision-maker.<sup>20</sup> This has been articulated variously in the case law as ‘deference’<sup>21</sup> a

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<sup>15</sup> Human Rights Act 1998, Section 3.

<sup>16</sup> Human Rights Act 1998, Section 4.

<sup>17</sup> Human Rights Act 1998, Section 6.

<sup>18</sup> *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 involved a challenge to a ministerial rule, whereas *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45 was a challenge to legislation. The two cases were decided within a week of each other in May 2001.

<sup>19</sup> Forsyth, C. ‘Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review’ (1996) 55 CLJ 122; and Elliott, M. ‘The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review’ (1999) 115 LQR 119; Craig, P. ‘Competing Models of Judicial Review’ [1999] PL 428; Allan, T.R.S. ‘Constitutional Dialogue and the Justification of Judicial Review’ 2003 OJLS 563; Poole, T. ‘Questioning Common Law Constitutionalism’ [2005] Legal Studies 142.

<sup>20</sup> The European Court of Human Rights applies a ‘margin of appreciation’ to states when scrutinising their compliance with the European Convention on Human Rights. See further Arai-Takahashi, Y. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the jurisprudence of the ECHR* (Oxford: Intersentia, 2002).

‘margin of discretion’<sup>22</sup> and a ‘discretionary area of judgment’.<sup>23</sup> More recently, the House of Lords has noted the need for proportionality to be guided by a concept of ‘relative institutional competence’.<sup>24</sup>

This is a very brief overview of the landscape within which this thesis operates: the HRA introduced litigable human rights to UK law. Where a person is of the view that a measure taken by a public body (including Parliament) has breached their rights, they can challenge that measure in court. In order to decide whether or not the right has been violated, the courts often use the multi-stage proportionality test. The courts are the primary ‘doers’ of proportionality.<sup>25</sup> When ‘doing’ proportionality to the decisions of other branches of government, the courts will pay deference to aspects of the decision-making process which gave rise to the challenged measure.

This landscape has not yet been sufficiently explored. At the time of the introduction of the HRA, Kentridge noted that ‘the most difficult and important problem facing British courts will be to develop (or, rather, invent) a coherent and defensible doctrine of proportionality’<sup>26</sup> A decade later, there is a consensus that this has not been achieved. Hickman argues that while proportionality was a great advance, there had not been a ‘well-thought-out, clear, consistent and principled approach to its content and structure.’<sup>27</sup> This view has been expressed by other commentators<sup>28</sup> and even the

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<sup>21</sup> *R v DPP, ex parte Kebilene* [2000] 2 AC 326.

<sup>22</sup> *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606; [2002] QB 1391.

<sup>23</sup> Lester, A. and Pannick, D. (eds.) *Human Rights Law and Practice* (London: Butterworths, 1999) at 74. Cited with approval in *R v DPP, ex parte Kebilene* [2000] 2 AC 326, at 381, per Lord Hope.

<sup>24</sup> *A&X v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

<sup>25</sup> Some analysis of the proportionality of proposed legislation is undertaken by Parliament’s Joint Committee on Human Rights. See Feldman, D. ‘Can and Should Parliament Protect Human Rights?’ (2004) 10 *European Public Law* 635. However, the bulk of the application of proportionality has been in the courts.

<sup>26</sup> Kentridge, S. ‘The Incorporation of the European Convention’ in University of Cambridge Centre for Public Law, Beatson, J., Forsyth, C. and Hare, I. (eds.) *Constitutional Reform in the United Kingdom* (Oxford: Hart Publishing, 1998), at 70.

<sup>27</sup> Hickman, T. ‘The Substance and Structure of Proportionality’ [2008] PL 694, at 714.

<sup>28</sup> See for example, Clayton, R. ‘The Human Rights Act Six Years On: Where Are We Now?’ [2007] EHRLR 11; and Martin, M. and Horne, A. ‘Proportionality: Principles and Pitfalls – Some Lessons from Germany’ [2008] JR 169.

judiciary themselves.<sup>29</sup> It is evident that the *process* which occurs when a court undertakes a proportionality analysis is not yet fully understood. In this thesis, I set out a structural, institutionally sensitive model of proportionality and deference. I expect this to make significant strides in deepening the usual analysis of proportionality review under the HRA.

## 1.2: PROBLEM ONE – THE SPATIAL METAPHOR

Within human rights-based judicial review, deference to the primary decision-maker is an important complement to the proportionality test. There are legitimate circumstances where the courts cannot or should not second-guess aspects of the original decision. The dominant approach to understanding how deference operates under the HRA is the ‘spatial metaphor’. In this section, I will initially set out the main features of the spatial metaphor. I then briefly examine two prominent strands of proportionality theory, each of which is based on a spatial approach. The section concludes with an analysis of the limitations of the spatial understanding of proportionality and deference.

The term ‘spatial metaphor’ was initially coined by Hunt as a way of explaining the courts’ approach to deference in the early years of the HRA.<sup>30</sup> The courts have recognised that there is a ‘discretionary area of judgment’ for primary decision-makers to which the courts should defer.<sup>31</sup> The idea of an ‘area’ to which deference is due expressly divides the constitutional landscape up into separate spaces for the courts and

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<sup>29</sup> *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105; [2005] 3 WLR 488 (CA), at 513 per Laws LJ.

<sup>30</sup> Hunt ‘Sovereignty’s Blight’, above n2.

<sup>31</sup> Lord Hope cited this term with approval in *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 366, at 381. The term ‘discretionary area of judgment’ was initially formulated by Lester and Pannick. See: Lester and Pannick, *Human Rights Law and Practice*, above n23, at 74. Another commonly used term is the ‘margin of discretion’, which is also a spatial term. See *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606; [2002] QB 1391, at 1417 per Lord Phillips.

the other arms of government. Hunt argues that this is a form of non-justiciability doctrine, whereby certain issues are removed from judicial scrutiny.

The spatial metaphor is based on the assumption that rights require the demarcation of certain zones of autonomy for the different institutions of government, outside of which they should not stray. This is done by setting out two separate and opposing ‘spaces’: one space for the human right (as protected by the courts) and another space for government autonomy. Inevitably, human rights and state power will come into conflict. Proportionality and deference are a means of resolving such conflicts. The spatial approach associates proportionality with rights and it associates deference with governmental autonomy. If proportionality ‘wins’ in a given case, then the human right also ‘wins’. If deference ‘wins’ then governmental autonomy ‘wins’ too.

The spatial metaphor charges the courts with determining the size of the discretionary area of judgment. In the first instance, the spatial approach seeks to determine the scope of that area based on the subject matter of a given case. If the subject matter deals with economic and social policy, then the courts should give a large degree of deference. If the case concerns the right to fair trial, then the courts should defer less. Subsequently the bases for deference have been elaborated further. It has been recognised that there are some institutions which deserve more deference than others. For example, in his dissenting judgment in *International Transport Roth GmbH v Secretary of State for the Home Department*, Laws LJ recognised that greater deference was due to Parliament than is due to an administrative official.<sup>32</sup>

The spatial metaphor developed as a way of describing deference. As a result of these origins, it treats proportionality and deference as separate issues. In its crudest form, the spatial metaphor requires a reviewing court to determine whether or not it should defer

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<sup>32</sup> [2002] EWCA Civ 158; [2003] QB 728, at 765-767. Laws LJ’s elements of deference were cited with approval in the House of Lords in the case of *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 AC 185 *per* Lord Walker.

to the primary decision-maker before engaging in a proportionality review. The dominance of the spatial metaphor has led to proportionality and deference being dealt with as two distinct questions, which has oversimplified the relationship between them.

This spatial approach assumes that the primary connection between proportionality and deference is that the tension between the two of them causes some clearly identifiable bright line to be moved backwards and forwards. The line marks out the border between the limits of judicially enforceable rights on the one hand, and the powers of other institutions of government on the other. More detailed interactions between proportionality and deference are not explored and while the debate varies in terms of its sophistication, it is still predominantly trapped in this paradigm.

This spatial conception of proportionality and deference in opposition to each other can be seen in the literature on the HRA. For example, Blake describes proportionality as drawing ‘a line in the sand identified by principle and justice beyond which the executive cannot go.’<sup>33</sup> With regard to the discretionary area of judgment Blake asks ‘how could the dimensions of this area be measured?’<sup>34</sup> This question is clearly premised on the spatial metaphor. Similarly, Poole recently contended that ‘there is no built-in limit to the proportionality test’ and so it can ‘be applied almost infinitely forcefully or infinitely cautiously, producing an area of discretionary judgement that can be massively broad or incredibly narrow’.<sup>35</sup> Leigh has analysed the post-HRA standard of review by dividing the analysis into ‘expansionary arguments’ in favour of a stricter standard of judicial review and ‘limiting arguments’ in favour of a less strict standard.<sup>36</sup> This presupposes a spatial conception of competence as between decision-maker and reviewing court, where the mechanism of review (proportionality) and the level of

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<sup>33</sup> Blake, N. ‘Importing Proportionality: Clarification or Confusion’ [2002] EHRLR 19, at 27.

<sup>34</sup> *ibid*, at 21.

<sup>35</sup> Poole, T. ‘The Reformation of English Administrative Law’ (2009) 68 CLJ 142, at 146.

<sup>36</sup> Leigh, I. ‘The Standard of Judicial Review after the Human Rights Act’ in Fenwick, H., Phillipson, G. & Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007).



scrutiny are separate, parallel factors which are in tension with one another, rather than being integrated in a meaningful way.

The focus on the demarcation of a space for rights and a space for government makes the spatial metaphor good at explaining the *outcomes* of HRA-based judicial review. However, it does very little to explain the *process* of judicial reasoning which leads to those outcomes. Once the process is examined, it becomes clear that it is inaccurate to suggest that deference is somehow separate from proportionality or a prior condition for the operation of proportionality. The inputs and outcomes of proportionality analysis may be spatial questions, but the way in which proportionality and deference operate to produce those outcomes is not a solely spatial question. I argue that there is a complex structural relationship between the two which must be understood in order fully to explain the process by which proportionality review operates.

In an article discussing deference, Jowell gives a brief explanation of how deference applies differently at the legitimate aim and minimal impairment stages of proportionality.<sup>37</sup> His analysis is short: he only covers two of the four parts of the proportionality test and the discussion is limited to a single institutional setting. The article does not purport to provide a comprehensive explanation of the relationship between proportionality and deference and a full-scale examination of that relationship is still required. However, Jowell's contribution is most welcome and it is one of the only attempts to move past an understanding of proportionality and deference in opposition to one another.

The spatial metaphor has been a useful fiction for judicial review theory in the past, where the courts were primarily concerned with limiting arbitrary governmental power and setting out the limits of the powers of the courts. To some extent the heavy influence of the spatial metaphor on proportionality and deference can be explained by

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<sup>37</sup> Jowell, J. 'Judicial Deference: Servility, Civility Or Institutional Capacity' [2003] PL 592, at 598-599.

the traditional judicial review standard of reasonableness.<sup>38</sup> Reasonableness was built on the premise that within the ‘four corners’ of administrative law principles, the discretion of decision-makers was ‘an absolute one’.<sup>39</sup> The case law leading up to the introduction of proportionality highlighted the need for increased scrutiny in cases involving fundamental rights.<sup>40</sup> However, these cases were still applying the reasonableness standard and so, if anything, this jurisprudence entrenches the spatial metaphor.

The spatial fiction has carried over into the HRA-era. The focus on deference as something which is separate from proportionality is undoubtedly fruit from the *Wednesbury* tree. Theorists want to know ‘where does proportionality leave the distinction between appeal and review?’<sup>41</sup> The focus on these two polarities has overshadowed any meaningful exposition of what proportionality actually *is* rather than what it *is not*. Proportionality has been variously described as ‘constitutional review’<sup>42</sup> which requires a higher degree of scrutiny and as ‘a formal approach with a variable content, rather than a fixed standard.’<sup>43</sup> Clayton suggests that ‘proportionality does not require a court to re-evaluate the underlying merits of the case: instead the court must assess the process or methodology used by the decision-maker in arriving at its decision.’<sup>44</sup> Each of these propositions goes some way towards elaborating the concept of proportionality, but they all understand proportionality by reference to the distinction

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<sup>38</sup> See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. See also *Council of Civil Service Unions v Minister of State for the Civil Service* [1985] AC 374. For an early criticism of unreasonableness relative to proportionality see: Jowell and Lester ‘Beyond *Wednesbury*’, above n3; and Jowell and Lester ‘Proportionality: Neither Novel Nor Dangerous’, above n3.

<sup>39</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, at 228 per Lord Greene MR.

<sup>40</sup> See *Council of Civil Service Unions v Minister of State for the Civil Service* [1985] AC 374; *R v Ministry of Defence, ex parte Smith* [1996] QB 517; and *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 and *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45.

<sup>41</sup> Beatson, J., Matthews, M. and Elliott, M. *Administrative Law: Text and Materials* (3<sup>rd</sup> ed., Oxford: Oxford University Press, 2005).

<sup>42</sup> Jowell ‘Judicial Deference’, above n37, at 598-599. See also Jowell, J. ‘Beyond the Rule of Law: Towards Constitutional Judicial Review’ [2000] PL 671.

<sup>43</sup> Leigh, I. ‘Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg’ [2002] PL 265, at 278.

<sup>44</sup> Clayton, R. ‘Developing Principles for Human Rights’ [2002] EHRLR 175, at 186.

between reasonableness review and appeal. They fail to explain proportionality on its own terms.

As will become clear in subsequent chapters, proportionality is far more sophisticated than *Wednesbury* unreasonableness, and if understood fully, it can transcend the spatial metaphor. The emphasis on the demarcation of zones restricts an understanding of how the proportionality test actually functions. The demarcation of such zones is often an outcome of proportionality analysis, but this is not a prerequisite of proportionality, it is a consequence of it.

Two views of proportionality and deference have been particularly prevalent in the literature, both of which are based on the spatial metaphor. One conceives of proportionality as just another version of *Wednesbury* unreasonableness, the other views it as a way for judges to provide the ‘correct’ answer. Rivers describes these as the ‘reasonableness-conception’ and the ‘correctness-conception’ of proportionality.<sup>45</sup> Some theorists see proportionality as just an offshoot of reasonableness which entails a high level of deference. Others contend that proportionality requires a court to find the correct human rights answer and so afford less deference. Both are unnecessarily reductive and obfuscate the processes underlying these disputes.

### *1.2.1: Proportionality as reasonableness*

In 1999 Lord Hoffmann described proportionality as an aspect of irrationality and commented that he sees ‘little future for proportionality in this country as a freestanding principle’.<sup>46</sup> This reasonableness-conception arose in cases such as *R (Mahmood) v*

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<sup>45</sup> Rivers, J. ‘Proportionality and Variable Intensity of Review’ (2006) 65 CLJ 174, at 192-193. Thomas made a similar analysis based on earlier debates, see Thomas, R. *Legitimate Expectations and Proportionality in Administrative Law* (Oxford: Hart Publishing, 2000), at 95-97.

<sup>46</sup> Hoffman, Lord ‘The Influence of the European Principle of Proportionality upon UK Law’ in Ellis, E. (ed.) *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999), at 114.

*Secretary of State for the Home Department*<sup>47</sup> in which Lord Phillips MR held that the HRA required a court to assess whether the decision of an authority was within a range of reasonable decisions. While the Court accepted that proportionality would allow a smaller range of action, the assessment was still deeply entrenched in the *Wednesbury* model.<sup>48</sup>

Elliott contends that the difference between reasonableness and proportionality is one of degree not type.<sup>49</sup> He suggests that the two tests are very similar and not, as is often suggested, competing. He contends that both tests recognise the need for balance but that the ECHR jurisprudence affords a smaller zone of discretion to the executive. On Elliott's analysis both the *Wednesbury* test and proportionality entail the drawing of a dividing line between an area where the decision-maker has discretion and another area where she does not. He also argues that both tests are applied with varying levels of scrutiny, but this is presented in a spatial fashion.

This line of analysis has led over time to an understanding of proportionality which requires decision-makers to use the language of human rights when reaching their decisions, rather than making decisions which are substantively Convention-compatible. This approach has been roundly rejected by the House of Lords and a focus on the substantive human rights outcome of a decision seems now to be the required standard.<sup>50</sup> Notwithstanding this, Leigh and Masterman have expressed concern that

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<sup>47</sup> [2001] 1 WLR 840.

<sup>48</sup> This model was further propounded in cases such as *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139; *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716; [2003] 1 WLR 2979; and *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368 *per* Lord Carswell.

<sup>49</sup> Elliott 'Standard of Substantive Review', above n4. Elliott bases his argument on the more robust formulation of unreasonableness that was recognised pre-HRA as being necessary in rights cases. See: *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 and *R v Ministry of Defence, ex parte Smith* [1996] QB 517.

<sup>50</sup> See *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420. This was also a central finding of *Huang v Secretary of state for the Home Department* [2007] UKHL 11; [2007] 2 AC 167. See Clayton, G. 'Prediction or Precondition? The House of Lords Judgment in Huang & Kashmiri' (2007) 21 JIANL 311. However, Poole argues that there may still be situations, particularly in immigration decisions where the decision-maker is under an obligation to make a decision in convention specific terms, see Poole

where a court focuses exclusively on the ‘overall balancing’ element of proportionality, this could be the basis for the reintroduction of *Wednesbury* through the back door.<sup>51</sup>

### *1.2.2: Proportionality as correctness*

Clayton is critical of the degree of deference exercised in cases such as *Mahmood*.<sup>52</sup> He argues that proportionality must be strictly applied if it is to be of any value in protecting fundamental rights and that ‘the deferential view taken towards an administrative decision to implement the Secretary of State's policy is difficult to understand’.<sup>53</sup> Blake is also critical of deference to the public authority since it appears to ‘subjugate the Court's duty to ensure that administrative action was Convention-compatible, to the executive's freedom within limits of rationality to form policies and select preferred solutions.’<sup>54</sup> More recently, Knight has argued that the reasoning of the primary decision-maker is only relevant on the basis that if the primary decision-maker conducts its own human rights balancing analysis, then ‘the “correct” result is more likely to be reached’.<sup>55</sup> These schools of thought are examples of the ‘proportionality as correctness’ view.

Edwards is another adherent of this approach.<sup>56</sup> He argues forcefully that a strict application of the proportionality test is required to establish whether limitations on rights are legitimate. He is concerned that too much deference can lead to superficial

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‘Reformation of English Administrative Law’, above n35, at 150. See further: Knight, C. ‘Proportionality, the Decision-Maker and the House of Lords’ (2007) 12 JR 221; and Young, A.L. ‘In Defence of Due Deference’ (2009) 72 MLR 554.

<sup>51</sup> Leigh, I. and Masterman, R. *Making Rights Real: The Human Rights Act in its First Decade* (Oxford: Hart Publishing, 2008), at 152. See also: Leigh ‘Standard of Judicial Review’, above n36 at 199; and Leigh ‘Taking Rights Proportionately’, above n43, at 276-277.

<sup>52</sup> Clayton, R. ‘Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle’ [2001] EHRLR 504.

<sup>53</sup> Clayton ‘Developing Principles’, above n44, at 187. See also Clayton ‘The Human Rights Act Six Years On’, above n28.

<sup>54</sup> Blake ‘Importing Proportionality’, above n33, at 22-23.

<sup>55</sup> Knight ‘Decision-Maker and the House of Lords’, above n50, at 224.

<sup>56</sup> Edwards, R.A. ‘Judicial Deference under the Human Rights Act’ (2002) 65 MLR 859.

reasoning and is particularly critical of the application of deference prior to the limitation analysis itself. He contends that there is a risk that indiscriminate judicial deference can cause the minimal impairment stage of the proportionality test to become diluted. Edwards is aware of the need to apply deference within the proportionality analysis, which is undoubtedly a positive development. However, he does not flesh out the connections between proportionality and deference. His analysis is not a rejection of spatial conceptions of deference, but merely a rejection of the level of space that has been given. Writing around the same time, Leigh warned that proportionality should not ‘become a Trojan horse by which judicial deference can be smuggled back into the domestic legal system.’<sup>57</sup> Again this shows a spatial view of deference and proportionality which expresses a desire to see less space for deference.

Not all proponents of the correctness-conception are fans of proportionality. Nicol argues that the division of competences between the judiciary and the other branches of government ‘ebbs and flows with the respective assertiveness of judicial and elected officials’<sup>58</sup> and that the law is increasingly ineffective at separating the roles of judges from politicians. He views this as a cause for great concern and contends that ‘[a]t its most intrusive, the doctrine of proportionality points to a single lawful solution.’<sup>59</sup> Nicol’s main criticism is that the HRA brings questions of political morality into judicial review. This is indicative of the spatial underpinnings of his understanding of proportionality and deference.<sup>60</sup> He is concerned that by allowing the courts to decide questions of political morality, proportionality permits the courts to intrude upon a space which should belong to Parliament.

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<sup>57</sup> Leigh ‘Taking Rights Proportionately’, above n43, at 278.

<sup>58</sup> Nicol, D. ‘Law and Politics after the Human Rights Act’ [2006] PL 722, at 723.

<sup>59</sup> *ibid*, at 734. This analysis draws heavily on the decision in *A&X v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

<sup>60</sup> Hickman disputes Nicol’s assertion that judges are taking on a political role and argues that judges are adapting to new territory they still go about deciding cases in the same way they always have; see Hickman, T. ‘The Courts and Politics after the Human Rights Act: A Comment’ [2008] PL 84.

Hickman separates out the minimal impairment and the overall balance stages of the test.<sup>61</sup> In effect he sees overall balance in reasonableness-type terms and he suggests that minimal impairment should be dispensed with because it suggests that wherever there is a less intrusive option this must be taken. He claims that ‘the proportionality test, applied in this way, would extinguish the discretion of a public authority as to how best to achieve policy goals.’<sup>62</sup> Again, this analysis is predicated on a conception of deference which pits it against proportionality, rather than integrating it within proportionality.

### *1.2.3: The limitations of the spatial metaphor*

There is a legitimate desire to situate proportionality and deference in the existing public law tapestry by connecting them to traditional judicial functions, most notably reasonableness review and appeal. Arguments about proportionality have a tendency to connect it to one or other of these, by describing it either as a branch of reasonableness or as a correctness test, akin to an appeal on the merits. This attempt to understand by analogy is understandable. However, there comes a point when analogy becomes a hindrance and something has to be understood on its own terms. This has not yet occurred with proportionality and deference under the HRA.

There are two main limitations of the spatial metaphor. First, its heavy focus on normativity and the separation of powers has prevented a meaningful analysis of the structure of the relationship between proportionality and deference. As a result, the process which occurs in proportionality-based judicial review has not yet been adequately explained. Secondly, the spatial metaphor has prevented the development of an institutionally sensitive approach to proportionality. The second difficulty flows

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<sup>61</sup> Hickman ‘Substance and Structure’, above n 27.

<sup>62</sup> *ibid*, at 702.

from the first and is of particular importance for this thesis. I will explain each difficulty in turn.

The spatial metaphor is heavily focused on normative issues at the expense of an analytical approach. It over-simplifies proportionality-based rights adjudication, to an extent that renders the metaphor unrealistic. The discussion is largely about how much deference the courts ought to give, without any recognition of how deference and proportionality relate to one another. I do not seek to deny that the limitation of rights and state power is properly an *outcome* of a proportionality analysis. The problem is that the spatial view does not explain the *process* of proportionality.

Proportionality and deference are concerned with defining human rights and determining the limits of state power. These are deeply normative issues and I accept that they must be addressed. It is undoubtedly important to discuss whether government ought to be permitted to limit rights in a certain way and whether the courts ought to be permitted to make certain decisions instead of the other branches of government. Such things are fundamental to the operation of judicially enforceable human rights. However, while it is valuable to consider these normative issues related to proportionality and deference, those normative issues are concerned with the outcomes of HRA adjudication. If the debate about deference is focused on the question of the extent of deference due and when it should be afforded, then the question of *how* deference is afforded is overlooked. The proportionality test, unlike *Wednesbury* unreasonableness, does not require a court to ask a single question of a challenged measure. Proportionality requires a court to ask a series of questions, each of which is based on certain assumptions. Some of these questions involve normative issues; other questions involve empirical issues.<sup>63</sup> Deference will not operate in the same manner in

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<sup>63</sup> See Kumm, M. 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in Pavlakos, G. (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007), at 137.



relation to each question within the proportionality test. However, this fact is overlooked by solely spatial accounts of proportionality. A supplementary structural account is required. Such an account can explain the relationship between the different stages of proportionality and deference permits a more detailed understanding of the process which occurs. This in turn permits normative arguments to be applied to the appropriate aspects of the proportionality analysis, rather than being made in very generalised terms about HRA review as a whole.

A short example helps to illustrate this point. One of the elements of the proportionality test requires a court to ask whether a challenged measure went no further than was necessary to achieve its objective. This requires the reviewing court to decide whether or not there was a less rights-restrictive alternative available to the primary decision-maker which would still achieve the objective being pursued by that decision-maker. If a hypothetical local authority was seeking to evict a tenant it might do so on the basis that it was necessary to prevent anti-social behaviour caused by the tenant's eldest son. The tenant might challenge that eviction on the ground that it was a disproportionate interference with her right to respect for home life. Part of the tenant's case might be that she was prepared to ask her son to leave the house and that if he did so the anti-social behaviour would be eliminated.

Whether or not this is a less rights-restrictive measure which still achieves the objective is an empirical question which must be decided by the reviewing court as part of the proportionality test. There may disagreement about the answer to this question. The local authority may have doubts about whether or not the son is actually likely to leave. There may be a third alternative which would achieve the objective but be less restrictive of the tenant's rights than eviction would be. When deciding whether eviction is the least rights-restrictive alternative, the court may decide to defer to the view of the local authority on this matter, or on a related matter which affects it. If the

court does so, then it is affording deference to the fact-finding capabilities of the local authority. This is a very particular form of deference and in this instance it is connected to one particular part of proportionality. The questions involved at this point of the analysis are not normative, they are empirical. Normative arguments about the legitimate limits of governmental autonomy are of little use in deciding the level of deference to be afforded at this point in the proportionality test.

Other forms of deference may arise at other stages. At the final stage of proportionality, the court would examine whether or not there is an overall balance between the objective of preventing anti-social behaviour and the eviction. This is not a factual issue, and so the deference linked to the overall balance question is of a different form to the deference linked to the minimal impairment question. Normative arguments would be valuable at this point.

The preceding is a very crude example and I will give a more comprehensive exposition of the links between proportionality and deference in later chapters. However, at this point, the example should help to illustrate that there are different parts to proportionality and there are different forms of deference. Different parts of proportionality connect with different forms of deference in specific cases. An examination of the structure of the relationship between proportionality and deference will help to elaborate the process by which proportionality adjudication occurs. A solely spatial approach cannot achieve this, because it treats proportionality and deference as separate questions. In truth, they are a series of questions which interact with each other in order to produce a particular outcome.

This has not been achieved to date because the reasonableness and correctness conceptions of proportionality are both heavily focused on normative arguments. They effectively form opposite viewpoints of the same normative debate regarding the balance of power to be struck between the courts and the other arms of government. The

analysis of deference has focused excessively on general theories of the separation of powers, rather than analysing deference in terms of its relationship to the structure of the proportionality test. Neither approach permits the sort of step-by-step analysis of proportionality and deference that I have set out in the local authority example. The reasonableness and correctness conceptions only address the normative issues. The intermingling of normative and epistemic questions is not accounted for.

A normative analysis of the appropriate powers and roles under the HRA is based on assumptions about the structure and operation of the proportionality test as it relates to deference. The dominance of the spatial view has hidden these assumptions. A deeper analysis of the technical operation of proportionality review is required if the assumptions are to be brought out into the daylight and the normative arguments are to be permitted to develop beyond a turf war. A workable model of the structural relationship between proportionality and deference can provide a framework for the normative arguments regarding rights and governmental power to develop beyond their current level. Proportionality has a specific designated structure and so it is possible to understand deference *within* that structure.

It has been argued that the courts should get rid of proportionality altogether and focus solely on the normative questions. Tsakyrakis, writing about ECHR jurisprudence, suggests proportionality claims to be objective and morally neutral, when in fact it is not.<sup>64</sup> These criticisms of rights adjudication may have some weight but for the purposes of this thesis, they must be discounted for two reasons. First, I do not argue that proportionality is a means of providing a correct answer to normative questions. Rather, I argue that it is a means of providing a transparent process of decision making in matters which involve some normative questions and some empirical questions. I do not subscribe to a 'right answer thesis'. What I am seeking to do is provide a framework

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<sup>64</sup> Tsakyrakis, S. 'Proportionality: An Assault on Human Rights?' (2009) 7 IJCL 468.

within which normative questions can be addressed. Secondly, and perhaps more practically, the UK courts have committed themselves to proportionality and there does not seem to be any reduction in the pace with which it is being applied. If judges are using this process to reason on rights cases, then a sophisticated explanation of that process is needed.

The second difficulty with the spatial metaphor is that it is an impediment to the development of an institutionally sensitive approach to proportionality. As will be made clear in later chapters, the proportionality test does not operate in a uniform manner across the range of government activity. Certain parts of the test may be more or less important depending on the body being judicially reviewed. Making this aspect of proportionality adjudication explicit is crucial if a more sophisticated account of proportionality and deference is to be developed. In order to do this the structure of proportionality and its interaction with deference must be fully accounted for.

The spatial metaphor has managed to take some account of institutional sensitivity in deference.<sup>65</sup> However, it cannot explain the way in which the operation of the proportionality test (as opposed to deference) will be affected by the institutional features of the body being judicially reviewed. Spatial conceptions of proportionality are fundamentally about the appropriate extent of judicial power, not the manner in which that power is exercised.

The spatial metaphor obfuscates the institutional issues which can arise within proportionality analysis. I return briefly to the local authority example (again this will be a cursory illustration; a more detailed explanation of institutional sensitivity will follow below and in later chapters). Local authorities operate their housing policies under statutory schemes. If the statute required the authority to seek an eviction in any case where there is proof of anti-social behaviour, then it would not have had any

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<sup>65</sup> This is discussed further below at Chapter 1.3.3.

choice but to evict the tenant. When the reviewing court applied the minimal impairment stage of the test, it would be asking a question which had already been answered by the institutional setting in which the decision to evict was made. If the court asked ‘was there a less rights-restrictive alternative available to the local authority?’ the answer would be no. However, this is not because a less restrictive alternative does not exist; it is because the local authority does not have the power to choose such an alternative.

If the court were to apply the spatial metaphor, it would separate out deference and proportionality. It might decide that it was appropriate to defer to the decision of the local authority because the subject matter concerned social policy and the authority had more expertise. The court might then apply the minimal impairment arm of the proportionality test in a deferential manner and conclude that the eviction satisfied that part of the proportionality test. On such an analysis, it would not be possible to tell whether the outcome was the result of the level of deference that was afforded or because part of the test was irrelevant. Indeed, it would not necessarily be clear that the minimal impairment part of the test was irrelevant, since there would be little reason for the court to turn its attention to that issue. These institutional issues cannot be meaningfully explored as long as proportionality and deference are understood solely in spatial terms. A structural approach is a prerequisite to an institutionally sensitive approach.

### **1.3: PROBLEM TWO – THE LACK OF INSTITUTIONAL SENSITIVITY**

The second problem with the existing literature on proportionality in the UK is that insufficient attention has been paid to the institutional and functional distinctions

between the various types of governmental activity which a court may be called upon to review under the HRA. While there has been a great deal of discussion about the relative institutional features of the judiciary on one hand and ‘the government’ on the other, there has been little focus on the fact that there are varying institutions within ‘the government’ which themselves have different features and competences. The UK Courts can be called upon to consider proportionality-based challenges to all forms of government activity, from the decisions of appointed officials to primary legislation<sup>66</sup> and everything in between. (In this thesis I use the terms ‘government’ and ‘governmental’ in their broad sense to encompass all public bodies covered by the HRA, including Parliament.) There has been some recognition of the need to examine the different institutional reasons for deference.<sup>67</sup> However, no such recognition has arisen with regard to proportionality itself. The four stages of the proportionality test are based on certain assumptions about government measures being challenged as Convention-incompatible. These assumptions do not hold for all institutional situations. When a court is reviewing one branch of government, some of these assumptions may come to the fore, whereas they could be of less relevance if the court is reviewing a different institution of government.

Making these institutional aspects of proportionality clear is valuable of itself.

However, it is also necessary if the spatial metaphor is to be overcome. If these

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<sup>66</sup> Under sections 3&4, the courts do not have the power to strike down Acts of Parliament; however, they do have the power to scrutinise the proportionality of primary legislation. Jowell has suggested that the rule of recognition based on parliamentary sovereignty may now have been overtaken by one based on the rule of law, which applies to Parliament as well as the executive. See Jowell, J. ‘Parliamentary Sovereignty Under the New Constitutional Hypothesis’ [2006] PL 562.

<sup>67</sup> See for example: Lester, A. ‘The Human Rights Act 1998 - Five Years On’ [2004] EHRLR 258; Jowell, J. ‘Judicial Deference and Human Rights: A Question of Competence’ in Paul Craig and Richard Rawlings (eds.) *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford: Oxford University Press, 2003); Kavanagh, A. ‘Deference or Defiance? The limits of the Judicial Role in Constitutional Adjudication’ in Huscroft, G. (ed.) *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press 2008). See also *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2002] EWCA Civ 158; [2003] QB 728, at 765-767 per Laws LJ. Feldman has also recognised the need for institutional sensitivity in analysing different government bodies’ understandings of compatibility with the HRA and the manner in which this affects their approach; see Feldman, D. ‘Institutional Roles and Meanings of ‘Compatibility’ under the Human Rights Act 1998’ in Fenwick, H., Phillipson, G. & Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007).

institutional factors are not made explicit, then it will not be possible to integrate deference within proportionality. The reduced application of certain parts of the test can happen both because of the institutional features of the challenged decision-maker and because of deference. In order to overcome the spatial fiction, a theory of proportionality must be clear about which of these factors is at work.

### *1.3.1: Proportionality and the range of governmental activity*

The subject matter of a proportionality review will broadly fit into two categories of decision: rule-making and case-specific administrative decision-making. Most government activity which can be challenged under the HRA will fall into one of these two categories. There are also distinctions between the levels of autonomy enjoyed by government actors. For example, Parliament has much broader powers than other rule-makers. As was explained briefly above, there are four elements to the proportionality test: legitimate objective; rational connection; minimal impairment; and overall balance. There are certain institutional features which will affect the premises upon which these four elements are based.

Parliament will have a very wide amount of choice as to which objectives it pursues. This is not true of decision-makers further down the governmental food-chain. An appointed official may have some discretionary powers, but the objectives they pursue will have been set for them elsewhere. This means that asking whether or not the objective of a measure was legitimate requires a different analysis when asked of the outcomes of primary legislation than when it is asked of the actions of an appointed official.<sup>68</sup>

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<sup>68</sup> Furthermore, under section 6(2) of the HRA, if a public authority is mandated to act in a Convention-incompatible way by an Act of Parliament, then the actions of the public authority will not be deemed to

Rational connection has not been a significant element in very many HRA proportionality cases. However, there are institutional factors which could potentially arise. Whether or not a measure is capable of achieving its stated objective may be moot. In such instances the courts may decide to defer to the expertise of the decision-maker on the matter. Levels of expertise will differ depending on the institution involved.

The minimal impairment element of proportionality requires an examination of whether there was, in any particular case, a less rights-restrictive measure available. This presupposes that there is a range of measures available to the decision-maker. This cannot be assumed of all governmental activity. Parliament has a wide power to choose the specific measure it uses to pursue a particular aim. Many appointed officials have no choice whatsoever, which renders this element of the test defunct when a court is reviewing the actions of certain institutions.

The overall balance stage of proportionality requires a reviewing court to measure the impact of the challenged governmental action on Convention rights and the extent to which that action will achieve the stated objective. Such measurement might be quite straightforward in cases where the action only affects one individual. The same cannot be said for a rule of very wide application, where measurement of these two factors can be very complex.

A further issue of institutional sensitivity arises in relation to cases where a public authority exercises legislative powers. If there is an infringement of human rights, a court will need to address its proportionality review to either the decision of the public authority or the legislation or both. O'Brien describes these as 'applied review' and

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be unlawful. This is an issue for both legitimacy of objective and rationality of connection within the proportionality test.



‘legislative review’ respectively.<sup>69</sup> He points out that the relationship between these two modes of review is just as critical as the relationship between sections 3 and 4 of the HRA, but has received far less attention. Where a court is called upon to assess the Convention compatibility of governmental action which is the product of multiple levels of decision-making, the proportionality analysis becomes even more complex and so institutional sensitivity is particularly important in these ‘multi-level’ cases.

### *1.3.2: Institutional sensitivity and proportionality*

Current discussion of proportionality is unduly selective in its institutional assumptions about governmental activity. Analysis tends to either focus on an administrative law model or a legislative model. Under the administrative model, the assumptions underlying traditional judicial review are assumed to apply to all proportionality review.<sup>70</sup> The great concern of the legislative model is the dangers of judges taking the power to define the scope of rights away from the democratic powers, which implies a concern for the sovereignty of Parliament.<sup>71</sup>

It is somewhat telling that *Daly* is regularly referred to as the watershed for proportionality in judicial review.<sup>72</sup> This assertion is based on Lord Steyn’s judgment which introduced the three-part proportionality test used in the Privy Council case of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and*

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<sup>69</sup> O’Brien, D. ‘Judicial Review under the Human Rights Act 1998: Legislative or Applied Review?’ [2007] EHRLR 550.

<sup>70</sup> Clayton ‘Developing Principles’, above n44; Elliott, M. ‘The Human Rights Act 1998 and the Standard of Substantive Review’ [2002] JR 97.

<sup>71</sup> Nicol, ‘Law and Politics’, above n58; Hiebert, J.L., ‘Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?’ (2006) 4 IJCL 1. It is noteworthy that Elliott, who addresses proportionality in administrative law, does not give detailed consideration to proportionality when he analyses the sovereignty of Parliament. See Elliott, M. ‘Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention’ (2002) 22 *Legal Studies* 340.

<sup>72</sup> This has been expressed repeatedly in the literature, for example, see Poole ‘Reformation of English Administrative Law’, above n35, at 146; and Clayton, R. and Ghaly, K. ‘Shifting Standards of Review’ [2007] JR 210, at 214-215.

*Housing*.<sup>73</sup> However, Lord Steyn had introduced precisely the same test six days previously in *R v A (No 2)* as a basis for analysing the proportionality of legislation. Furthermore, while his comments in *Daly* were effectively *obiter dicta*, the use of the test in *R v A (No2)* was central to his judgment. The focus on *Daly* is indicative of the institutionally insensitive analysis of proportionality under the HRA. Prior to the HRA, judicial review in the UK was focused almost exclusively on administrative decision-making. It is understandable that an administrative law case would be cited as the introduction of the test. However, this focus on *Daly* serves to minimise the importance of the legislative review aspect of proportionality analysis.

Hickman seeks to provide an analysis of the structure of proportionality by separating out the minimal impairment and overall balance parts of the test.<sup>74</sup> However, he is hampered in his efforts by institutional insensitivity. While he accepts that the House of Lords confirmed that both are part of the test in *Huang*,<sup>75</sup> he is concerned that there is not sufficient clarity about which of the two tests is the dominant one. If an institutionally sensitive approach is taken, it can be shown that this issue is contingent on the features of the government body being judicially reviewed. Hickman argues that '[p]ut simply, courts and public officials address different questions.'<sup>76</sup> While this is true, he fails to give adequate recognition to the fact that so too do administrators and ministers, or ministers and Parliament, and that these differences impact on which limb of the test is dominant.

As with the spatial metaphor, there are good historical reasons for this lack of institutional sensitivity. In general, there has been limited discussion of the separation of

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<sup>73</sup> [1999] 1 AC 69. The formulation used includes the first three parts of the proportionality test: legitimate objective, rational connection and minimal impairment.

<sup>74</sup> Hickman 'Substance and Structure', above n 27, at 711-714.

<sup>75</sup> *Huang v Secretary of state for the Home Department* [2007] UKHL 11; [2007] 2 AC 167.

<sup>76</sup> Hickman 'Substance and Structure', above n 27, at 699.

powers in the UK<sup>77</sup> and the understanding of the relationship between the legislature and the executive is still often very traditional.<sup>78</sup> It is still accepted doctrine that the powers of government in the UK are unified in the Crown.<sup>79</sup> Over the past half century, there has been a very substantial growth in the administrative state<sup>80</sup> coupled with the dominance of two heavily-whipped political parties<sup>81</sup> and an increasing use of delegated legislation.<sup>82</sup> This has reduced the powers of Parliament while at the same time increasing the powers of the executive in a way that makes it quite understandable that many would view governmental activity as being a single amorphous mass. Indeed, in some instances, government is a single amorphous mass: many state bodies and agencies have been set up to regulate certain discrete fields and these bodies regularly control rule-making, policy-setting and adjudication on those rules.<sup>83</sup> The same is true of much of local government.<sup>84</sup> This constitutional backdrop goes some way to explaining the lack of institutional sensitivity in modern proportionality analysis in the UK.

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<sup>77</sup> See Barendt, E. 'Separation of Powers and Constitutional Government' [1995] PL 599; Saunders, C. 'Separation of Powers and the Judicial Branch' [2006] JR 337. Craig examines the separation of powers, but like much of the analysis of this topic, he is concerned primarily with the separation between the courts and the other branches, rather than between the executive and the legislature: Craig, P. 'Fundamental Principles of Administrative Law' in Feldman, D. (ed.) *English Public Law* (Oxford: Oxford University Press, 2004).

<sup>78</sup> See generally Dicey, A.V. *Introduction to the Study of the Constitution* (10<sup>th</sup> ed. London: MacMillan, 1959). For a HRA-era defence of Dicey, see Young, A.L. *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart Publishing, 2008).

<sup>79</sup> Loughlin, M. *The Idea of Public Law* (Oxford: Oxford University Press 2003) at 23-25.

<sup>80</sup> Supperstone, M., Goudie, J. and Walker, P. *Judicial Review* (3<sup>rd</sup> ed. London: LexisNexis Butterworths, 2005), at 8-10; and Loughlin, 'Idea of Public Law', above n79, at 8-12.

<sup>81</sup> Lijphart, A. *Patterns of Democracy: government Forms and Performance in Thirty-Six Countries* (New Haven, CT: Yale University Press, 1999), at 13-14.

<sup>82</sup> There are now thousands of statutory instruments passed each year; see [www.opsi.gov.uk](http://www.opsi.gov.uk). See also Ganz, G., 'Delegated Legislation: A Necessary Evil or a Constitutional Outrage?' in Leyland, P. and Woods, T., *Administrative Law Facing The Future: Old Constraints and New Horizons* (Blackstone 1997); and Barber, N.W. and Young, A.L. 'The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty' [2003] PL 112.

<sup>83</sup> Barendt 'Separation of Powers', above n77, at 607.

<sup>84</sup> See generally Turpin, C. and Tomkins, A. *British Government and the Constitution* (6<sup>th</sup> ed. Cambridge: Cambridge University Press, 2007), at 244-259.

Admittedly, there has been some recognition of the variety of forms of governmental activity to which proportionality can apply.<sup>85</sup> Prior to the entry into force of the HRA, Feldman noted that proportionality would be applied in different ways depending on various factors, one of which was source or form of interference.<sup>86</sup> He distinguished between legislative rules, individual decisions and policy powers and suggested that the UK Courts were more likely to use proportionality for administrative law than for review of primary legislation.<sup>87</sup> While these contributions were certainly valuable, they need to be developed further in order to address the issues that arise within the structure of proportionality when it is applied to varying forms of government activity.

The interplay between the legislative and administrative levels of proportionality has also received a certain amount of attention.<sup>88</sup> Clayton is critical of judicial decisions in which it has been held that ‘the statutory scheme represents Parliament’s view of striking a balance so that there is no scope for undertaking a proportionality exercise by looking at the particular circumstances in an individual case.’<sup>89</sup> Feldman argues that Parliament ‘does not make proper judgments about the limits to the proportionality of power-conferring legislation’<sup>90</sup> and so it is left to decision-makers to decide for themselves. While Feldman views this in a negative light, Sales and Hooper contend that proportionality actually requires legislation to give decision-makers wide discretion, so that their decisions can be more fact-sensitive.<sup>91</sup> While this recognition of effect of multi-level decision-making on proportionality is certainly valuable, there has not yet been an analysis of how the test itself is affected by the institutional setting.

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<sup>85</sup> For example, Blake comments on the fact that much proportionality case law has focused on the Home Office and has included challenges to legislation, policies and individual decisions. See Blake ‘Importing Proportionality’, above n33, at 20.

<sup>86</sup> Feldman, D. ‘Proportionality and the Human Rights Act 1998’ in Ellis, E., (ed.) *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999), at 137.

<sup>87</sup> Feldman, ‘Proportionality and the Human Rights Act’, above n86, at 138-139.

<sup>88</sup> See O’Brien ‘Legislative or Applied Review?’, above n69.

<sup>89</sup> Clayton ‘The Human Rights Act Six Years On’, above n28, at 23.

<sup>90</sup> Feldman, D. ‘Human Rights, Terrorism and Risk: The Roles of Politicians and Judges [2006] PL 364, at 377.

<sup>91</sup> Sales, P. and Hooper, B. ‘Proportionality and the Form of Law’ (2003) 119 LQR 426.

The confusion regarding institutional roles in proportionality has already impacted on the quality of judicial reasoning. For example, in the case of *R v Shayler*<sup>92</sup> the House of Lords examined the Convention compatibility of the Official Secrets Act 1989 ('the OSA'). There was a scheme in place whereby a person bound by the OSA could make a request to certain officials if they wished to make a disclosure that would otherwise be in breach of the OSA. The House of Lords noted that a refusal of such a request would be subject to proportionality-based judicial review if the refusal affected Article 10 of the convention. The House therefore held that the OSA was Convention-compatible. This is an unsatisfactory decision. The House's assessment of the legislation was sidetracked by a hypothetical assessment of an administrative decision-making process which had not even occurred. The HRA challenge brought in this case was to the legislation itself and yet instead of assessing the proportionality of the OSA, the House of Lords was content to presume that any Convention-incompatible use of the OSA would be weeded out by proportionality-based judicial review. If a more institutionally sensitive approach had been adopted, better quality reasoning could have been expected, regardless of the eventual outcome.

### *1.3.3: Institutional sensitivity and deference*

Unlike proportionality, deference has been approached in an institutionally sensitive manner both by commentators and the judiciary. Not long after the entry into force of the HRA there was a recognition that different levels of deference should be afforded to administrative action as opposed to primary legislation.<sup>93</sup> The dissenting judgment of Laws LJ in *International Transport Roth GmbH v Secretary of State for the Home*

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<sup>92</sup> [2002] UKHL 11; [2003] 1 AC 247.

<sup>93</sup> See Clayton 'Developing Principles', above n44, at 187.

*Department*<sup>94</sup> is a much celebrated exposition of the bases on which deference might be paid. It is possible to distil these bases into the complementary concepts of democratic legitimacy<sup>95</sup> and ‘relative institutional competence’<sup>96</sup> thus separating the institutional reasons for deference into their two primary elements. These two ideas have been recurring themes in the literature on proportionality and deference,<sup>97</sup> although not all commentators have accepted democratic legitimacy as a basis for deference under the HRA.<sup>98</sup>

Unfortunately, discussion of the institutional reasons for deference has not yet broken free of the spatial understanding of the relationship between proportionality and deference.<sup>99</sup> Hunt, who is deeply critical of the spatial metaphor, sees it as creating a non-justiciability hurdle, marking out certain issues as being beyond judicial oversight.

<sup>100</sup> His answer to this problem is to introduce a standard of ‘due deference’. This standard is based on the actual features of the decision-maker, particularly with regard to democratic legitimacy and institutional competence. While Hunt succeeds in developing an institutionally sensitive concept of deference, he fails to overcome the spatial metaphor with regard to proportionality and so his overall analysis is limited.

Instead of a line delimiting the sphere of autonomy of the courts from the sphere of

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<sup>94</sup> [2002] EWCA Civ 158; [2003] QB 728, at 765-767. Laws LJ’s elements of deference were cited with approval in the House of Lords in the case of *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 AC 185 per Lord Walker.

<sup>95</sup> See Lester ‘Five Years On’, above n67, at 265. Democratic legitimacy is at the heart of ‘dialogue’ models of judicial review of primary legislation, although in the UK these models have not tended to give much detail on the operation of the proportionality test. See: Clayton, R. ‘Judicial Deference and “Democratic Dialogue”: The Legitimacy of Judicial Intervention under the Human Rights Act 1998’ [2004] PL 33; Hickman, T. ‘Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998’ [2005] PL 306; and Young, A.L. *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart Publishing, 2008). Turner has expressed concerns about the effect that ‘expertization’ has on political discourse. See Turner, S.P. *Liberal Democracy 3.0* (London: Sage, 2003).

<sup>96</sup> This term was introduced into the case law in *A&X v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, at 102 per Lord Bingham. See a detailed consideration of competence as a basis for deference see Jowell ‘A Question of Competence’, above n67.

<sup>97</sup> See for example: Steyn, Lord ‘Deference: A Tangled Story’ [2005] PL 346; Clayton, R. ‘Principles for Judicial Deference’ [2006] JR 109; Sayeed, S ‘Beyond the Language of “Deference”’ [2005] JR 111.

<sup>98</sup> See Phillipson, G. ‘Deference, Discretion, and Democracy in the Human Rights Act Era’ (2007) 60 CLP 40; and Jowell ‘Servility, Civility Or Institutional Capacity’, above n37.

<sup>99</sup> See for example Keene, Sir D. ‘Principles of Deference under the Human Rights Act’ in Fenwick, H., Phillipson, G. & Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007)

<sup>100</sup> Hunt ‘Sovereignty’s Blight’, above n2.

autonomy of other arms of government, Hunt gives us two lines, based on two differing standards. His analysis does not provide a substitute for the spatial metaphor; he merely develops it on its own terms. It is as if Hunt has split the spatial metaphor into two sub-planes, on which the metaphor and its limitations survive. Hunt claims that due deference can overcome the problem of a ‘non-justiciability’ concept of deference which is inherent in the spatial metaphor. Allan dismisses this, suggesting that ‘[d]ue deference turns out, on close inspection, to be non-justiciability dressed in pastel colours.’<sup>101</sup>

Gearty also addresses institutional sensitivity in deference. He argues for a subject-matter analysis, which falls along similar lines to that of Hunt. He uses the metaphor of a swimming pool to suggest when and if courts should undertake detailed scrutiny of the decision-maker.<sup>102</sup> At the shallow end of the pool is legal principle and at the deep end is public policy. According to Gearty, the judiciary should stay in the shallow end. Kavanagh challenges Gearty’s analysis, arguing that the cases under the HRA ‘do not arise in separate categories marked “legal principle” or “public policy.” Rather, they are often, if not typically, entwined.’<sup>103</sup> Controversial cases will arise at the halfway point in the swimming pool; the line between an uncomfortable judge and a drowned one will be thin.

Julian Rivers notes that ‘there is uncertainty as to the conceptual structure within which debates about relative institutional competence and legitimacy can take place.’<sup>104</sup> While it is clear that there has been a recognition that deference is institutionally contingent, there has been a corresponding failure to recognise that this is also true of

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<sup>101</sup> Allan, T.R.S. ‘Human Rights and Judicial Review: A Critique of Due Deference’ (2006) 65 CLJ 671, at 689. Allan’s own analysis of deference is itself deeply rooted in a spatial understanding of the operation of judicial review and his argument is based on the correctness-conception of rights based judicial review discussed above.

<sup>102</sup> Gearty, C. *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004) at 121-122.

<sup>103</sup> Kavanagh ‘Deference or Defiance?’ above n67, at 197.

<sup>104</sup> Rivers, ‘Variable Intensity of Review’, above n45, at 176.

proportionality. The spatial metaphor will not be overcome until there is an explicit elaboration of *both* the structural relationship between proportionality and deference *and* the institutional contingency of the sub-stages of proportionality test.

#### **1.4: GOALS OF THESIS AND OUTLINE OF CHAPTERS**

The review of the existing literature on proportionality and deference in this chapter has established that the spatial metaphor and institutional insensitivity have not been adequately addressed and that they are related problems. It is my view that proportionality has been an over-discussed and yet under-analysed field. Proportionality has the potential to be a valuable judicial tool: it is significantly more sophisticated than previous approaches to rights-based judicial review. If the structure of the test is adequately understood, deference can be integrated into the individual stages of the test. This structural model will provide a significant advance on previous attempts to explain the operation of deference under the HRA. In order for the structural model to be possible, an institutionally sensitive approach to each of these stages is required. The institutional factors which affect the stages of the proportionality test must be explicit in order to avoid confusing them with the institutional factors in which deference is grounded.

In this thesis, I will undertake a detailed analysis of the structure of proportionality and deference and develop this structural model in order to make it institutionally sensitive. My over-arching goal is to give a detailed account of the operation of proportionality and deference in a way which transcends the pitfalls in the existing literature. In order to achieve this, I will show that there is a structure to the proportionality test as applied in the case law under the HRA. I will explain that this structure can accommodate



deference within the elements of the proportionality test. I will also show that certain aspects of proportionality are minimised or emphasised depending on the institution being judicially reviewed, in much the same way that occurs with deference. The application of the structural, institutionally sensitive model will enable some order to be put on the existing HRA proportionality case law. A clear doctrine of proportionality under the HRA has yet to emerge. In this thesis, I aim to go some way towards imposing some shape on the existing jurisprudence.

Aside from the elaboration of the nature of proportionality under the HRA, I expect two other outcomes from my analysis. First, it will be easier to apply proportionality in a manner which is internally logically consistent. This will prevent the use of judicial reasoning which misunderstands the institutional aspects of proportionality. I term this 'institutionally perverse reasoning'. Secondly it will be possible for normative arguments about the proper division of governmental powers to be made in a more focused way, so that they can be applied to specific aspects of the structure of the test (e.g. overall balance, legitimate aim). This will allow for a more meaningful discussion of the normative issues in proportionality than the current approach of making normative arguments in general terms directed at the test as a whole. Such arguments are based on implicit institutional assumptions which limit their effectiveness. If the institutional assumptions are made explicit, then the debate can begin to move forward.

In Chapter 2, I will set out a structural model of proportionality based on the work of Robert Alexy. Alexy's model is based on the test as applied by the German Constitutional Court, the *Bundesverfassungsgericht* ('*BVerfGE*'). However, as I will show, the elements of the German test are all present in the UK case law, so an importation of Alexy's model is feasible. Alexy explains proportionality as the optimisation of competing principles. He uses this analysis to explain the interaction between the minimal impairment arm of proportionality and the overall balancing arm.

Alexy's model also describes deference as integrated within the stages of the proportionality test. He divides deference into 'structural' and 'epistemic' and explains how they relate to each stage of proportionality. My exposition of Alexy's model will adapt it to the UK context so that it can form the basis for the analysis of the structure of proportionality and deference that follows.

Alexy's model is focused solely on judicial review of legislation and so in Chapter 3 I will develop it by explaining a number of specific institutional distinctions which affect the operation of proportionality in all fields. In doing so, I am not seeking to set out a comprehensive theory of institutional difference in government. The purpose of Chapter 3 is to explain differences which are relevant to the structural model of proportionality, so that it can be made institutionally sensitive. In addition to these I will explore the two institutional features which provide the main reasons for deference. I will also look at the way in which a challenged decision can be the product of multiple levels of government decision-making. As I noted above, these 'multi-level decisions' pose particular issues for the proportionality test and I will examine those here.

In the remainder of the thesis, I will show how the structural, institutionally sensitive model of proportionality and deference operates in existing HRA case law. This will be done through three thematic case studies: immigration, criminal justice and housing. The HRA cases on immigration to date have been heavily focused on one-off decision-making. Much of the proportionality analysis in the field of criminal justice has been concerned with rule-making: predominantly primary legislation, although other, non-Parliamentary, rules have featured too. I have chosen these two case studies because they are at opposite ends of the institutional spectrum, and so they will provide a strong contrast. The proportionality cases on housing have entailed an element of both one-off decision-making and rule-making and some of them have involved multi-level

decisions. These three case studies will enable me to develop a detailed analysis of the recurring institutional patterns within the proportionality test in the UK case law.

The first case study is set out in Chapter 4. In this chapter I will look at the proportionality case law relating to immigration. The challenged decisions in the bulk of immigration cases have been made on an individualised basis by appointed officials. Such officials are at one end of the institutional spectrum as regards the institutional distinctions which are relevant to proportionality. This – coupled with the fact that there have been a significant number of proportionality decisions on immigration – makes the field an ideal case study for this thesis. I will show how the structural model of proportionality can be seen at work in these cases provided an institutionally sensitive approach is taken. I will also explain how the courts' approach to deference in these cases can be explained in terms of the structural model, permitting the integration of deference into the proportionality test.

Chapter 5 is the second case study, in which I will examine the proportionality case law relating to the criminal justice system. I have defined this broadly to include prisons and terrorism as well as mainstream substantive criminal law. In the cases I examine, the challenged measures are rules of general application adopted by various levels of government, up to and including Parliament itself. These cases are a valuable institutional counterpoint to the immigration decisions and will help to illustrate the importance of an institutionally sensitive model. In this chapter I will show how this institutional setting leads to specific emphases in the application of the structural model of proportionality. I will also explain the operation of deference in these cases as it relates to that structural model.

Chapter 6 is the third case study, which is concerned with housing cases. As with the other two case studies, there has been a good deal of judicial consideration of this field. Housing cases have regularly involved HRA challenges that were addressed to multiple

levels of government simultaneously. These multi-level cases will further elaborate the effect that institutional distinctions have on the operation of proportionality. I will show that the structural, institutionally sensitive model of proportionality and deference can be seen at work in these cases. I will also give examples of cases where the internal logic of proportionality has been undermined by a lack of judicial understanding of the institutional and structural features of the test.

The final chapter sets out the conclusions of this research. The HRA proportionality test affirmed in *Huang* involves a series of steps. I will show that while the test itself is of universal application, in certain institutional settings, some of the elements of the test are either emphasised or minimised. Furthermore, once this institutionally sensitive approach is taken, it is possible to accommodate deference into the proportionality test, by using Alexy's formulation of structural and epistemic deference. I will finish by reflecting on some of the expected outcomes of this research.

## *Chapter 2: Importing Alexy: towards a structural understanding of proportionality and deference in the UK*

In Chapter 1, I identified two problems with the current understanding of proportionality and deference in the UK. First, the current literature on proportionality has been dominated by a ‘spatial metaphor’ which seeks to understand deference in terms of zones of competence. Secondly, little attention has been paid to the distinction between the different types of governmental activity which can be judicially reviewed under the Human Rights Act 1998 (‘the HRA’).

The spatial metaphor focuses on the separation of powers between the courts and the other arms of government. Spatial arguments about proportionality are essentially normative debates about government power. The attention given to such debates has prevented any rigorous analysis of the structure of how the proportionality test actually operates. An analysis of that structure could explain how deference operates *within* that structure. In this thesis I wish to move away from the normative debates concerning what proportionality should or should not be doing. I want instead to look at the process of proportionality and examine how it actually works in practice. I am not suggesting that normative arguments are irrelevant to judicial review under the HRA. My

contention is that normative arguments are only part of the picture. It is the other part of that picture that I am exploring in this thesis.

I plan to give a meaningful account of deference within the structure of proportionality. This requires a structural model of proportionality, which must be institutionally sensitive if it is to take account of the full range of HRA proportionality review. The four stages of the proportionality test are based on certain premises which will be affected by distinctions between the various governmental bodies which can be judicially reviewed under the HRA. These distinctions need to be accounted for.

This model will provide a more sophisticated account of proportionality and deference. It will also provide a structure into which normative arguments about the separation of powers can be made in a more productive way. This will allow such arguments to be made against a background of a proper account of the process in which courts are engaged when they apply the proportionality standard.

My starting point for building this model is the work of Robert Alexy. In *A Theory of Constitutional Rights*<sup>1</sup> (*TCR*) Alexy sets out a general theory of constitutional rights. He focuses on the German Basic Law (*Grundgesetz*), but much of his analysis is relevant to judicially enforceable fundamental rights generally, and can be applied to adjudication under the HRA, as was noted by Rivers, who translated the book into English.<sup>2</sup> *TCR* is a structural theory of constitutional rights. Contained within it is a structural discussion of the operation of the principle of proportionality which integrated deference into the stages of the proportionality test. In this thesis, I am specifically concerned with the elements of *TCR* which provide a structural theory of *proportionality*. As I will show, the German test contains the same elements as the UK test, so the model is well suited

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<sup>1</sup> Alexy, R. and Rivers, J. (Translator) *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002).

<sup>2</sup> See 'Translator's Introduction' in Alexy *TCR*, above n1; and Rivers, J. 'Fundamental Rights in the UK Human Rights Act' in Menéndez, A.J. and Eriksen, E.O. (eds.) *Arguing Fundamental Rights* (Dordrecht: Springer, 2006). See also Rivers, J. 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174.

for the UK context. Also, Alexy focuses heavily on case law in his model. Such an approach can be more easily adapted to a common law jurisdiction than a more doctrinaire civil law model. By using Alexy's theory as a basic framework, I aim to expound a structural theory for the British case law.

Alexy expresses concern that there is insufficient clarity about the structure of constitutional rights norms and that ideological influences have been over-accentuated at the expense of analytical clarity.<sup>3</sup> This mirrors the problems which I have highlighted in Chapter 1 with the scholarship on proportionality and deference in the UK. The structural nature of Alexy's theory is of particular value in deepening our understanding of proportionality and deference in the UK; because instead of asserting what the correct scope of rights should be, it provides a descriptive account of how judicially enforceable fundamental rights actually work in practice in the courts. Alexy moves beyond a solely normative theory of what the content of rights should be or who should get to decide that content. He expressly countenances that the analytical aspects of his theory should be applicable as a framework theory to other normative arguments.

In this chapter I will set out Alexy's model of the structure of proportionality and deference and explain how it can be applied to the UK. Alexy's model of proportionality focuses solely on rights-based judicial review of the legislature. It therefore needs to be adapted in order to expand his ideas across a range of government functions, in order to make it institutionally sensitive. In essence, this chapter is about importing Alexy's ideas into the UK context and the next chapter is about translating them more effectively and developing them further.

This chapter is divided into five sections. In the first I look at the elements of the UK and German proportionality tests in order to establish the similarities between the two. In the second section, I set out Alexy's consideration of the nature of fundamental rights

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<sup>3</sup> Alexy *TCR*, above n1, at 13-18.

norms. He characterises rights norms as principles and this is the basis upon which he proceeds with his structural theory. In the third section I consider the individual steps of the proportionality test and Alexy's analysis of how they work. In the fourth section of this chapter I set out Alexy's theory of deference, which accommodates judicial deference to the primary decision-maker within the proportionality test. This is a key innovation of Alexy's work and it is of particular relevance to the UK. In the final section, I will look at the limitations of Alexy's model for the UK context and set the stage for the development of his theory which I undertake in Chapter 3.

## 2.1: ELEMENTS OF THE PROPORTIONALITY TEST

Before moving into the substantive discussion of Alexy's model, it is important to address a preliminary issue concerning the applicability of a German model to the UK jurisprudence. Alexy's model is based on the German Constitution and the jurisprudence of the German Constitutional Court (the *Bundesverfassungsgericht*, or, '*BVerfGE*'). In this thesis, I am setting out a similar framework for the HRA and the UK Courts. I will do this by importing and translating Alexy's model.

The role of proportionality analysis is to assess the legitimacy of government measures which impinge on fundamental rights.<sup>4</sup> The *BVerfGE* uses a three-stage proportionality test. The House of Lords has recently affirmed that the test to be used in the UK is a four-stage test.<sup>5</sup> The two tests differ slightly in the way in which they are set out. However, as I will show, both tests contain the same four fundamental elements.

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<sup>4</sup> The *BVerfGE* is concerned with 'constitutional rights' and the British Courts are concerned with 'human rights'. In practical terms, the two are identical. In this chapter I use the term 'fundamental rights' as a collective term to describe both forms of right.

<sup>5</sup> *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167.



The three elements of the German test are: suitability, necessity and proportionality *stricto sensu*.<sup>6</sup> The ‘suitability’ arm of the test requires that the measure in question actually be capable of achieving its aim. It does not need to completely realise the aim, but must go some way towards it. The second arm of the German test, ‘necessity’, requires that the least rights-intrusive means of achieving the aim be used. So, even if the challenged measure is suitable, it may not be the least rights-intrusive measure available and may fall foul of this stage of the test. The third stage, ‘proportionality *stricto sensu*’ requires that there be an overall balance between the seriousness of the intervention on the constitutional right and the gravity of the reasons for the measure.<sup>7</sup>

These three elements are all present in the UK test. In *Huang v Secretary of State for the Home Department*<sup>8</sup> the House of Lords drew on previous jurisprudence and affirmed that the test in the UK involved four elements. The first three are contained in an oft-cited passage from the judgment of Lord Clyde in the Privy Council decision in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*:

‘In determining whether a limitation is arbitrary or excessive he said that the court would ask itself:

“whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”<sup>9</sup>

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<sup>6</sup> These three stages were affirmed in 1958 in the *Apothekenurteil* judgment *BVerfGE* 7 S 377. See further Emiliou, N. *The Principle of Proportionality in European Law: A Comparative Study* (The Hague: Kluwer Law International, 1996) at 25.

<sup>7</sup> *ibid*, at 26-37. See also Kommers, D.P. *The Constitutional Jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed., Durham N.C.: Duke University Press, 1997), at 46.

<sup>8</sup> [2007] UKHL 11; [2007] 2 WLR 581.

<sup>9</sup> [1999] 1 AC 69, at 80

In *Huang*, the House of Lords affirmed that the applicable test in the UK also contained a requirement that an overall balance be struck between the needs of the individual and of the community as a whole.<sup>10</sup>

The House's affirmation of this final, overall balance, element was not its first introduction into UK proportionality. It had been utilised in the jurisprudence as early as 2001<sup>11</sup> but had not always been applied consistently. As will be shown throughout this thesis, the application of the proportionality test has not always been uniform. In later chapters, I will set out the institutional reasons why this is so. However, at this stage it is sufficient to note that the similarities between the UK and German tests are easily established. The requirement that there be a rational connection between a measure and its objective mirrors the requirement that a measure be capable of achieving its aim. The requirement that a measure restrict a right as little as possible matches the German necessity requirement and overall balance asks the same questions of measure as proportionality *stricto sensu*. The German test does not expressly include the 'legitimate objective' arm of the UK test, although the *BVerfGE* does address the legitimacy of the aim, albeit in a different manner.<sup>12</sup> It is sufficient that the German test entails three of the UK test's elements. As will be shown, the UK's separate legitimate objective element can be accommodated within Alexy's model and indeed the latter will be strengthened as a result.

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<sup>10</sup> Hickman has questioned whether or not this final elements is subordinate to the minimal impairment test or *vice versa* see Hickman, T. 'The Substance and Structure of Proportionality' [2008] PL 694.

<sup>11</sup> See *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139. See generally Beatson, J., Grosz, S., Hickman, T., Singh, R. and Palmer, S. *Human Rights: Judicial Protection in the United Kingdom* (London: Sweet & Maxwell, 2008), at 202-206.

<sup>12</sup> See Emiliou 'Principle of Proportionality in European Law', above n6 at 25.

## 2.2: THE NATURE OF FUNDAMENTAL RIGHTS NORMS

The use of human rights (or ‘fundamental rights’) as a basis for litigation is a relatively new practice in UK judicial review.<sup>13</sup> A human rights norm is significantly different to the types of norm that courts ordinarily consider. In order to understand the operation of proportionality, the nature of the norms to which it applies must be examined.

In *TCR* Alexy draws on the work of Ronald Dworkin, and his division of legal standards into rules and principles.<sup>14</sup> Dworkin first introduced the distinction between rules and principles in the 1970s as a critique of legal positivism. Dworkin was conscious that not everything decided by a court could be based on a stated rule, but was unhappy with the positivists’ argument that this left judges free to fill in the blanks as they saw fit.<sup>15</sup> Dworkin argued that the filling in of gaps in rules, was based on legal principle. He described principles and rules as being substantially different in character. Rules have an all-or-nothing character: they either apply or they do not. Principles are different in that they do not necessarily apply, they can be applied to varying degrees and it is not feasible to create an exhaustive list of all legal principles (while it is theoretically possible to list all rules). Unlike rules, principles do not provide an account of the legal consequences of their own realisation.

Dworkin’s approach forms the basis for Alexy’s explanation of the nature of fundamental rights.<sup>16</sup> Fundamental rights are norms that exist at an extremely high degree of abstraction, particularly when compared to norms contained in other sources of law, such as statutes. As such, they come closer to the realm of principles than rules and Alexy argues that many constitutional rights norms are in fact principles, not rules.

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<sup>13</sup> Notwithstanding the running debate about common law constitutionalism, see generally: Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) and Craig, P. ‘Constitutional Foundations, The Rule of Law and Supremacy’ [2003] PL 92.

<sup>14</sup> See Dworkin, R. *Taking Rights Seriously* (London: Duckworth, 1977), at 22-28.

<sup>15</sup> See Hart, H.L.A. *The Concept of Law* (2<sup>nd</sup> ed. Oxford: Clarendon Press, 1994).

<sup>16</sup> Although it is worth noting that Dworkin himself does not use the principles model for rights, which he characterises as ‘trumps’. See: Dworkin, R. ‘Rights as Trumps’ in Waldron, J. (ed.) *Theories of rights* (Oxford: Oxford University Press, 1984).

Conflicts of rules are resolved in a very different manner than are collisions between principles.<sup>17</sup> Where two rules conflict, either an exception is written into one of them, or else one of them becomes invalid. Where two rights come into conflict, then the two competing principles must be reconciled in some manner. It would be wrong to suggest that one right will always trump another right in all circumstances, since it would be relatively easy to think of a circumstance in which it would be unjust to do so. The outcome of a conflict between two constitutional principles of equal notional weight must be decided according to the concrete facts of a specific case and cannot be decided in the abstract, as would be the case if they were rules.

Alexy gives the example of the decision of the German Constitutional Court in the *Lebach* case<sup>18</sup> which concerned a tension between an individual's right to personality and the freedom of the press. Neither of these two rights can be stated to be more important than the other in the abstract. As such, the principles have to be weighed against each other according to the facts of the case. The outcome of that case is a specific rule, which says that in those particular circumstances, one has priority over the other. This means that while constitutional rights norms are principles in the abstract, they can become rules when put into a particular set of facts, so that they can bind subsequent cases that match that fact pattern in a rule-like manner. Once it is accepted that fundamental rights norms operate as principles which produce fact-specific rules, it becomes evident that a theory of balancing rights against each other based on a model of principles is an appropriate model for explaining this process.

However, Alexy goes further than this and argues that the role of principles is not limited to rights. He is clear that certain collective interests can constitute competing principles for the purpose of constitutional adjudication. He argues that these must be identified and he gives examples of numerous public interest principles which have

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<sup>17</sup> Alexy, R. 'On the Structure of Legal Principles' (2000) 13 *Ratio Juris* 294, at 295-297.

<sup>18</sup> BVerfGE 35, 202.

been applied in past German constitutional case law: for example public health, the security of the state and the protection of a free democratic order.<sup>19</sup> In this respect Alexy differs from Dworkin, insofar as Dworkin is only prepared to characterise principles as reasons for individual rights, not as reasons for competing public interest norms.<sup>20</sup> This is central to Alexy's conception of the proportionality principle, which involves a balancing of competing principles against one another. Such a model cannot operate if certain public interests are not seen as being based on principles.

As the example of the *Lebach* judgment shows, it is not possible to state in the abstract that one fundamental right is more important than another in all cases. Similarly, it is not possible to state in the abstract that a particular fundamental right will be outweighed by a particular public interest consideration in all circumstances. The characterisation of rights norms and the public interest as principles can account for this.

Habermas has criticised the model of rights as principles.<sup>21</sup> He draws a distinction between rights as norms and rights as values arguing that the former are deontological, whereas the latter are teleological. For Habermas, a right must be a norm and must have a deontological or 'ought' character. He argues that any model of rights as principles will necessarily entail the reduction of rights to the status of values. He contends that this places rights on the same level as policy arguments, and that this gives too much leeway for the dilution of rights.<sup>22</sup>

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<sup>19</sup> Alexy *TCR*, above n1, at 65.

<sup>20</sup> *ibid*, at 66. Habermas takes the same view as Dworkin. He argues that 'only rights can be trump in the argumentation game.' See Habermas, J. and Rehg, W. (Translator) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Oxford: Polity Press, 1996), at 259.

<sup>21</sup> Habermas, *'Between Facts and Norms'*, above n20, at 253-255.

<sup>22</sup> These criticisms are noted in the postscript to *TCR*. See: Alexy *TCR*, above n1, at 388-390.

The core of this criticism is that rights and collective interests are being put on an equal footing.<sup>23</sup> However, Habermas is incorrect to suggest that Alexy is reducing rights from the status of norms to the status of values. What actually occurs in Alexy's model is that certain public interests are raised from the status of values to the status of norms. Alexy is explicit that principles are deontological and that this is a qualitative difference between principles and values.<sup>24</sup> His characterisation of rights as principles makes it clear that he is not seeking to undermine their deontological character. Instead he is prepared to accept that certain public interests are also deontological.

Both the German Constitution and the European Convention on Human Rights ('the Convention') expressly countenance the limitation of rights in the public interest in certain instances. This means that in certain situations there must be public interests with sufficient normative weight to justify restricting fundamental rights. As such it is not possible to describe the operation of fundamental rights in Germany or the UK without accepting that certain public interests can be deontological. However, characterising the public interest as a principle to be balanced against fundamental rights does not mean that government is entitled to trample on any right it chooses and use some amorphous 'public policy' basis to excuse it. Only certain public interests will be accepted. Therefore, the real issue thrown up by Habermas's criticism is not whether rights are values or norms relative to public interests. The issue is how to distinguish between public interests that are values and public interests that are norms. Only public interests which have the status of norms can be deemed to be principles for the purposes of Alexy's model. The exclusion of certain public interest reasons as illegitimate is necessary in order to avoid a form of utilitarian cost-benefit analysis for all rights

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<sup>23</sup> Habermas makes his comments as part of a general criticism of the self-understanding of the *BVerfGE* which covers the work of numerous jurists. See Habermas, '*Between Facts and Norms*', above n20, at 253-267. A full response to the general criticism is unnecessary for the purposes of this thesis, provided Habermas can be rebutted in relation to Alexy's model.

<sup>24</sup> Alexy *TCR*, above n1, at 92-93.

(which is what Habermas is seeking to avoid). Such an approach would fundamentally undermine the protections afforded by the Convention and the *Grundgesetz*.

Kumm discusses this issue and points out that it is necessary to ensure that only certain public interest goals can be used to limit rights. For Kumm, some public interest goals can never acquire the status of principles and so can never be the basis of a proportionality analysis. Effectively, he is endorsing the division of public interest goals into deontological and teleological norms. He describes the principles which do not suffice for the purposes of limiting human rights as ‘excluded reasons’, which he sees as being complementary to the proportionality principle.<sup>25</sup> Alexy takes a slightly different route, but reaches a similar conclusion. He argues that this concept of ‘excluded reasons’ can in fact be accommodated within his overall model of proportionality, in that such reasons would be given a weight of zero within any balancing exercise, and so would never prevail in a proportionality analysis.<sup>26</sup> For Alexy, such excluded reasons would be invalid principles.<sup>27</sup> Kumm is arguing that certain public interest goals must be excluded from the outset. Alexy is arguing that those goals should be given a status whereby they are deemed incapable of ever limiting any right. The practical effect of each approach is the same.

It is clear that Alexy’s model of proportionality only permits public interests with a certain normative force to be used in the proportionality analysis. Some public interest goals will reach the standard of principles, whereas others will not. In certain very clear-cut cases, it may be easy to illustrate the distinction between public interests that qualify as principles and those that are illegitimate. For example, limitations on the right to respect for family life may arise in the context of immigration control. The state may

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<sup>25</sup> Kumm, M. ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’ in Pavlakos, G. (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007).

<sup>26</sup> Alexy, R. ‘Thirteen Replies’ in Pavlakos, G. (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007). See also Alexy’s consideration of ‘invalid principles’ in Alexy *TCR*, above n1, at 61-62.

<sup>27</sup> Alexy *TCR*, above n1, at 61-62.

wish to restrict immigration for various reasons. The goal of protecting national security would usually qualify as a principle. However, if the goal of the restriction on immigration were the exclusion of members of certain specific ethnic groups, then that would almost certainly not qualify as a principle. While this example illustrates the distinction being drawn, in most cases it will not be a straightforward exercise to determine which public interests qualify as valid principles and which ones do not.

Alexy's model assumes the segregation of those public interests that have the status of deontological norms and those that are 'excluded reasons'. The possibility of achieving such segregation is also presupposed in any system of adjudication which permits the limitation of rights in the public interest (as is the case in both Germany and the UK). However, Alexy's model does not purport to provide a mechanism for conducting this segregation. Alexy seeks to describe the structure of the proportionality process rather than to prescribe the content of rights. Human rights and deontological public interests are both *inputs* of proportionality analysis. These inputs must be defined. While Alexy's model can tell us at which stage in the process the definition occurs, it does not provide a comprehensive account of how that definition is conducted.

Whether a public interest is a principle for the purposes of proportionality is a deeply normative question. A meaningful examination of that question requires a reviewing court to consider complex issues of political morality. A comprehensive legal mechanism for separating valid public interest principles from illegitimate goals is certainly desirable, but it is not provided by Alexy's model.

I do not purport to present such a mechanism in this thesis. Like Alexy, I am seeking to provide an account of the proportionality process, rather than conclusively answer the normative questions that arise within it. My contention is that certain public interests are principles and that once a court is satisfied that a public interest is a principle then the court may proceed with the proportionality analysis. While I accept the importance of



defining which public interests are principles, this is a separate normative question which can be accommodated within the framework presented here. A structural model of proportionality and deference permits moral disagreements about the legitimacy of certain public interest aims. The value of the structural model for the purposes of those disagreements is that it allows them to be focused on the particular normative issue of whether a specific public interest aim is a principle. As was discussed in Chapter 1.2, normative arguments about proportionality have, to date, been made in an unstructured fashion which has obscured the very process that I am seeking to clarify.<sup>28</sup>

There are two techniques currently employed by the UK courts to determine whether a public interest is a legitimate principle. Neither technique is a comprehensive system for determining which public interests have sufficient normative weight to be put in the balance against human rights. However, each technique has gone some way to making explicit the moral reasoning underlying such a decision. While greater clarity would be welcomed, I am not seeking to provide it here. I will outline each technique briefly here and then show them in operation in the case studies in Chapters 4, 5 & 6.

In the first instance, the courts have been guided by the first arm of the UK proportionality test, which entails an explicit control on using excluded reasons as public interest. The first part of the test requires that the public interest objective being pursued by the challenged measure is ‘sufficiently important to justify limiting a fundamental right’.<sup>29</sup> This is a high threshold which will exclude common or garden public policy considerations from being treated as being on the same constitutional plane as human rights. As such, only substantial and important public interest aims can

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<sup>28</sup> For example, Tsakyrakis criticises the proportionality test on the basis that ‘it pretends to be objective, neutral, and totally extraneous to any moral reasoning’. The main thrust of his argument focuses on the definition of the principle used to limit the human right. His critique of this definitional stage is certainly valid. However by levelling his attack at proportionality as a whole, he seeks to discount the whole process because of difficulties of definition of the inputs of that process. See Tsakyrakis, S. ‘Proportionality: An Assault on Human Rights?’ (2009) 7 IJCL 468.

<sup>29</sup> *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, at 80. Cited with approval by Lord Steyn in *R (Daly) v Secretary of State for the Home department* [2001] 2 AC 532.

be used as principles to be balanced against rights. This limb of the test is relatively loosely framed, and it could be argued that it is somewhat circular. However, it does at least show that the UK courts are only prepared to accept certain public interests as principles and they seek to explicitly examine this normative issue.

The second approach employed by the UK judiciary has been to use the text of the Convention itself when undertaking this onerous task of discerning legitimate objectives. Articles 8-11 list specific public interest principles which can be taken into account when the courts are called on to determine whether or not there has been a violation of a protected right. Public interests that fall within these provisions may achieve the status of principles for the purposes of rights adjudication. As I will show in the case studies in Chapter 4, 5 & 6, the UK Courts have been strongly guided by these provisions when deciding whether a public interest was a 'legitimate objective.'

These limitation provisions of the Convention are a recognition of the need to balance rights against the public interest, which in certain contexts will be unavoidable. This can also be seen in Article 6, which ostensibly contains an absolute protection of the right to fair trial, but admits that a balancing exercise is required to determine what the content of that right is.<sup>30</sup> The European Court of Human Rights ('the ECHR') has been clear that where such a balancing occurs, it must be in pursuit of a legitimate aim.<sup>31</sup> ECHR jurisprudence on this point has been used by the UK Courts when discerning whether limitations on Article 6 are in pursuit of a legitimate aim.

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<sup>30</sup> See van Dijk, P. and van Hoof, G.J.H. *Theory and Practice of the European Convention on Human Rights* (4<sup>th</sup> ed. Oxford: Intersentia, 2006), at 511-650.

<sup>31</sup> See Arai-Takahashi, Y. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford: Intersentia, 2002), at 35. However, it is worth noting that, as with other applications of the proportionality test, there is no comprehensive mechanism for determining which aims are legitimate. The issue is dealt with on a somewhat *ad hoc* basis, although through the development of case law, certain aims have been given detailed exploration.

Another, related, feature of rights norms is that they have a semantically open texture which can give rise to the possibility of derivative norms.<sup>32</sup> Not only do Convention rights norms not provide an account of their own realisation, they often do not even provide an account of their own content. For example, the right to respect for private life in Article 8 does not, by its own terms, set out whether this includes a principle that individuals have a right to build relationships with people outside of their family,<sup>33</sup> or that the preservation of mental stability is a precondition to the exercise of Article 8 rights.<sup>34</sup> These sub-norms are judicially derived from the right as laid down. The broad nature of human rights norms means that they will inevitably require the articulation of specific principles in a given case.

The possibility of derivative norms also arises with public interest principles. For example, Article 8 of the Convention expressly countenances the limitation of the right to respect for family life in order to protect the ‘economic well-being of the country’. Over time, this public interest principle has been developed to include the sub-norm of immigration control.<sup>35</sup> Recognition of this derivative feature of certain public interest principles is important in ensuring that illegitimate aims are excluded as bases for limiting rights. As was discussed above, it can be difficult to distinguish between public interests that are principles and those that are merely goals. It is important that any derivative public interest be examined with the necessary rigour to ensure that it has sufficient normative force to qualify as a principle. If ‘definitional generosity’ is used in assessing these derivative public interests, then an aim which constitutes a valid principle may be permitted to introduce a sub-aim which is not a valid principle.<sup>36</sup>

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<sup>32</sup> Alexy *TCR*, above n1, at 33-38.

<sup>33</sup> *B v Secretary of State for the Home Department* Unreported, Court of Appeal, 18 May 2000.

<sup>34</sup> *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368.

<sup>35</sup> See *Ahmut v Netherlands* (1997) 24 EHRR 62; *Gül v Switzerland* (1996) 22 EHRR 93.

<sup>36</sup> The term ‘definitional generosity’ is used by Tsakyrakis in criticising the lack of explicit moral reasoning in the ECHR’s approach to determining whether an aim is ‘legitimate’ for the purposes of limiting a Convention right. See Tsakyrakis ‘An Assault on Human Rights?’, above n28.

The precise definition of the inputs of proportionality analysis in a specific case is essential. The exact public interest being pursued must be made explicit and fully assessed to determine its legitimacy. If the public interest aim is overly broad or insufficiently defined, then this will affect the operation of the proportionality analysis. The narrow definition of what is an acceptable aim is an important normative prerequisite. As was noted above, a comprehensive account of how that normative process of definition ought to occur is beyond the scope of this thesis. However, from the point of view of describing the structure of proportionality, the pitfalls involved with derivative norms must be recognised.

There is a positive (or at least less cautionary) aspect to the recognition that principles can entail derivative norms. This recognition is an important step in moving past a spatial conception of proportionality and deference. Convention rights themselves do not need to be viewed solely as a hard-edged mass into which no intrusion is permitted. Instead, Convention rights can be the source of rights principles, which interact with public interest principles and produce case-by-case outcomes. These fact-specific outcomes build up over time to create a framework of human rights rules. The determination of sub-principles involves important normative considerations, but once those initial moral decisions are made, a more sophisticated account of the proportionality process can be developed.

A further answer to Habermas's concern about dilution of rights can be seen in the way Alexy's exposition of proportionality builds up a set of fact-specific constitutional rules. It is from these cases that the hard crust of fundamental rights is built. As was discussed above, fundamental rights in the abstract are too indeterminate to function as rules rather than principles. They are nonetheless norms, and their normative force can be seen in their application by the courts through the proportionality test. Where a court makes a fact-specific determination that a given fundamental right has not been

adequately protected, then a fundamental right rule arises from that case. In many instances, the boundary of rights is produced through the process of proportionality. Habermas proposes that where norms conflict, only one of them will be appropriate and so the norms can be ‘fit together into a unified system designed to admit exactly one right solution for each case.’<sup>37</sup> While this might be a legitimate description of the rules that are the outcome of proportionality analysis, it does not take account of the balancing of principles which is implied in that outcome.

These fact-specific rules help both the courts and the other arms of government to discern the specific content of rights in a manner which develops over time through the case law. While this approach might seem unsatisfactory to a continental constitutional lawyer, this sort of system is central to the way common law nations do their legal business.

Habermas’s dilution criticism is therefore partially answered if Alexy’s model is applied in the UK. The UK proportionality test has a stated restriction on the public interest principles which may be pursued at the expense of rights. Admittedly, the operation of this restriction could be developed to make the moral considerations involved more explicit. However, it is nonetheless an important recognition that some goals are illegitimate when it comes to limiting rights. The UK also has a system of binding precedent, which means that fact-specific human rights rules will develop over time. These two factors go some considerable way to avoiding the risk of a heavy dilution of human rights.

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<sup>37</sup> Habermas, *‘Between Facts and Norms’*, above n20, at 261.

### 2.3: PROPORTIONALITY AS OPTIMISATION OF PRINCIPLES

The recognition of rights as principles is the first step in understanding the operation of the proportionality test. The second step is to look at how these principles function within the proportionality test itself. In order to explain this process, Alexy uses the concept of optimisation.

Optimisation is central to Alexy's work. In his postscript to *TCR*, Alexy sums up his theory: '[t]he central thesis of this book is that regardless of their more or less precise formulation, constitutional rights are principles and that principles are optimisation requirements.'<sup>38</sup> Proportionality analysis is concerned with determining whether or not the limitation of a human right is permissible, having regard to the public interest which the government decision-maker is seeking to pursue. (Although I use the term 'public interest' throughout this chapter, this can include conflicts of rights in situations where the decision-maker is trying to protect one human rights principle at the expense of another.) Alexy argues that an understanding of rights and the public interest which is based on principles requires a mechanism for resolving conflicts when those principles come into competition with each other. His analysis is centred on the idea that principles must be balanced against one another in such a way that they are each realised to the greatest degree possible.<sup>39</sup> On this basis, he contends that principles require proportionality and that the proportionality principle 'logically follows from the nature of principles; it can be deduced from them'.<sup>40</sup> As such, the rights principle and the public interest principle need to be optimised relative to each other. This requires that each be realised to an extent where neither can be realised any further without any cost to the other.<sup>41</sup> Alexy traces this concept through the various stages of the

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<sup>38</sup> Alexy *TCR*, above n1, at 388.

<sup>39</sup> See generally Alexy 'Structure of Legal Principles', above n17.

<sup>40</sup> Alexy *TCR*, above n1, at 66.

<sup>41</sup> This is generally referred to as 'Pareto-optimality' named after the Italian economist Vilfredo Pareto. Alexy uses the term 'Pareto-optimality' throughout his work.

proportionality test, focusing particularly on the last two stages: minimal impairment and overall balance.

It is important to realise that Alexy's optimisation model of proportionality is about improving *both* of the principles being balanced in so far as is possible. The goal is not for one principle to win; it is for both principles to win to the greatest extent achievable.

### *2.3.1: Legitimate aim and suitability*

The first limb of the German test requires that the challenged measure be 'suitable'. In the UK there is an additional stage which requires the measure to be in pursuit of a legitimate objective as well as being 'rationally connected' to that objective. This part of the test requires that the challenged measure actually be capable of achieving its aim. Alexy points out that if a measure (M) limits one principle (P<sub>1</sub>) but does nothing to promote the principle against which it is being balanced (P<sub>2</sub>), then it is not suitable. A detriment to P<sub>1</sub> that does nothing to achieve P<sub>2</sub> does not achieve anything other than a limitation of P<sub>1</sub> for its own sake. As such, 'P<sub>1</sub> and P<sub>2</sub>, when *taken together*, prohibit the use of M. This shows that the principle of suitability is nothing other than an expression of the idea of Pareto-optimality: one position can be improved without detriment to another.'<sup>42</sup>

The suitability point can be seen at work in UK case law. In *Secretary of State for the Home Department v Akaeke*<sup>43</sup> the Court of Appeal refused to permit the removal from Britain of a Nigerian woman who had entered the UK illegally and then married a British citizen. The argument made by the Home Secretary was that she should be required to go to Nigeria and apply from there for leave to enter the UK to live with her

<sup>42</sup> Alexy, R. 'Constitutional Rights, Balancing and Rationality' (2003) 16 *Ratio Juris* 131, at 135.

<sup>43</sup> [2005] EWCA Civ 947.

husband. This was supposed to discourage others from ‘jumping the queue’. There had been extraordinarily long delays in the processing of the woman’s application to the Home Office. The Court expressed the view that the delay was so onerous that no prospective immigrant would be prepared to endure it in order to be exempted from the need to get entry clearance in their country of origin. On this basis, the Court expressed doubts about whether or not the removal of the applicant would actually do anything to deter other potential ‘queue-jumpers’. This suggests that the court did not believe that the challenged measure was suitable to achieve the legitimate aim of preventing queue-jumping.<sup>44</sup>

Once the model of principles is accepted, rational connection to a legitimate objective is an obvious requirement. Rivers characterises legitimate aim and rational connection as ‘threshold criteria’<sup>45</sup> and suggests that they are in fact presupposed by the second and third stages of the proportionality test.<sup>46</sup> An illegitimate aim will not be sufficient to derive a ‘public interest principle’ and so will not justify the balancing exercise in the first place. This suggests that the legitimate aim arm of the test is inherent in balancing. Similarly, as was just noted, a measure that does not achieve any protection of one principle cannot justify an intrusion on the other.

The legitimate aim stage is also important for the further reason that it requires a court to define precisely which two principles are being optimised. As was discussed above, only certain public interests have the status of principles. At the legitimate aim stage of proportionality the reviewing court will examine the normative force of the public interest goal being pursued by the decision-maker. Also, fundamental rights norms have a semantically open texture and can lead to derivative norms. Since proportionality

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<sup>44</sup> It is not entirely clear from the judgment whether the measure was deemed Convention incompatible on the basis of this point or on the overall balancing point. See Chapter 4.1.3 and Chapter 4.3.3 for further discussion.

<sup>45</sup> Rivers ‘Variable Intensity of Review’, above n2, at 195-198.

<sup>46</sup> Rivers, J. ‘Proportionality, Discretion and the Second Law of Balancing’ in Pavlakos, G. (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007), at 171.



involves balancing two principles against one another, it is crucial that the principles be clearly defined. Where a derivative rights norm is the subject of a proportionality test, then the court must be very specific about precisely which derivative norm is being used.

This point is well illustrated by the dicta of Sedley LJ in *B v Secretary of State for the Home Department*.<sup>47</sup> The case concerned the Home Secretary's attempt to deport an Italian national who had been convicted of very serious crime. Sedley LJ expressly refused to countenance deportation itself as the aim and required another public interest justification to form the basis of the proportionality analysis instead. If deportation had been permitted as the aim, then nothing short of deportation could achieve that aim. The aim had to be construed in terms of crime prevention and the protection of public safety in order to conduct the proportionality analysis. This shows how important it is to define the aim of a challenged measure.

### 2.3.2: *Factual optimisation*

Alexy describes the second stage of the German test (necessity) as 'factual optimisation'. In the UK this stage is usually referred to as 'minimal impairment.' This stage of the proportionality test requires a court to look and see whether there is another measure which would also realise the public interest principle but would be less restrictive of the affected fundamental right. Where a government measure infringes upon a right unnecessarily, then the right has not been optimised. If an alternative measure would realise the public interest aim to the same degree, but have a less severe impact on the Convention right, then the alternative measure should be chosen. In such a situation, it makes no difference to the public interest which measure is chosen, since

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<sup>47</sup> Unreported, Court of Appeal, 18 May 2000.

both protect the public interest to the same extent. However, the choice of measure is important from the perspective of the fundamental right, since the latter measure has a less profound effect on it. This involves a choice between various measures which are *in fact* available to the decision-maker: hence it is called factual optimisation. This element of the test assesses the means available to the government in pursuing one principle and tells the court which of those means it should choose. However, factual optimisation only tells the court which of the available means is preferable. It does not tell the court whether any or all of the means are unacceptably intrusive. Kumm has noted that this stage of the proportionality test is empirical.<sup>48</sup>

Factual optimisation can be seen at work in the series of burden of proof cases taken under the HRA.<sup>49</sup> For example, in *R v Lambert*<sup>50</sup> the House of Lords considered the public interest in controlling the unauthorised possession of dangerous drugs and the Article 6 right to the presumption of innocence. The challenged legislation put a legal burden on the defendant to disprove an element of the offence. A majority of the House accepted that a shifting of the evidential burden would achieve the public interest aim to the same extent as the shifting of the legal burden of proof, and so the shifting of the legal burden would not be the least rights-intrusive option. Conversely, Lord Hutton took the view that an evidential burden would not achieve the public interest to the same extent. This is an important illustration of the parameters of factual optimisation. It only requires the use of the measure which is least rights-intrusive chosen from among the measures which achieve the public interest to the required extent. It is not, as

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<sup>48</sup> Kumm 'Political Liberalism and the Structure of Rights', above n25, at 137.

<sup>49</sup> See for example: *R v Lambert* [2002] 2 AC 545 and *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43; [2005] 1 AC 264.

<sup>50</sup> [2001] UKHL 37; [2002] 2 AC 545.

is sometimes suggested, a requirement that the achievement of the public interest be diluted in favour of the protected right.<sup>51</sup>

### 2.3.3: *Legal optimisation*

Neither Alexy nor the proportionality test leaves the matter with factual optimisation, and with good reason. While it might be less rights-intrusive to use a lethal injection to punish a recidivist double-parker than to use a firing squad, neither measure could reasonably be described as a proportionate response to violations of the Road Traffic Acts. Once the least intrusive means of achieving a particular legitimate aim has been chosen, the question still remains whether the level of intrusion on the protected right is in fact justified by the public interest being pursued.

The issue of whether the least intrusive measure is nonetheless unduly intrusive is addressed at the third stage of proportionality: proportionality *stricto sensu*, which Alexy terms ‘legal optimisation’. In the UK this is generally referred to in terms of striking a ‘fair balance’ between the rights of the individual and the needs of the community as a whole.<sup>52</sup> The term ‘legal optimisation’ can be slightly misleading: legal optimisation is one of the most fact-sensitive aspects of the proportionality analysis, and also one of the most normative. Factual optimisation involves an assessment of whether there is, in fact, a less restrictive means available to a decision-maker, which is an empirical issue. Legal optimisation is concerned with whether the right balance has been struck. This stage of the test involves a normative assessment of the facts.<sup>53</sup>

Legal optimisation requires that the more intrusive the measure is on a right, the more important must be the public interest being pursued. The death penalty for road traffic

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<sup>51</sup> This is the basis for Hickman’s criticism of minimal impairment. See Hickman ‘Substance and Structure’, above n10, at 702.

<sup>52</sup> See *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139; and *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 WLR 581.

<sup>53</sup> See Kumm ‘Political Liberalism and the Structure of Rights’, above n25, at 137.

offences is unlikely to meet this threshold. The Court will examine whether the overall benefit to the public interest principle justifies the level of restriction of the rights principle. The structured analysis of the earlier parts of the test allows this last stage to be extremely fact-sensitive. Alexy sums up the legal optimisation process as follows: ‘the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.’<sup>54</sup> This is what Alexy calls ‘the law of balancing’.

This sort of reasoning is evident in cases such as *Samaroo v Secretary of State for the Home Department*<sup>55</sup> in which Dyson LJ concluded that it was proportionate to deport a convicted drug trafficker whose wife and children lived in the UK and were likely to remain here even if he was removed. Dyson LJ held that the deterrent effect this would have on drug trafficking generally would be important enough to justify the impact on the right to respect for family life. Dyson LJ placed heavy emphasis on the importance of overall balance in proportionality analysis. He held that ‘[b]roadly speaking, the more serious the interference with a fundamental right and the graver its effects, the greater the justification that will be required for the interference.’<sup>56</sup> This is almost identical to Alexy’s law of balancing.

The idea of balancing, or ‘legal optimisation’ is one of the most controversial aspects of Alexy’s model. Habermas objects to balancing on the ground that it removes the ‘firewall’ of rights and takes the decision out of the realm of correctness and right and wrong. For Habermas ‘weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies’.<sup>57</sup> Habermas is concerned that the limitation of rights must be done in a rational manner and he argues that balancing is not rational. Alexy rejects this analysis on the basis that balancing can be seen as

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<sup>54</sup> Alexy *TCR*, above n1, at 102.

<sup>55</sup> [2001] EWCA Civ 1139.

<sup>56</sup> *ibid* at paragraph 28.

<sup>57</sup> Habermas, *Between Facts and Norms*, above n20, at 259.

rational once it is accepted that it involves three distinct steps, each of which is itself rational. First the level of interference with the first principle is assessed, then the importance of satisfying the competing principle is assessed. Finally, the court looks at whether the importance of satisfying the second principle justifies the level of interference with the first. Alexy contends that Habermas's criticism would only be valid if it were not possible to make rational judgments about each of these three things. Alexy gives a detailed account of the manner in which the *BVerfGE* addresses these questions and the reasoned manner in which it reaches its conclusions.<sup>58</sup> He points out that these judgments are the reasons for the proportionality decision. In making rational decisions about each of these three sub-points, the court is building towards a rational decision on the overall balance or legal optimisation of the principles in the case.<sup>59</sup>

Kumm argues that certain means-ends fits are not permissible, giving the example of killing one person to save five.<sup>60</sup> This is undoubtedly a fair point, but it does not mean that overall balancing is not legitimate. Kumm recognises that there is a normative element to the balancing exercise, and the exclusion of certain means-ends fits is a normative limit on how far it can go. However, this does not undermine the existence of balancing, it merely shows how it can provide a framework for normative argument.

### *2.3.4: A fact-sensitive structural model*

At this stage it should be clear that what Alexy is doing with this model is describing a process of constitutional adjudication, not setting out a catch-all formula for answering difficult questions. The normative issues such as the level of importance of a particular

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<sup>58</sup> See Alexy, 'Constitutional Rights, Balancing and Rationality', above n42, at 136-138.

<sup>59</sup> Steven Greer has analysed the rationality of the balancing exercise carried out by the European Court of Human Rights when undertaking proportionality analysis. He concludes that the Court's use of balancing is much closer to Alexy's view than to that of Habermas. See Greer, S. "'Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) 63 CLJ 412.

<sup>60</sup> Kumm 'Political Liberalism and the Structure of Rights', above n25.

public interest or the correct balance in legal optimisation still need to be tackled. Alexy's contribution is to give us a framework of the process of adjudication within which the balancing of rights and the public interest occurs.

Möller challenges this contention.<sup>61</sup> According to Möller, certain legitimate theoretical perspectives about rights cannot be accommodated within the model. Möller contends that this means that Alexy's model does not have the framework character that would be necessary for it to be a structural theory. Möller gives examples of theories of rights which place an extremely high value on certain rights. He suggests that Dworkin would not countenance balancing of the 'principle' of freedom of speech. He also argues that Nozick would be totally opposed to the possibility of interfering with the right to property in order to pursue a welfare state. He suggests that the only balancing outcome possible for either of these normative systems would be 100 per cent for the right and 0 per cent for the public interest. However, it is clear that Alexy is prepared to accept this extreme outcome of balancing. In response to another of Kumm's discussions of proportionality, he suggests that there is no reason why a principle cannot be given a value of zero or an infinite value when engaging in balancing. He accepts that this shows that there are limits to balancing, but points out that '[t]he fact that balancing has limits of this kind is not to say, however, that proportionality does not remain at the centre of rights analysis.'<sup>62</sup> While it is unlikely that Alexy would use the zero/infinite value version of balancing, his response does protect the contention that the argument is structural.

Aside from this absolutism versus balancing argument, there is a deeper element to Möller's criticism, particularly in relation to the Nozickian perspective on property rights. Möller argues that an adherent of a Nozickian viewpoint would put such a significant value on property rights and such a small value on the welfare state that she

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<sup>61</sup> Möller, K. 'Balancing and the Structure of Constitutional Rights' (2007) 5 IJCL 453.

<sup>62</sup> Alexy 'Thirteen Replies', above n26, at 344: 'Reply 5 to Mattias Kumm'.

would not be prepared to countenance the two being balanced against one another. This is not really a criticism of the concept of balancing; it is a criticism of the choice of public interest goal. The Nozickian is of the view that the welfare state is not a 'legitimate aim' where property rights are concerned. If the normative perspective of the Nozickian were introduced at an earlier stage of the proportionality test, then the balancing test would not be relevant since the aim would not be deemed legitimate. This is not to suggest that the welfare state is never a legitimate aim. However, the legitimate aim limb of proportionality can be used to screen out certain public interest goals. This means that even some more extreme normative positions can be accommodated within Alexy's framework. This shows it is possible to have a structural model which explains the operation of proportionality without taking a particular view of the normative content of rights. As was discussed above, Alexy's model is not seeking to establish a conclusive account of which public interests have a normative character. As was discussed above, that distinction is a separate normative issue. The value of the model is that once it is decided which public interests have a normative character, the relationship between those public interests and competing rights can be fully explored.

A further attack on Alexy's model is made by Adler, who claims that rights and the public interest are fundamentally incommensurable.<sup>63</sup> '[t]here might be rational support for any given outcome, but no tie-breaker to enable us to choose between alternative lines of rationality'<sup>64</sup> He accepts that Alexy's model shows structured reflective outcomes from rights cases but denies that balancing can provide a mechanism for finding the 'true' answer to a rights question without reducing the interests being balanced to a common scale, which he denies is possible, as they are incommensurable. Adler suggests that the outcome of rights cases is based more on an emotional response

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<sup>63</sup> See Adler, J. 'The Sublime and the Beautiful: Incommensurability and Human Rights' [2006] PL 697.

<sup>64</sup> *ibid*, at 699.

than on a rational one. Much of Adler's argument is directed at the concept of judicially enforceable rights, rather than the structural aspects of Alexy's theory.

Adler's argument must be rejected for three reasons. First, from a theoretical perspective, Adler's incommensurability argument is overly simplistic: he seeks to claim that individual rights and public interests cannot be rationally compared because on a utilitarian cost-benefit analysis public interests will always win. This fails to take account of the qualitative differences in the way that rights are valued. Sunstein points out that the values inherent in rights are plural and diverse rather than unitary.<sup>65</sup> Once this is accepted, the balancing exercise becomes more nuanced, making it more than just an economic cost-benefit analysis.

Secondly, Adler's position is premised on the idea that proportionality purports to provide a single right answer to all rights problems. This confuses the normative arguments for a particular outcome in a given case and the structure within which those arguments are considered. Proportionality cannot provide a single right answer on its own; its real value is that it gives a more developed, rational mechanism for coming to a conclusion. Alexy does not claim that proportionality will, of itself, provide a single correct answer to a rights problem. As was noted above, the question whether a particular aim is legitimate is an important normative issue which must be addressed *before* the balancing process begins. He provides a structural theory of proportionality which purports to describe how proportionality can be used as a framework mechanism for deciding rights cases.<sup>66</sup> Alexy accepts that the balancing is at the discretion of the one carrying it out and that all of the usual means of legal argumentation can be applied to that process.<sup>67</sup> The essential contribution of Alexy's theory of proportionality is not that it tells us what the right answer is, but that it explains how the answers are arrived

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<sup>65</sup> Sunstein, C.R. 'Incommensurability and Valuation in Law' (1994) 92 Mich LR 779, at 831.

<sup>66</sup> Alexy *TCR*, above n1, at 101.

<sup>67</sup> *ibid*, at 107.



at. The explanation of the derivation and balancing of principles and the operation of deference within that balancing has the potential to provide a clearer picture of how human rights adjudication operates than the spatial theories that have been so dominant in the UK. I argue that this process is already in operation in the UK.

The third reason to reject the incommensurability argument is a purely practical one. Once litigable human rights are introduced into a society there is an implicit acceptance that rights and the public interest may come into conflict and that it will be up to judges to resolve those conflicts. This acceptance is explicit in jurisdictions where proportionality has been expressly endorsed as a mechanism for human rights adjudication, as is the case in the UK. Adler's incommensurability argument is an attempt to deny that those conflicts can ever be resolved by any rational scheme other than a crude cost-benefit analysis. Such a defeatist position simply gives up the ghost of any possibility that a more sophisticated explanation of the process can be devised. The Convention rights are now a part of the UK legal landscape. The ECHR has been using proportionality analysis for three decades.<sup>68</sup> It seems clear that proportionality analysis is going to remain a significant element of UK public law. Aside from the other reasons for rejecting Adler's position, there is a strong basis for arguing that since proportionality has arrived and seems here to stay, we would do well to try to understand how it works.

Although Alexy's model of human rights norms as principles could be seen to suggest that the extent of rights is indeterminate, this is not in fact the case. Optimisation causes constitutional law to become concretised over time. Each time a proportionality decision is reached by a court, a fact-specific rule is created. This has the qualities of a rule (as opposed to a principle), in that it has an all or nothing character. Alexy describes the system by which optimisation creates these rules as the 'law of competing

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<sup>68</sup> See *Sunday Times v UK* (1979-80) 2 EHRR 245; *Handyside v UK* (1979-80) 1 EHRR 737.

principles’ which states that: ‘the circumstances under which one principle takes precedence over another constitutes the conditions of a rule which has the same legal consequences as the principle taking precedence.’<sup>69</sup> This optimisation produces a fact-specific rule, which is a condition of precedence between two principles. By deciding specific cases, the courts build up a series of rules, which form the hard edges of human rights. For example, the burden of proof cases discussed above have produced a rule that evidential burdens on the defendant in criminal law are to be preferred over legal burdens. Thus, a rights principle and a public interest principle are factually and legally balanced to produce a rights rule. As more and more of these rules are produced, the limits of rights and of state power are defined.

#### **2.4: ALEXY’S THEORY OF DEFERENCE**

Many of the critics of proportionality and judicially enforceable rights have strong concerns about the possibility that every aspect of every governmental decision could be made by a judge.<sup>70</sup> However, judges do not apply proportionality in this way and are at pains to give leeway to the other arms of government where it is due. In the UK this has generally been referred to as ‘deference’. Alexy’s model of proportionality takes account of deference and, unlike existing UK theories, Alexy’s model integrates deference into the structure of proportionality.

Alexy uses the term ‘discretion’ instead of ‘deference.’ Although the two are functionally synonymous, for clarity of exposition I have chosen to use the term ‘deference’ throughout this thesis as it is more widely recognised in the UK. In addition to this, the term ‘discretion’ has a specific meaning in British administrative law and I

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<sup>69</sup> Alexy *TCR*, above n1, at 54.

<sup>70</sup> See for example Nicol, D. ‘Law and Politics after the Human Rights Act’ [2006] PL 722.

am concerned to ensure as little confusion as possible arises from the already complex taxonomy I am applying. I will therefore explain Alexy's theory as a theory of 'deference' notwithstanding the fact that he uses the term 'discretion'.

Alexy classes deference into two categories: structural and epistemic deference.<sup>71</sup> Structural deference relates to the deference afforded to the decision-maker in choosing between constitutionally permissible (i.e. rights-compatible) options.<sup>72</sup> Epistemic deference is the deference afforded to a decision-maker when there is some unavoidable uncertainty involved in the decision-making. When looking at a challenged government measure, it will not always be possible to make a precise measurement of the realisation of the fundamental right or the public interest. In such circumstances, it may be appropriate to afford the primary decision-maker some deference.

#### *2.4.1: Structural deference*

The different stages of the proportionality test place certain requirements on government decision-makers. However, these stages do not necessarily point to a single rights-compatible outcome. Where there are multiple permissible answers to a question posed by the proportionality test, the decision-maker is given 'structural deference'. This deference can arise at three stages of the test: legitimate aim, factual optimisation and legal optimisation.<sup>73</sup>

Structural deference arises at the legitimate aim stage when the decision-maker has a choice as to which ends to pursue. Some ends will not be permitted if they fail the

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<sup>71</sup> Alexy *TCR*, above n1, at 388-425. Matthias Klatt uses this distinction as a way of developing an understanding of *judicial* discretion in the context of the Hart-Dworkin debate. See Klatt, M 'Taking Rights Less Seriously. A Structural Analysis of Judicial Discretion' (2007) 20 *Ratio Juris* 506.

<sup>72</sup> Alexy *TCR*, above n1, at 393.

<sup>73</sup> Rivers suggests that structural discretion can also arise in the setting of the relationship between factual and legal optimisation. See Rivers, 'Second Law of Balancing', above n46, at 170-171. While his analysis is undoubtedly a valuable contribution, it is at a level of abstraction which is arguably unnecessary for the purposes of this thesis.

‘legitimate aim’ arm of the test<sup>74</sup> but numerous public interest objectives will pass that stage. Where there is more than one public interest objective which reaches the normative standard of a ‘principle’, then structural deference gives the decision-maker a freedom to choose which of those objectives to pursue. For example, Article 10 of the Convention permits the limitation of freedom of expression for certain specific purposes, including national security and the prevention of crime. It is up to the government to decide which of these two legitimate aims to pursue. A reviewing court will afford a structural deference to that choice of aim in that it will not question the decision to pursue, for example, the goal of national security instead of the goal of crime prevention.

Structural deference can also arise in factual optimisation, which requires a decision-maker to choose the least rights-restrictive option available. There may be two measures, each of which achieves the public interest to the same extent and each of which has the same level of impact on a fundamental right. In such a situation, the decision-maker is given structural deference regarding the choice between them. For example, a prison governor might wish to decrease the availability of drugs in prisons by having a daily search of each cell using sniffer dogs. Alternatively a policy of strip-searching prisoners after they had received visitors might be pursued. If a court were called upon to address the proportionality of each of these measures, it might take the view that each involved the same level of intrusion on the prisoners’ Article 8 rights. In those circumstances, the prison governor would be afforded structural deference concerning the choice of which measure to implement. This is structural deference in factual optimisation.

Structural deference is most likely to arise in the UK at the legitimate aim stage and the factual optimisation stage. It is also possible for structural deference to arise in legal

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<sup>74</sup> See for example the dicta of Sedley LJ in *B v Secretary of State for the Home Department* (Unreported, Court of Appeal, 18 May 2000) in which he refused to accept deportation as an aim.

optimisation, although this is less likely to be significant in case law under the HRA. Structural deference in legal optimisation gives decision-makers a choice between what Alexy calls ‘stalemates’.<sup>75</sup> Stalemates arise in situations where the public interest principle and the human rights principle are equally balanced. There are two forms of structural deference in legal optimisation: structural deference *between* stalemates and structural deference *in* stalemates.

Structural deference between stalemates gives decision-makers a choice between a high level of rights intrusion paid for with a high level of public interest realisation on the one hand and a low level of rights intrusion with a low level of public interest on the other. This is unlikely to be a central issue in any legal optimisation analysis under the HRA. Decision-makers are afforded structural deference concerning the choice of legitimate objective. Implicit in that is deference to the decision-maker’s choice of the level of public interest to be pursued. Once that level has been set, the choice of a balanced measure will flow directly from it, and so there will be no need for separate structural deference at the overall balancing stage. For example, once the prison governor decided on the level of decrease in drug availability she wished to pursue, then legal optimisation would indicate which measures were proportionate. There would be no need to compare those measures to other measures which involved a greater or lesser level of decrease in drug availability.

Structural deference *in* a stalemate arises when a public interest and a right are equally balanced. Where this occurs, the decision-maker has a choice as to which of the two principles to prioritise. Obviously, if the case makes it to court, the decision-maker will have chosen to prioritise the public interest, and so this form of structural deference is unlikely to be an explicit factor in any HRA case. For example, once the prison governor decided to pursue the anti-drugs policy, then by implication the reduction of

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<sup>75</sup> Alexy *TCR*, above n1, at 405-414.

drug availability was going to take priority over the prisoners' rights in any situation where the two were equally balanced.

These two branches of structural deference in legal optimisation are to some extent implied by the legal optimisation requirement itself. Legal optimisation requires a balance between the public interest and the human right. The stalemates Alexy discusses are situations where that balance has been struck. In such cases, legal optimisation has little more to say about the measure, so it makes sense that the decision-maker should be permitted to either choose which principle to prioritise or to choose which level of public interest protection to pursue. However, as I have explained, structural deference in legal optimisation is unlikely to be a central issue in any HRA cases. I have only explained it here for the purposes of giving a comprehensive account of Alexy's theory.

One difficulty with the structural deference model is that it assumes that it is possible precisely to compare the level of intrusion on a right compared with the level of realisation of the public interest. Alexy accepts that precise measurement is not always possible and that '[l]egal scales can thus only work with relatively crude divisions and not even that in all cases.'<sup>76</sup> However, while such measurements might be crude, it is generally possible to determine relative levels of intrusion and protection and to use these as a basis for rational argument about where the balance between intrusion and protection should lie. Determining these levels is a substantial part of the job of a court charged with human rights adjudication and so an expectation that judges should do it in these circumstances should not be an impediment to the structural theory of proportionality. If uncertainty arises in these measurements, the courts may opt to use Alexy's other form of deference: epistemic deference.

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<sup>76</sup> Alexy *TCR*, above n1, at 408.

### 2.4.2: Epistemic deference

Alexy's concept of epistemic deference relates to the reliability of assessments made by primary decision-makers. This falls into two categories, empirical and normative. Empirical epistemic deference relates to knowledge and fact-finding. In many instances it might not be possible to prove conclusively that a certain policy will realise the public interest. Alexy argues that if you were to require 100 per cent certain proof of protection of the public interest for all intrusions on rights, then the legislature would be absolutely prohibited from doing a significant number of things.<sup>77</sup> Empirical epistemic deference relates both to knowledge of the extent to which policies will be successful and to the level at which they will intrude upon a fundamental right.<sup>78</sup> It will often be impossible to know conclusively what effect a measure will have on a right or public interest principle. This is particularly true of the public interest.<sup>79</sup> In such circumstances, it is not necessarily appropriate for a court to supplant the primary decision-maker's analysis of the impact with the court's own. The decision-maker may have more expertise and a greater understanding of the facts of a situation than the court and so an estimate by the decision-maker on the impact of the measure on the relevant principle will be afforded greater weight. An obvious example of this is a threat to national security. The assessment of such threats is a process of very complicated guesswork and it is rarely possible to show conclusively that a threat exists. In such situations, the relevant decision-maker may be given some degree of empirical epistemic deference.

Empirical epistemic deference can be seen in the reasoning of majority judgments of the House of Lords in *A&X v Secretary of State for the Home Department*.<sup>80</sup> The House

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<sup>77</sup> Alexy *TCR*, above n1, at 417.

<sup>78</sup> *ibid*, at 415. See also: Rivers, 'Second Law of Balancing', above n46, at 180-183.

<sup>79</sup> See Rivers, 'Second Law of Balancing', above n46, at 180-183.

<sup>80</sup> [2005] 2 AC 68.

examined Parliament's finding that there was a public emergency<sup>81</sup> and paid a large degree of deference to that finding. Lord Bingham noted that the Home Secretary, his colleagues and Parliament were better placed than the courts to make such a decision which 'involved a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did.'<sup>82</sup>

The other form of epistemic deference is 'normative'. Normative epistemic deference has to do with deciding between two outcomes on the basis of a normative assessment of their relative importance. The idea is that where two principles are being balanced, there will be occasions where a choice has to be made between prioritising one or the other of them. If this choice occurs in circumstances where each principle receives enough protection for it to be realised, then the choice of which principle to favour is up to the decision-maker. The normative assessment of the decision-maker is accepted by the courts. Alexy gives the example of a piece of redundancy legislation in Germany which favoured employers over employees. Two sets of constitutional rights were in issue and the BVerfGE was satisfied that the measure protected both sets of rights up to a minimum standard and as such the choice about which set of rights to prioritise was left up to the legislature.<sup>83</sup> The operation of normative epistemic deference is similar to structural deference, but it can be distinguished from it. Normative epistemic deference concerns choices about what the correct balance should be. Structural deference affords a decision-maker a choice between measures which are correctly balanced.

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<sup>81</sup> At issue in this case was a derogation from certain Convention rights under Article 15, which permits certain derogations in a time of public emergency. Article 15 requires a proportionality test to be applied and the issue of whether or not there is a public emergency operates in the same manner as the legitimate aim stage of the test. See further van Dijk and van Hoof *Theory and Practice of the ECHR*, above n30 at 1062-1064.

<sup>82</sup> [2005] 2 AC 68, at 102. The applicants subsequently brought an unsuccessful case to the Grand Chamber of the ECHR. The ECHR agreed with the view of the House of Lords on whether there was a public emergency. The ECHR noted that '[w]eight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question.' See *A v United Kingdom* (Application No: 3455/05) Judgment of the Grand Chamber, 19 February 2009

<sup>83</sup> Alexy *TCR*, above n1, at 415.



Epistemic deference can arise within both the factual and legal optimisation stages of proportionality. Factual optimisation requires that the least rights-intrusive means of achieving the public interest be used. In order to assess which means of achieving the public interest is the least intrusive, a determination will have to be made as to the impact of each of the available means on the fundamental right principle and on the public interest principle. This may involve empirical measurements which cannot be entirely certain, in which case the decision-maker will be afforded empirical epistemic deference.

At the legal optimisation stage, the court will have to assess the level of impact on the fundamental right and the level of realisation of the public interest in order to determine whether they are balanced. The issue of whether they are balanced may involve empirical or normative uncertainty. The reviewing court may not be in a position to know exactly how extensive the realisation of the public interest principle will be under a particular measure. The court may not wish to disturb the decision-maker's findings as to the correct means-ends balance to be struck. In situations where this sort of uncertainty arises, the reviewing court will afford the decision-maker empirical or normative epistemic deference.

It is also conceivable that epistemic deference could arise at the rational connection stage of proportionality. If there is uncertainty about whether or not a particular measure achieves the public interest at all, then a court might be prepared to afford empirical epistemic deference to the decision-maker. However, as rational connection is rarely the key battleground in proportionality cases, it is difficult to show this in operation in the case law.

Epistemic deference is also important in relation to Habermas's criticism that legal optimisation is not rational. As was noted above, Alexy responded to that criticism by breaking legal optimisation into three questions: what is the level of realisation of the

public interest? What is the level of intrusion on the right? Is a fair balance struck? Empirical epistemic deference will potentially play a role in the first two questions and normative epistemic deference will play a role in the third.

There is a relationship between structural and epistemic deference,<sup>84</sup> which goes some way to explaining the framework within which deference operates. Structural deference in factual optimisation can arise where there are two options which both achieve the public interest to the same extent and which are equally rights-intrusive. However, the level of intrusion upon a human rights principle is not something that can always be precisely measured. A restriction on a right might be deemed more, or less, severe by two different courts or decision-makers who consider the issue. Even more opaque is the level of promotion of the public interest, which Alexy clearly countenances will sometimes be an educated guess taken by a decision-maker to which a court will defer. Structural deference in factual optimisation is reliant on a determination of the level of limitation of one right and the level of promotion of the other.<sup>85</sup> Where these determinations involve empirical uncertainty, they will be subject to epistemic deference. The more epistemic deference is afforded to a decision-maker, the larger the range of measures that the court is going to accept as balanced and so the greater the likelihood of structural deference being relevant.

### *2.4.3: The level of deference*

So far I have explained Alexy's structural model of proportionality and the classification he gives to the different forms of deference that can be afforded to a decision-maker within that model. For Alexy, proportionality is about optimising fundamental rights principles against public interest principles. In seeking to find the

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<sup>84</sup> Alexy *TCR*, above n1, at 413-414.

<sup>85</sup> This point is picked up by Rivers: Rivers, 'Second Law of Balancing', above n46, at 177.

means of achieving the public interest which has the least intrusion upon the fundamental right, the court is engaged in an exercise of factual optimisation. In seeking to find an overall balance between the means used and the ends achieved, the court is engaged in an exercise of legal optimisation. Alexy's two forms of deference relate to these two processes differently. Structural deference is connected to factual optimisation: it affords the decision-maker a choice between equally balanced measures and permits the decision-maker some discretion in setting the goals to be achieved in the first place. Epistemic deference is connected directly to factual and legal optimisation: where there is uncertainty about the effect of a measure, the decision-maker can be afforded deference in their assessment of those effects, be they empirical or normative. I have also explained how epistemic deference can be connected to the operation of structural deference within factual optimisation. Deciding whether or not two measures are equally balanced may require the decision-maker to be given some leeway in their analysis of the facts.

In setting out his theory of deference, Alexy recognises two important principles. On the one hand, rights must be protected but on the other hand, as much decision-making as possible should be undertaken by the elected legislature. A total prioritisation of rights or democracy would lead to either no legislative freedom or no rights-protection. Alexy recognises this problem and attempts to devise a means of dealing with it.

While the theory of deference detailed so far gives an effective description of the operation of structural and epistemic deference within the structure of the proportionality test, it does not give much guidance on the degree of deference to be afforded to a primary decision-maker. Categorising deference as structural or epistemic tells a court at which stage of the proportionality test to afford deference. It does not tell the court how much deference to afford. Alexy and Rivers both recognise there is a need for a formal principle for deciding the level of deference. Alexy sees structural

deference as being largely limited by its own terms and suggests a formal principle that is limited to epistemic deference. Rivers on the other hand sees a need for guidance with both types and suggests a formal rule to cover all deference.<sup>86</sup>

Alexy is prepared to accept a large degree of epistemic deference in cases involving a light intrusion on a fundamental right. However, where the intrusion is more extreme, he contends that the level of deference should be lessened. On this basis, he suggests a 'second law of balancing' which is: 'the more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premisses.'<sup>87</sup> Thus, where there is a substantial detriment to a right, the epistemic deference afforded to the decision-maker will be less than where there is a lesser intrusion on the right.

Rivers' model accepts the basic principle underlying Alexy's test but seeks to develop it such that it can also cover structural deference. He suggests that the formal principle should be: 'the more serious a limitation of rights is, the more intense should be the review engaged in by the court.'<sup>88</sup> He argues that the more weighty the right, the less scope for structural deference; the more serious the infringement, the more empirical evidence is required to show the means achieves the aim and the more the court will be prepared to look for small increases in rights-protection. It is interesting to note that models of deference along the lines Rivers suggests have been expressly countenanced in human rights jurisprudence in the UK even before the advent of the HRA. In *R v Ministry of Defence ex parte Smith* The Court of Appeal accepted the principle that '[t]he 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 reasonable'.<sup>89</sup>

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<sup>86</sup> Rivers, 'Second Law of Balancing', above n46, at 185-187.

<sup>87</sup> Alexy *TCR*, above n1, at 418. See also Alexy, R. 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 *Ratio Juris* 433.

<sup>88</sup> Rivers, 'Second Law of Balancing', above n46, at 187.

<sup>89</sup> [1996] QB 517 at 554 *per* Sir Thomas Bingham MR (as he then was). The formulation of this test comes from the submission of David Pannick QC, who was counsel for three of the appellants in that case. Sir Thomas accepted Mr Pannick's submission that this formulation was an accurate distillation of

Rivers' second law has the potential to be more institutionally sensitive than Alexy's in that it can be applied in two ways. It can be used to set the level of deference to be afforded to a policy-maker based on the importance of the Convention right at stake. It can also be used to set the level of deference to be afforded to an administrative decision-maker's finding of fact in a specific case. Notwithstanding this feature of Rivers' test, the distinction between deference to policy-makers and deference to administrative decision-makers needs to be more explicit. I anticipate that this can be achieved through the development of a structural, institutionally sensitive theory of the proportionality test as a whole and I will show how this is the case in the next chapter.

What Alexy attempts to set out, and what I am seeking to develop in this thesis, is a 'structural' model of proportionality and deference which can accommodate different normative arguments about the appropriate scope of rights while channelling them in a way that is more effective. Admittedly, the two formulations of the second law of balancing discussed here are essentially normative arguments. They are fundamentally concerned with the level of deference which *ought* to be afforded to a decision-maker. However, a different basis for the level of deference could be substituted without disrupting the structure of the overall model.

In this thesis, I am not seeking to provide a conclusive answer to normative questions about rights. Instead, I am seeking to elaborate the process by which rights adjudication occurs and through that elaboration, put some shape on the existing HRA case law. The normative question of the level of deference (like the question of the legitimacy of a public interest objective) is a question with a particular place in the proportionality test. My purpose here is to show where that question fits into the structure of the test, not to conclusively answer the question.

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the principles set out in *R v Secretary of State for the Home Department ex parte Bugdaycay* [1987] AC 514 and *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696. See also *R v Secretary of State for the Home Department ex parte Leech* [1994] QB 198.

## 2.5: THE LIMITATIONS OF ALEXY

Given the complexity of the issues discussed in this chapter, some recounting of the basic ideas is appropriate at this juncture. In this chapter I have shown how Alexy characterises rights and the public interest as principles which compete with one another and need to be reconciled using the proportionality test. The test has four stages. The first two, legitimate aim and rational connection, are threshold issues. The key business of proportionality is done at the last two states: minimal impairment and overall balance. Alexy's model accounts for these two stages in terms of optimising the competing principles. This optimisation theory of proportionality is a useful and sophisticated exposition of the operation of the test as an interaction of competing norms. It is this structural analysis of the proportionality test which allows Alexy to account for the role of deference *within* the structure of proportionality. Alexy classifies deference as structural or epistemic and explains how these forms of deference arise at different stages of the proportionality test. This classification and integration of deference is only possible because the structure of proportionality has been explained in such detail. This is a major improvement on existing theories of proportionality and deference in the UK. As was discussed in Chapter 1, the UK discussion of proportionality is trapped in the spatial metaphor, which sets up proportionality and deference as being in opposition to one another.

However, Alexy's model suffers from a significant limitation for the purposes of UK proportionality: he adopts an institutionally rigid approach. He explains proportionality and deference exclusively in terms of the judicial review of legislation. The manner of his discussion of proportionality suggests that he has conceived of his model solely in terms of this particular form of judicial review. This is perfectly understandable for a model based on the jurisprudence of the *BVerfGE*, which is a constitutional court

concerned with review of legislation.<sup>90</sup> However, the lack of institutional sensitivity in Alexy's structural theory means that it is not possible to import his approach directly into the UK, where judicial review theory must accommodate a wide variety of governmental action. The value of Alexy's model is as a basis upon which to build a domestic UK approach. If the structural model is to be effective in the UK, it must be adapted to take account of the wide variety of governmental institutions which can be subjected to HRA-based proportionality review.

Alexy's model of factual and legal optimisation is a valuable starting point, but it must be accepted that these two arms of the proportionality test do not apply to all forms of governmental activity in the same way. This is evident from a cursory examination of the stages of proportionality across a range of government bodies. At the legitimate aim stage, Parliament will have a very wide amount of choice in identifying which public interest principle to pursue. This is not true of appointed public officials. Institutional difference is even more acute at the factual optimisation stage. If a court is asking whether there is a less rights-restrictive alternative available to a decision-maker, the court is presupposing that there is a range of options available. While this is certainly the case at the level of primary legislation, it is not true of an appointed official exercising an adjudicative power. For example, a Home Office official making a decision in an asylum application can decide to grant or deny asylum. That is the extent of her options. In such a situation, factual optimisation will have little to add to the analysis. Legal optimisation will also operate differently depending on the institution concerned. Whether the balance struck is acceptable can depend on a number of factors, such as the level of generality of a decision. If a government measure only affects one individual, in one particular case, then questions asked about the public interest and the impact of rights are set in a very different context when compared to a piece of

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<sup>90</sup> Federal administrative law is dealt with by the Federal Administrative Court, the *Bundesverwaltungsgericht*.

legislation, which affects everyone. In the latter case, the question may be much more difficult to answer.

Institutional factors will also affect Alexy's model of deference. First, these factors will affect deference wherever they affect proportionality, since the model integrated deference into proportionality. For example, if the institutional setting of an administrative case is such that factual optimisation has no meaningful role to play, then structural deference will not be relevant either. Secondly, Alexy's categories of deference are based on institutional assumptions in much the same way as is the model of factual and legal optimisation. For example, empirical epistemic deference arises where there is uncertainty as to facts and the reviewing court decides to defer to the decision-maker's view of those facts. For Alexy, the decision-maker is always the legislature, so the level of expertise can be assumed. In the UK, the level of expertise and competence of the various institutions of government can vary significantly. If there is less expertise, then there is less reason for empirical epistemic deference. Similarly, normative epistemic deference affords leeway to a decision-maker on issues of normative uncertainty. Since Alexy is focused on the legislature, he can presume a large degree of democratic legitimacy in the making of normative assessments. Such assumptions cannot be made of every official in the British system of governance.

Alexy provides a model for establishing the level of deference to be afforded to the primary decision-maker, but this is done in a somewhat free-floating manner. Alexy and Rivers both give a version of the 'second law of balancing' which is supposed to help gauge the level of deference to be paid. However, this is expressed solely in terms of the impact on the right, and no account is taken of institutional differences between decision-makers. I contend that the specific features of particular institutions can provide reasons for affording them deference. If the institutional setting of a challenged measure were to be explored further, then it should be possible to have a basis for



affording deference that goes beyond the level of intrusion on the right. I am not suggesting that the level of intrusion is not relevant to deference. However, I wish to establish that there are other factors that are also relevant to deference. Alexy does not consider these factors. Rivers recognises that there are different reasons for affording deference but is not prepared to accept that they should be criteria in assessing the correct level of deference.<sup>91</sup> I disagree with this proposition, and I will show in the next chapter the way in which these elements can be usefully explored when assessing deference.

Overall, the conceptual value of Alexy's structural theory is significant, but its immediate practical utility in the UK is undermined somewhat by its one-dimensional institutional presuppositions. A structural model along the lines of Alexy's has the potential to overcome the spatial metaphor of proportionality and deference by explaining the relationship between the two more fully. However, if Alexy's model were to be adopted wholesale in its current institutionally blinkered form, then it would be undermined by differences between the institutions to which it was applied. This would hamper the model's ability to explain the structure of proportionality and deference because institutional factors would be at play in the background. If problems were to arise with the model, it would not be possible to trace their origins precisely. If the institutional presuppositions are challenged and overcome, then Alexy's theory has the potential to provide a comprehensive structural model of proportionality and deference in the UK. The missing ingredient is institutional sensitivity, which I will be adding throughout the rest of this thesis.

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<sup>91</sup> Rivers 'Variable Intensity of Review', above n2, at 205.

## 2.6. CONCLUSION

In this chapter I have set out the main features of Alexy's structural theory of rights insofar as it applies to proportionality analysis. I have shown how he characterises rights norms and certain public interest goals as 'principles' and how the interaction of these principles gives rise to an understanding of proportionality based on factual and legal optimisation. These principles are the inputs of proportionality. While Alexy does not give a perfect account of how the inputs are derived, he does show the process by which they interact in a manner which has not been achieved elsewhere. In addition to this I have set out Alexy's theory of the deference to be afforded to the original decision-maker. By categorising deference as structural or epistemic, Alexy manages to integrate deference into the structure of the proportionality test. This is of great significance for UK theories of proportionality which have been hamstrung to date by an over preoccupation with a spatial conception of rights.

The explanation of the relationship between proportionality and deference is, of itself, a good reason for applying Alexy's model to the HRA, but there are further benefits to Alexy's model. Alexy shows that when human rights principles and public interest principles interact in a specific case, a human rights-based rule is created, which will then be applicable to similar cases. This focus on case law as the driver of developments in human rights rule is apposite for a common law system. The focus on how proportionality works in individual cases is also of significance in that it puts the adjudicating court at the centre of the test.

I will show that the various elements of Alexy's model are currently present in the jurisprudence of the UK Courts on the HRA. Rivers has suggested that the UK courts need to move towards an optimisation theory of proportionality.<sup>92</sup> I contend that all of the elements of Alexy's model are already evident in the UK. The difficulty is not that

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<sup>92</sup> See Rivers 'Variable Intensity of Review', above n2.

the elements have not been applied. The difficulty is that they have been applied in a disparate fashion and the overall structure has not always been made explicit. I will show these elements in the detailed case studies contained in Chapters 4, 5 & 6 of this thesis.

However, before going on to that stage, it is important to take account of the full range of judicially-reviewable government decision-makers in the UK. There is no separate constitutional court in the UK: all judicial powers are exercised in a unified court system.<sup>93</sup> This places a limitation on the value of Alexy's theory to the UK. Because Alexy bases his theory on the jurisprudence of the *BVerfGE*, which is primarily concerned with the constitutionality of legislation, his model is focused exclusively on proportionality review of statute law. As I have indicated, proportionality of executive and administrative action is not adequately accounted for. The UK model of proportionality is applied across the entire range of governmental activity. Because there is a single court system, applying a single set of rights to a multiplicity of institutions, the theory of proportionality needs to take full account of distinctions between those institutions. In order for Alexy's model to be fully transplanted into the UK, it must also be adequately translated, and it is to this task that I turn in the next chapter.

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<sup>93</sup> See Rivers 'Fundamental Rights in the UK', above n2.

### *Chapter 3: Developing Alexy: institutional sensitivity and the structural model of proportionality and deference*

In Chapter 2, I set out the basic elements of Alexy's structural model of proportionality. As I explained, Alexy only applies his model to judicial review of primary legislation. In the UK, the Human Rights Act 1998 ('the HRA') can be applied to all levels of government activity.<sup>1</sup> In this chapter, I develop Alexy's model so that it can take account of the full range of government action. By doing this, I add the element of 'institutionally sensitivity' to the structural model.

The central purpose of the proportionality test in the UK is to allow judges to decide whether or not governmental actions are compatible with the European Convention on Human Rights ('the Convention') which was incorporated by the HRA. The judiciary are the primary 'doers' of proportionality under the HRA.<sup>2</sup> Aggrieved individuals who have been affected by a government measure petition an appropriate court and ask the judge(s) to find that the effect the measure has had on their Convention rights is

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<sup>1</sup> Although, as has been noted, the courts do not have the power to declare primary legislation invalid.

<sup>2</sup> Parliament's Joint Committee on Human Rights also has a role in assessing the proportionality of legislation before it is passed. See Feldman, D. 'The Impact of Human Rights on the Legislative Process' (2004) 25 *Statute Law Review* 91; Feldman, D. 'Can and Should Parliament Protect Human Rights?' (2004) 10 *European Public Law* 635; and Hiebert, J.L. 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?' (2006) 4 *IJCL* 1. However, the Committee's role is limited to the period before a Bill becomes law. After legislation is enacted, it is the judiciary who generally assess its compatibility with the Convention.

disproportionate. In examining the governmental measure, the judge applies the proportionality test in order to find out if the measure is Convention-compatible.<sup>3</sup> When undertaking this proportionality analysis, the judiciary give deference to the primary decision-maker where such deference is warranted.

The outcomes of proportionality cases under the HRA build over time to set out the line between what is and is not acceptable on proportionality grounds. In that sense, the courts are creating a tapestry of human rights rules through their individual rulings. In this sense, judges are not only ‘doers’ of proportionality in specific cases, through the proportionality test, they are also building the hard edges of the protected rights, which then informs subsequent cases and the development of future governmental measures.

When a judge is applying the proportionality test to a challenged government act, she asks a series of questions about that government act. What I wish to establish in this chapter is that the premises upon which those questions are based can change depending on which institution of government is being reviewed. Those changes need to be accounted for because they can affect the operation of proportionality and deference.

In ‘doing’ proportionality, judges can be called upon to examine the actions of a vast swathe of public bodies. Much attention has been paid to the institutional differences between the courts on one hand and the other arms of government on the other. Far less attention has been paid to the differences between these other arms of government

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<sup>3</sup> Recent decisions of the House of Lords indicate that proportionality under the HRA is a substantive standard and is concerned with the actual result of the measure, not the decision-making process by which it was introduced. There was some controversy over precisely what a reviewing court was looking for when examining proportionality. It had been argued on that the court must examine whether the challenged measure was itself proportionate. It had also been contended that the court’s role was to examine whether the decision had been reached in a proportionate manner. This was a tension between a view of proportionality as requiring a substantive outcome or a formal process from the primary decision-maker. The matter was recently settled by the House of Lords in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100. Lord Hoffmann held (at 126) that the relevant article was ‘concerned with substance, not with procedure’ and that ‘what matters is the result’. A similar stance was taken in *Belfast City Council v Miss Behavin’ Ltd* [2007] UKHL 19 [2007] 1 WLR 1420. There has been some academic commentary suggesting that there is still space for a review of the decision-makers view of proportionality, but the House does not seem to have endorsed this. See Poole, T. ‘The Reformation of English Administrative Law’ (2009) 68 CLJ 142. See also Poole, T. ‘Of Headscarves and Heresies: The Denbigh High School Case and Public Authority’ [2005] PL 685.

insofar as these affect judicial review. Such differences are significant for judges who are applying the proportionality standard, both in relation to the proportionality test itself and to the level of deference to be afforded to the challenged decision-maker. Reviewing the actions of an appointed official in the Home Office is a qualitatively different task than that of reviewing the actions of Parliament.<sup>4</sup>

As was explained in Chapter 1, the dominance of the spatial metaphor and a lack of institutional sensitivity have been recurring problems in the understanding of proportionality and deference in the UK. In Chapter 2, I showed how, *prima facie*, Alexy's model could form the basis for a structural model for the UK proportionality test which integrates deference into the stages of the proportionality test. This would help to overcome the spatial metaphor. However, as it stands, Alexy's model is not institutionally sensitive enough: his focus is entirely on the legislature. For Alexy's model to be adapted to the UK it must be developed in a way that accounts for the institutional distinctions between the different government bodies whose actions can be challenged in court under the HRA.

In this thesis I am seeking to establish that there is a discernable structure to the operation of proportionality and deference under the HRA. All of the elements of that structure can be found in the existing HRA case law. The structural model does not need to be imposed; it merely needs to be explained. The structural model is affected by the nature of the institution being judicially reviewed. By establishing an institutionally sensitive version of Alexy's model I am arguing that there is a universal proportionality test which can be applied to any governmental activity which is challenged under the HRA. However, certain aspects of that model are either emphasised or reduced in importance depending on the institutional setting.

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<sup>4</sup> While the courts do not have the power to strike down Acts of Parliament under the HRA, they do have a power to review their Convention-compatibility. While the possible outcomes of a challenge to primary legislation may be different to other types of government activity, there is still a central role for the proportionality test when the courts are reviewing legislation.

In this chapter I will explain the way in which institutional distinctions will affect the operation of the structural model of proportionality and deference if it is applied in the UK. The chapter is divided into four main sections. In the first, I give a brief description of the different types of government activity which can be subjected to proportionality review. In this section I also introduce three hypothetical examples which will be used throughout the chapter. In the second section, I will explain how different institutional features can impact on the operation of proportionality and deference in the structural model. I have identified three specific areas of difference between the three forms of government activity which will affect Alexy's model: the choice of objectives; the range of measures open to the decision-maker; and the scope of application of the challenged decision. In the third section, I look at how proportionality and deference will operate if a court is called upon to assess the proportionality of multiple levels of government decision-making which have interacted to produce a challenged government action (e.g. an official exercising a statutory power). Such cases involve a series of sub-decisions, made at different levels of government. I call these 'multi-level decisions'. In the fourth section I will discuss the institutional reasons for affording deference to a decision-maker. I will examine how they relate to Alexy's concepts of structural and epistemic deference. In this section I will also examine how the institutional features of sections 3 & 4 of the HRA affect deference.

This chapter will introduce institutional sensitivity into the structural model. Once I have set out the institutional and functional distinctions and shown how they impact on the model, the stage will be set to test the applicability of this model to the HRA case law. I will do this in the three case studies in the following chapters, which are case studies of the operation of proportionality in three different fields.

### 3.1: FORMS OF GOVERNMENT ACTIVITY

The purpose of this chapter is to develop Alexy's model so that it becomes sensitive to the institutional differences between various forms of government activity. As a preliminary matter, it is important to establish the different types of government activity which might be challenged in court on proportionality grounds under the HRA. The subject matter of a proportionality-based judicial review will broadly fit into two categories of decision: case-specific administrative decisions and generalised policy decisions which set rules. For example, a decision to refuse asylum to an applicant is a one-off decision made by an administrative official. The Sexual Offences Act 2003 is a generalised policy set out as a series of rules. While these two examples are at the extremes of the spectrum, these two core roles recur again and again at different levels of government.

The work of Denis Galligan is instructive on this point. He distinguishes between the two core roles, which he calls 'adjudication' and 'policy making'. He then sub-divides each of these two into a further two categories. His four categories of governmental decision are:

- 1) adjudication;
- 2) modified adjudication;
- 3) specific policy issues; and
- 4) general policy issues.<sup>5</sup>

Adjudication and modified adjudication are individualised determinations of rights and duties which take place within a normative framework of settled standards. Adjudication only has a direct affect on the parties to the specific dispute (although it

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<sup>5</sup> Galligan, D.J. *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986), at 114-117.



may have some precedential impact). Court cases are an archetypal example of adjudication although this can also include certain administrative tribunals. This first category of government action is more properly a description of what a judge engages in when 'doing' proportionality. It is Galligan's other three categorisations which help illustrate the types of government activity which judges will be called upon to review for Convention-compatibility.

Galligan's second category of 'modified adjudication' is like adjudication in that it results in an individualised decision, but in these situations the framework of standards is less certain and there is more discretion to include matters of policy and preference. This sort of decision is generally entrusted to administrative officials and includes immigration, social welfare and some planning decisions. Galligan's third category, 'specific policy decisions' relate to particular decisions which affect a large number of interests, such as where to build a motorway, whether or not to expand an airport etc. There is a large degree of discretion in these decisions although there may be some settled standards. His fourth category, 'general policy issues', involves a substantial discretion although there might be some abstract standards and a large range of interests can be affected. These three categories are instructive as a starting point from which to examine variations in forms of government action which are subject to proportionality review.

The distinction between specific policy decisions and general policy decisions is essentially one of degree rather than of substance. Galligan's analysis is limited to acts of the executive branch of government and he does not apply his model to Acts of Parliament. His 'general policy decision' category could certainly be applied to primary legislation. However, while Acts of Parliament may be similar forms of decision to general policy emanating from the executive, there are very specific institutional issues relating to Parliament which establish primary legislation as a discrete form of

governmental activity. For the purposes of this thesis, the categorisation of governmental activity must take account of primary legislation. Therefore, I will amend Galligan's categorisation slightly. Modified adjudication is a good description of administrative decision-making, so I will follow Galligan's definition on that category. Policy decisions of the executive, whether general or specific have enough of the same institutional features to be combined into one category. I will describe this as 'non-parliamentary rule-making'. The third category is 'primary legislation' which has all of the features of Galligan's 'general policy issues' but with the additional factor that they are promulgated by a directly elected legislature, rather than an executive official.

Modified adjudication and primary legislation are at opposite ends of the institutional spectrum. This makes them particularly valuable in elaborating the need for institutional sensitivity. Non-parliamentary rule-making involves a very wide range of activities; it could certainly be sub-divided into different categories. However, I am not going to do so. In this thesis I will be concentrating more heavily on the other two forms of government activity, since the substantial contrast between the two is the most effective way of elaborating the need for institutional sensitivity. The case studies in Chapters 4 and 5 are heavily focused on modified adjudication and primary legislation, although Chapter 5 does give some consideration to non-parliamentary rule-making. This does not mean that greater exploration of non-parliamentary rule-making is not valuable. It is just that I am seeking to establish the parameters of the institutionally sensitive model, and so the more extreme contrasts are of more immediate use. I accept that it might initially appear overly simplistic for a discussion of non-parliamentary rule-making to treat school uniform policy and delegated legislation as been essentially the same thing. I wish to stress that this is done with good reason. Once the institutional factors have been fully explored through using heavily contrasting government bodies, then it will be possible to examine the more nuanced areas of difference at some later stage.

The distinctions between these types of governmental activity have ramifications for proportionality and deference. In order to illustrate this, I will use three hypothetical examples throughout this chapter. While fictional, each is a plausible example of the sort of government act that might be challenged on Convention grounds. They are the sorts of cases that judges evaluate using proportionality:

- Mr Green (modified adjudication): The first hypothetical example concerns a first instance immigration decision, made by an appointed official at the United Kingdom Border Agency (UKBA).<sup>6</sup> A fictional immigrant, ‘Mr Green’, is an Afghan citizen, who has been living in the UK for the past five years with his British born wife and their three young children (all of whom hold British citizenship). Mr Green initially entered the UK illegally and when the authorities discovered him he applied for asylum. His asylum claim was rejected. He made a further application for leave to remain which was refused by a UKBA official. This was refused under paragraph 322(5) of the immigration rules, on the basis that the security services have reason to believe that Mr Green is a member of a proscribed organisation and poses a threat to national security (although he has not been charged with any offence under anti-terrorism legislation). Mr Green is challenging the decision to refuse him leave to remain on the basis that it is a violation of his Article 8 right to respect for family life.
- Blue school (non-parliamentary rule): The second hypothetical example concerns a fictional school, ‘Blue School’. Blue School is a state run secondary school<sup>7</sup> with a diverse student body representing a wide range of religious affiliations. In the past year, there have been four serious violent incidents at the

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<sup>6</sup> The UK Border Agency took over various immigration functions as of April 2008. It is currently a shadow agency of the Home Office; full executive agency status is expected during the course of 2009. For further information, see [www.ukba.homeoffice.gov.uk](http://www.ukba.homeoffice.gov.uk).

<sup>7</sup> For the purposes of section 6 HRA a school may be a ‘public authority’ which bears Convention obligations.

school. Each one arose out of disturbances which were initiated at religious meetings held by students during the school day. In response to this, the governing body has decided that group religious meetings will no longer be permitted on school property. Only individual, solitary religious observance will be allowed. A group of students are challenging the decision on the basis that it is a violation of their Article 9 right to freedom of religion.<sup>8</sup>

- The Red Act (primary legislation): The third hypothetical example concerns a fictional piece of legislation, ‘the Red Act’. The Red Act was passed in response to a series of violent attacks on people arrested on suspicion of offences under anti-terrorism legislation. A number of suspects (who were subsequently acquitted) were attacked by violent groups and three suspects were murdered. The Red Act states that it is an offence to publish the name of a person suspected of a terrorism offence (where that person has not yet been convicted). A person convicted of an offence under the Red Act is liable, on indictment, to a maximum sentence of ten years imprisonment. Three journalists have challenged the Red Act on the basis that it is a violation of their Article 10 right to freedom of expression.

I will return to these examples throughout this chapter to illustrate the way in which the differences between the three institutions from which these decisions emanated can affect the operation of the proportionality test.

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<sup>8</sup> I have chosen quite a low-level example of non-parliamentary rule-making in order to distinguish it from primary legislation more fully. Delegated legislation could also be used as an example, but as it emanates from central government, the contrast with Acts of Parliament is less stark.

### 3.2: INSTITUTIONAL SENSITIVITY, OPTIMISATION AND DEFERENCE

In Chapter 2, I showed how Alexy's model of the operation of proportionality describes the elements of the test in terms of factual and legal optimisation of human rights principles and public interest principles. Factual optimisation requires that the least intrusive means of achieving a government objective be used. Legal optimisation requires that there be an overall balance between the level of intrusion on a human right and the level of achievement of the public interest. Alexy describes deference as either structural or epistemic. Structural deference arises in the setting of objectives and where there is a choice between rights-compatible means. Epistemic deference arises where there is uncertainty and the primary-decision-maker's assessment of empirical or normative questions is deferred to by the reviewing judge. Alexy integrates these two forms of deference into the optimisation model of deference. Structural deference can arise at the legitimate objective stage and the factual optimisation stage. Epistemic deference can arise at the factual and legal optimisation stages.

Judges use proportionality to examine the Convention-compatibility of three different types of government activity. The differences between these types of activity will impact on the model of proportionality and deference. There are three specific institutional factors which affect the operation of the structural model of proportionality and deference: 1) the decision-maker's freedom to choose its own objectives; 2) the range of measures available to the decision-maker; and 3) the scope of the decision. I will look at each of these three factors separately.

#### *3.2.1: Choice of objectives*

Different institutions of government have different levels of control over the objectives they pursue. The UKBA official in Mr Green's case has no choice of objective: she

must fulfil the duties placed on her by the Immigration Rules. Conversely Parliament had a wide choice of objectives when passing the Red Act. A judge applying the proportionality test in a HRA challenge to either of these decisions must take account of this difference.

The UK proportionality test requires that the legislative objective be ‘sufficiently important to justify limiting a fundamental right’.<sup>9</sup> As was discussed in Chapter 2.2, this limb of the test, combined with the text of the Convention is used to identify those public interests which have sufficient normative force to justify limiting human rights. It is noteworthy that the wording of this stage of the proportionality test requires that the *legislative* objective be legitimate. This is despite the fact that the proportionality test is applied to government institutions with no legislative power. This implicitly accepts that some decision-makers have their objectives set for them by a different level of government. The wording of this arm of the test is a recognition of institutional difference, although the full ramifications of it for the later stages of the proportionality test have yet to be fully fleshed out.

It is clear from Alexy’s model that identifying the public interest objective is an important preliminary step for a court conducting a proportionality analysis of the challenged measure. The public interest objective of a government measure is described as a principle which must be optimised relative to a competing human rights principle. Alexy’s theory is predicated on the idea that principles are optimisation ‘commands’.<sup>10</sup> The human rights principle and a public interest principle both ‘command’ that they be realised to the greatest extent possible. Julian Rivers accepts the characterisation of human rights principles as optimization commands, but takes issue with Alexy’s characterisation of the public interest as a ‘command’. Rivers points out that the

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<sup>9</sup> *de Freitas v Minister for Agriculture and Fisheries* [1999] 1 AC 69, at 80 *per* Lord Clyde. Cited with approval in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 and *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45.

<sup>10</sup> See Alexy, R. ‘On The Structure of Legal Principles’ (2000) 13 *Ratio Juris* 294.

legislature can choose whether or not to pursue a particular public interest principle, and so according to Rivers, the public interest principle is an ‘optimisation permission’, not a command.<sup>11</sup>

In fact, they are both correct. The reason for the confusion is that neither of their analyses of proportionality takes full account of institutional differences between decision-makers. Once an objective has sufficient normative force to be used to limit human rights, it is a public interest principle for the purposes of the structural model. That public interest principle can be a command or a permission, depending on the institutional setting in which the decision is made. In Mr Green’s case, the parameters of the decision have already been set. Paragraph 322(5) of the Immigration Rules is clear that a person who poses a threat to national security should not be permitted leave to remain. The UKBA official does not get to choose which goals she wishes to pursue. She is not *permitted* to optimise the public goal of protecting national security; by the terms of her remit, she is *required* to do so.

Conversely, rule-makers will have more choice in the public interests pursued. The level of choice may vary. For some rule-makers the choice will be limited. The board of governors of Blue School can make policies towards a specified list of ends such as school discipline, promoting the wellbeing of students or improving educational standards. The range of objectives is small and the board is under a duty to pursue all of them to some extent. Like the UKBA official in Mr Green’s case, the governors of Blue School have limited ability to set their objectives, although they do have a wider range of objectives to pursue. In the case of the Red Act, the choice of objectives is incredibly broad. Parliament is under no external legal obligation to pursue the goal of preventing attacks on terror suspects. It chose to pursue that goal, but it could just as easily have

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<sup>11</sup> Rivers, J. ‘Proportionality, Discretion and the Second Law of Balancing’ in Pavlakos, G. (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007), at 168.

left things as they stood. In this sense, for Parliament, the public interest is an optimisation *permission*, whereas for the other two decision-makers, it is an optimisation *requirement*. The structural model of proportionality and deference should take account of this difference.

In addition to this requirement/permission distinction, the choice of objectives open to a decision-maker will affect how much work a reviewing court will need to do in identifying the principles to be optimised. The court must be clear precisely which competing principles are at stake in a proportionality case.<sup>12</sup> The optimisation process in Alexy's model is based on the relationship between a public interest principle and a human rights principle. Different public interest principles will interact with the human rights principle in different ways and lead to different outcomes. For example if the goal of the Red Act was the prevention of crime, then this might interact with the Article 10 right differently than if the identified principle was national security.

If the goal pursued by a decision-maker has already been set for it elsewhere, then identifying the public interest principle will be a relatively straightforward task. If the decision-maker gets to choose its own goals, then it will be more complicated. Mr Green's application was decided on the basis of stated national security goals, set out in the Immigration Rules. The precise objective of the Red Act is less clear. It could have been the protection of the right to life, the prevention of crime and disorder, the administration of justice or any other related goal. If a court were reviewing the proportionality of the Red Act, it would need to look more deeply into the precise public interest pursued than would be required if it were reviewing Mr Green's deportation.

Official decision-makers enjoy a certain leeway in exercising their powers. Galligan points out that even though a power may be limited by statute and the goal very clearly

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<sup>12</sup> See Rivers, J. 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174.



stated, there are still sub-goals and strategies for achieving the main goal which the decision-maker will decide upon herself and this gives such a person a good degree of leeway in how the goal is pursued. Galligan argues that political leanings, policy preferences and moral outlook are likely to play an important role in this.<sup>13</sup> The objectives which an administrative decision-maker is supposed to achieve will be set for it by an external rule-making authority and some constraints may also be set out, in terms of what factors need to be considered etc. The decision-maker's own understanding of the goal will heavily inform the operation of their discretion as will various other factors, including their moral outlook and their relationship to community morality, the availability of resources and the concept of fairness to name just a few.<sup>14</sup> This is well illustrated in the decision to ban group worship in Blue School. While protecting the welfare of the students is a clear duty placed on the governors, they may have acted as they did in pursuit of the 'sub-goal' of calming religious tensions through a restriction on religious meetings in the school. This is a sub-goal of the goal of protecting the welfare of the students. The sub-goal was chosen by the governors themselves, it is not a goal which was imposed externally. Had the sub-goal been differently formulated, then the policy adopted could have been different. This sort of situation needs to be accommodated within the structural model of proportionality and deference. A reviewing court would need to decide whether it was the sub-goal or the primary goal which was the public interest principle upon which the ban was based.

The job of defining the objective becomes even more difficult at the level of Parliament. Even where there are lists of the objectives which may be pursued when limiting a right, as is the case in Articles 8-11 of the Convention, the terms used are so broad that many governmental pursuits could feasibly be worked into them. Some possible goals of the Red Act have already been mentioned, but there could easily have been others. Great

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<sup>13</sup> Galligan *Discretionary Powers*, above n5, at 109-114.

<sup>14</sup> *ibid*, at 129-163.

care must be taken by a reviewing court to ensure that it defines the objective of the challenged measure in very precise terms. As will be seen in later chapters, this can have a significant knock-on effect on the rest of the analysis.

The choice of objective will also affect structural deference. As was discussed in chapter two, structural deference can arise in three ways: choosing the objective to be pursued, choosing between equally rights-intrusive measures and choosing between equally balanced measures (although, as was noted in Chapter 2.4.1, the last of these is unlikely to arise under the HRA). The first of these is what Alexy calls ‘end-setting’ structural deference.<sup>15</sup> This form of structural deference is only relevant where the decision-maker is actually in a position to exercise a choice of objectives. The UKBA official in Mr Green’s case did not have a choice as to which goals to pursue and so end-setting structural deference is not relevant to a HRA challenge to the UKBA official’s decision. Conversely, both the governors of Blue School and Parliament have a degree of choice as to which end to pursue (this choice is significantly wider for Parliament). As such, the possibility of end-setting structural deference can potentially arise in each of those two cases.

In situations where the decision-maker does have some power to determine the objective pursued, epistemic deference can arise in a court’s assessment of the objective chosen. Optimisation of principles entails a measurement of the level of importance of a public interest principle. A reviewing court may be faced with uncertainty as to the importance of the objective. There might be good reasons to defer to the decision-maker’s view of what is or is not important in a society. The decision-maker might be in a better position to make a measurement than the court can be expected to. This could arise in the case of Blue School, where the level of importance of the violent incidents and the possibility of their recurrence could be better measured by the governors of the

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<sup>15</sup> Alexy *TCR*, above n15, at 395-396.

school than by the court reviewing the governors' decision. This would be empirical epistemic deference, since it concerns the measurement of effects on a group of people and of possible future outcomes. The goal of the Red Act might also be afforded empirical epistemic deference. Parliament might be given deference regarding its assessment of the extent of the problem of attacks on terrorism suspects.

### *3.3.2: Range of measures*

When a decision-maker is pursuing an objective, the range of measures available as a means of pursuing that objective can vary considerably. This is not only a question of the practical realities of whatever problem the decision-maker is grappling with. It is also affected significantly by institutional distinctions between decision-makers. Parliament's choice of measures is potentially infinite. The same is not true of many administrative officials at lower levels of government, although their decisions regularly have an impact on human rights.

The nature of modern government is such that administrative decision-makers are far more likely to have a very limited range of measures available to them. By and large, such decision-makers decide whether or not a particular rule applies to a particular case. For example, in Mr Green's case, the only options open to the UKBA official were to grant leave to remain or to refuse leave to remain. In Blue School, the governors had other options for achieving the desired outcome apart from an outright ban on group worship. For example, the school could have increased teacher presence at religious services or put a cap on the number of worshipers who could be present. In the case of the Red Act, the range of options was enormous. Parliament could have mandated greater protection and/or surveillance of terror suspects; it could have legislated for the

monitoring of the groups responsible for the previous attacks; it could have legislated for all terror suspects to be taken into protective custody.

The range of measures available to a decision-maker has a significant impact on the factual optimisation stage of the proportionality test. Proportionality comes into play when a challenged measure brings a public interest principle into competition with a human rights principle. Factual optimisation requires a reviewing court to examine whether there is another measure available which would realise the public interest to the same extent while intruding upon the human right to a lesser extent. This presupposes that another option that would pursue the public interest was available to the decision-maker. This will rarely be the case with administrative decision-makers.

In Mr Green's case, the UKBA official had no range of measures available; she was faced with a binary choice. Where the range of options is limited to such a large extent, then factual optimisation cannot be applied in any meaningful way. It is pointless to ask if a less rights-restrictive way of achieving the public interest was available when they had *no* other way of achieving the public interest. In these cases, legal optimisation will be crucially important. Administrative decision-makers work within frameworks of rules. No matter how precisely those rules are defined, they will not be able to anticipate every situation to which they will be applied. It is inherent in the operation of administrative discretion that some cases will fit the rules better than others. This leaves open the possibility of injustice through either overly rigid enforcement of the rules or through lax application of the standards which underpin them. In such instances, if Convention rights are engaged, the legal optimisation arm of proportionality is likely to be the key battleground in deciding whether the impugned decision was or is Convention-compatible. In Mr Green's case, this means that a court reviewing the decision to deport him will be primarily concerned with balancing his right to family life against the interest in national security. In this institutional setting, factual

optimisation is minimised to a very large extent and so legal optimisation is heavily emphasised. In *Samaroo v Secretary of State for the Home Department*<sup>16</sup> Dyson LJ considered that the factual optimisation arm of proportionality should only be applied where there is a ‘blanket policy’ as was the case in *Daly*<sup>17</sup> whereas the decision challenged in the *Samaroo* case only fell to be considered on the basis of overall balancing, because it was an individualised administrative decision. In Chapter 4, I will elaborate on this minimisation of factual optimisation in proportionality cases dealing with challenges to administrative decision-making.

Where the challenged measure is a rule, rather than an administrative decision, the situation is quite different. The extent to which factual optimisation will apply to a given case will depend on the range of options available to the decision-maker and this will vary across the different levels of governmental rule-making institution. The governors of Blue School will have fewer options open to them than are available to Parliament. The greater the number of options, the greater the extent to which a factual optimisation of principles can be undertaken. If we ask what other options the governors of Blue School had for preventing further religious violence, we will find that we can write a list, but not a particularly long one. When we ask the same question of Parliament’s options when passing the Red Act, the list is considerably longer.

The range of options will also affect the operation of structural deference. As was discussed in Chapter 2.4, this is likely to arise in relation to the choice of objectives and factual optimisation. At the factual optimisation stage of proportionality, the reviewing court asks if a less rights-restrictive measure was available to the decision-maker. For structural deference to arise at this stage there must actually be a range of measures available. On this basis, it is evident that structural deference is relevant to the Red Act

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<sup>16</sup> [2001] EWCA Civ 1139.

<sup>17</sup> *ibid*, at paragraph 19.

and to the actions of the governors of Blue School, since in each case the decision-maker had a range of options from which to choose. For example, a reviewing court might take the view that Blue School could have limited group worship to non-denominational inter-faith services. The court might deem that this intrudes on the Article 9 rights of the students to the same extent as limiting religious observance to private individual worship. If the court was also satisfied that both measures protected the safety of the students to the same extent, then each would be equally rights-intrusive. This would mean that at the factual optimisation stage of proportionality there would be a structural deference available to the school governors as to which measure was chosen. This situation can be contrasted with Mr Green's case. The UKBA official only had two options available: leave to remain and deportation. Leave to remain would protect the human rights principle, but would not realise the public interest principle. Deportation would realise the public interest principle, but would severely impact on the human rights principle. In such a situation, no structural deference can arise, because there is no choice of equally rights-intrusive means.

### *3.2.3: Scope of the decision: individual vs. general*

One of the defining features of Galligan's 'modified adjudication,' as practiced by administrative officials, is that it relates to specific decisions in individual cases. Such decisions involve a determination being made regarding how a particular person or situation is to be treated. Conversely, rule-making entails the setting of policies which will be of general application to a group. The key distinction here is between a *rule* and a *ruling*. A ruling is focused on the instant case and seeks to resolve some particular issue that has arisen. To that degree, rulings are not particularly forward looking,

beyond the settlement of the immediate dispute.<sup>18</sup> For example, the decision to deport Mr Green affects only him and not other immigrants.

The legal optimisation stage of proportionality requires that an overall balance be struck between the realisation of the public interest and the protection of the individual right.<sup>19</sup>

A very substantial intrusion on an individual right is not to be tolerated unless it is accompanied by a similarly large realisation of the public interest. Deciding whether this balance exists requires a measurement of both the intrusion on the human right and the level of realisation of the public interest. This measurement aspect of legal optimisation is closely related to Alexy's concept of epistemic deference. It will be recalled that epistemic deference arises where there is uncertainty in the proportionality assessment and the court is satisfied that the primary decision-maker's view of that uncertainty is to be respected. The level of intrusion on a right and the level of protection of the public interest are much easier to measure in a specific case than in the abstract. In Mr Green's case, there is a particular individual whose rights are affected and a particular expected outcome, which will be quantifiable to a greater or lesser extent. This means that the legal optimisation arm of proportionality is more straightforward when reviewing administrative decisions. It also means that there will be less uncertainty, and so less need for epistemic deference.

This contrasts with policy powers which involve the making of rules. Rule-making is primarily concerned with the setting of goals and norms of general application. The ban on group worship in Blue School affects all of the students but does not affect anyone outside the school; the Red Act affects the freedom of expression of everyone in the UK. Neither Parliament nor public bodies that make rules are concerned with specific cases in the way that administrative decision-makers are. There is a difference of degree

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<sup>18</sup> See Galligan *Discretionary Powers*, above n5, at 117.

<sup>19</sup> Alexy *TCR*, above n15, at 50-56.

between legislation and non-parliamentary rule-making whereas there is a difference of substance between the nature of primary legislation and administrative decisions. The governors of Blue School's ban is similar in nature to the Red Act, it just covers fewer people whereas both of these decisions differ qualitatively from Mr Green's case.

The generalised scope of rules means that they will necessarily exclude factors which might be important in one case but which would be of less significance in others. Rules are created in the abstract, based on various assumptions about the generalities of a class of potential fact patterns. This is done with a view to ensuring efficiency, consistency and preventing arbitrary use of discretion.<sup>20</sup> Galligan describes rules as being potentially both under-inclusive and over-inclusive<sup>21</sup> because they affect the interests of multiple parties simultaneously and in circumstances whereby those interests may be divergent. In addition to the generalised application of rules,<sup>22</sup> they are also concerned with future planning, whereas administrative decisions are concerned with past or current events. This can be seen with the Blue School ban and the Red Act, both of which were designed to prevent future problems across a range of individuals.

The forward-looking and generalised scope of rules makes it more difficult for a reviewing court to measure the effects of the rule on the public interest. This has implications for legal optimisation and epistemic deference. While a HRA challenge to a rule will involve a particular case, a reviewing court's decision on Convention compatibility will require the consideration of factors beyond that case. The level of public interest achieved by a rule must be measured by the effect of the rule across the board, not just in relation to one individual claim. Given the range of people affected, the public interest outcomes from the Blue School ban and the Red Act will be much trickier to measure than in the case of Mr Green's deportation. It may be that the ban on

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<sup>20</sup> Baldwin, R. *Rules and Government* (Oxford: Clarendon Press, 1995), at 12-14.

<sup>21</sup> Galligan *Discretionary Powers*, above n5, at 129-132.

<sup>22</sup> *ibid*, at 116.



group religious meetings in Blue School reduces the incidence of violence, but it may also deepen religious tensions. Similarly, the Red Act may well protect terror suspects, but it could just as easily increase the public's sense of outrage. As such, the legal optimisation stage of the proportionality test will be more complex than would be the case with Mr Green. This also means that there will be more scope for epistemic deference. When a court is reviewing the proportionality of either the Blue School ban or the Red Act, it may be prepared to accept the evaluation of the decision-maker as to the expected outcomes of the rule.

The scope of the decision can also affect the evaluation of the human rights principle in legal optimisation. Where a court is reviewing the Convention-compatibility of a rule, the level of intrusion on the human rights of people not involved in the case will be of significance. I am not suggesting that they are parties to the proceedings. The point is that the level of intrusion on the protected right as a whole will have some bearing on the reviewing court's evaluation of whether an overall balance has been struck between the right and the public interest (i.e. whether the measure is legally optimised). For example, in Blue School, the effect of the ban on all religious students will enter into the analysis as well as its effect on those taking the case. Similarly with the Red Act, the effect of the legislation on the freedom of expression of everyone in the UK will inevitably arise in the consideration of whether the legislation is Convention-compatible. Again, this makes legal optimisation more difficult and raises issues of epistemic deference in a way which does not occur in cases such as Mr Green's.

The facts of the individual case are the sole consideration when a court reviews the proportionality of an administrative decision, but the facts are merely a starting point when reviewing rules. The broader effects must also be looked at, which complicates the task. This raises issues for legal optimisation and increases the potential for epistemic deference.

The pressure which a broad scope of a decision can put on legal optimisation may have the effect of causing a reviewing court's proportionality analysis to focus more heavily on factual optimisation. In the case of the Red Act, it is easy enough for a court to think of a less restrictive way of protecting the terror suspects. It is much more difficult for the court to measure precisely the impact of the Act on both the right to freedom of expression across the society and the level of protection of the public interest that the Act provides. Such measurements will be somewhat easier in the case of Blue School, because while the decision is of general application, it is limited to the school itself, rather than society at large. However, the potential for a heavy focus on factual optimisation instead of legal optimisation is evident in the case of Blue School too. As will be shown in later chapters, it is often the case that one of the two forms of optimisation involved in the proportionality test will do most of the heavy lifting when a court reviews the proportionality of a governmental act. As was noted above, with administrative decisions, it is likely that factual optimisation will be defunct, leaving most of the work to legal optimisation. Conversely, where a court is reviewing the Convention-compatibility of non-parliamentary rules and primary legislation, the difficulty of assessing legal optimisation means that there is a lot of scope for factual optimisation to become the central focus the proportionality analysis.

I have now examined three areas of difference between government institutions – the choice of objectives, the range of measures and the scope of the decision – and have shown how these three factors can impact on factual and legal optimisation and structural and epistemic deference. Once all of this has been recognised, institutional sensitivity can be introduced into the structural model of proportionality and deference.

### 3.3: MULTI-LEVEL DECISION-MAKING

In this chapter I am concerned with how a court's analysis of proportionality and deference will be affected by the institutional features of the government body being judicially reviewed. Up to now, I have been looking at situations where the challenged measure is of one type and is carried out by one institution. However, the complex and interdependent nature of modern government in the UK is such that where a measure affects an individual's human rights it can often be the outcome of more than one decision-making process at more than one level of government. This multi-level decision-making must be accounted for in a truly institutionally sensitive model of proportionality and deference.

Mr Green's case is a good example of this sort of decision. Up to now, I have been looking at the convention compatibility of the decision to deport. However, the decision was made on the basis of the Immigration Rules, which were promulgated by the Home Secretary in accordance with the provisions of the Immigration Act 1971. As such, Mr Green's case can actually be seen to involve three levels of government: the UKBA official, the Home Secretary's rule-making powers; and Parliament.

Administrative officials will be constrained in their decision-making by a framework of rules, which are set for them by other institutions.<sup>23</sup> Often they will be required to pursue certain objectives, rather than be merely permitted or empowered to pursue them.<sup>24</sup> Where the objective is obligatory, that obligation will have been created by another level of government. For example, in Mr Green's case, the UKBA official is bound to apply the Immigration Rules. The UK proportionality test requires that the 'legislative objective' of a challenged government measure be legitimate. This is despite the fact that the challenged decision may have been made by an administrative official

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<sup>23</sup> Wade, H.W.R. and Forsyth, C.F., *Administrative Law* (9<sup>th</sup> ed, Oxford: Oxford University Press, 2004) at 354.

<sup>24</sup> Galligan *Discretionary Powers*, above n5, at 109-114. See also section 3.2.1 above.

with no legislative power. Therefore, if Mr Green wished to challenge the Convention compatibility of the objective the UKBA official was pursuing, he would need to challenge the Immigration Rules. He could go even further and challenge the Immigration Act 1971, under which as we have seen the Immigration Rules are promulgated.

Section 6(2) of the HRA states that the Convention-compatibility of the decision of a public authority cannot be challenged if that authority was required to act in a particular way because of primary legislation. It would be open to a reviewing court to find that the UKBA official in Mr Green's case was exempted by section 6(2) because the Immigration Act 1971 required the deportation. If a court made such a finding and Mr Green wished to challenge the Convention compatibility of the decision to deport him, he would again need to challenge the Immigration Act itself.

O'Brien gives some consideration to these sorts of multi-level decisions.<sup>25</sup> He points out that a court will need to address its proportionality review to either the decision of the public authority or the legislation or both. O'Brien describes these as 'applied review' and 'legislative review' respectively. O'Brien notes that the approach of the courts has been to refuse to consider the Convention compatibility of the statutory provision itself unless the powers it grants can only ever be exercised in an incompatible way.<sup>26</sup> Where both incompatible and compatible applications are available, the courts seem satisfied to focus solely on judicial review of that decision.<sup>27</sup>

Section 6(2)(a) of the HRA exempts a public authority from the requirement to act in a Convention-compatible manner where, as a result of primary legislation, it could not have acted differently. Section 6(2)(b) exempts the public authority from the

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<sup>25</sup> O'Brien, D. 'Judicial Review under the Human Rights Act 1998: Legislative or Applied Review?' [2007] EHRLR 550.

<sup>26</sup> See *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307.

<sup>27</sup> O'Brien 'Legislative or Applied Review?', above n25, at 559-567.

requirement to act in a Convention-compatible manner if it is acting to give effect to provisions of primary legislation which are themselves Convention-incompatible and cannot be read down to remove the incompatibility. The purpose of these provisions is to respect the sovereignty of Parliament. Sections 6(2)(a)&(b) have been interpreted by the House of Lords in *R (Hooper) v Secretary of State for Work and Pensions*<sup>28</sup> and *R (Wilkinson) v Inland Revenue Commission*.<sup>29</sup> The House concluded that section 6(2)(a) arose where the public authority was acting under a statutory duty. It also held that section 6(2)(b) was to be given a wider interpretation: where a public authority is acting to give effect to a Convention-incompatible statute and it has both compatible and incompatible courses of action open to it, section 6(2)(b) will *not* require the public authority to choose the compatible course. The reason for this was that to require the public authority to choose the compatible course would be to change the statutory power into a statutory duty and preclude the possibility of the public authority giving effect to the incompatible legislation.<sup>30</sup> This indicates a permissive approach to administrative decision-makers when they are acting pursuant to Convention-incompatible legislation.

Administrative decision-makers may also be required to interpret the rules under which they operate. They will take various practical factors into account when doing this and their outlook will also effect their interpretation.<sup>31</sup> It may not always be clear whether an administrative decision is caused primarily by the rules under which it was made or by the decision-makers interpretation of those rules. In Mr Green's case, the UKBA official's understanding of the Immigration Rules could be as important as the Rules themselves. For example, the official's understanding of the term 'national security' and

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<sup>28</sup> [2005] UKHL 29; [2005] 1 WLR 1681.

<sup>29</sup> [2005] UKHL 30; [2005] 1 WLR 1718.

<sup>30</sup> See *R (Hooper) v Secretary of state for Work and Pensions* [2005] UKHL 29; [2005] 1 WLR 1681, at 1701, *per* Lord Hope. This point was recently affirmed in *Doherty v Birmingham City Council* [2008] UKHL 57; [2008] 3 WLR 636.

<sup>31</sup> Galligan *Discretionary Powers*, above n5, at 129-140; and Baldwin *Rules and Government*, above n20, at 25.

of her role in protecting it may have had a significant effect on the outcome of the decision. It may be necessary for Mr Green to challenge that interpretation in addition to both the actual decision and the rules themselves.

Multi-level decision-making can also arise with rule-making powers exercised by government officials up to and including government ministers. These powers are themselves limited by a framework of rules which are in the first instance contained in primary legislation, but may be refined by sub-rules promulgated at a higher level of the executive. This can be seen in the example of the Blue School ban on group religious meetings. The ban itself is a rule, but the need to make that rule is derived from other rules such as the provisions of the Health and Safety at Work Act 1974. It will also be affected by other rules, such as policies set out by the Secretary of State for Children, Schools and Families. This framework of rules will operate through both any specific restraints included in the legislation and through the objectives and purposes for which the power was granted. If any of the students wish to challenge the rules under which the ban was made, they may need to look beyond the decision of the school governors to implement the ban. They may have to challenge rules under which the ban was made. As with Mr Green's deportation, the decision to ban group worship in the school is not only constrained by the rules within which the school governors operate. It is also based on the governors' interpretation of those rules. Again, it may be necessary to challenge the interpretation of the rules as well as the rules themselves.

The constraints placed on institutions exercising rule-making powers are very similar to those placed on administrative decision-makers exercising adjudicative powers. The distinction is that where a governmental rule is made under the auspices of a statutory power, it involves filling in gaps in the existing framework of norms and rules. Where an administrative decision is made under a statutory power, the decision-maker is applying the existing rules to the facts of a specific case.

Multi-level decision-making involves one rights-intruding outcome, which is the product of multiple decisions made by different institutions. It is also possible for a HRA challenge to be made against a rights-intrusive outcome which is the product of multiple decisions made by the same institution, exercising different functions. It is not uncommon for a government body to be responsible both for the setting of policies and standards and the execution of those policies or standards.<sup>32</sup> For example, if three students at Blue School were to be expelled for breaching the ban on group religious meetings, then the governors of the school would have both made a rule and then made an administrative decision based on that rule. The rights-intrusive outcome would be a product of both layers of decision-making.

Some government decision-makers, most notably ministers, may have the power to set rules *and* the power to make decisions under those rules. The two governmental functions are unified in a single state actor, but they are still separate decisions. Allan notes the dangers inherent in the ‘exercise of broad discretionary power by the executive, circumscribed only by its own broadly framed official rules’.<sup>33</sup> However, precisely this situation is regularly permitted.<sup>34</sup> This is evidenced by the use of skeleton acts and delegated legislation. The use of such rule-making process has expanded considerably in past decades, while the level of Parliamentary supervision of delegated legislation has receded. In certain instances ‘Henry VIII’ clauses can be used to allow delegated legislation to amend the legislation under which it is made, thus giving the

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<sup>32</sup> Galligan *Discretionary Powers*, above n5, at 21-22.

<sup>33</sup> Allan, T. R. S, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) at 47-52.

<sup>34</sup> See for example *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (‘the Scott Report’), HC 115 HMSO, 1996. See also Tomkins, A., *The Constitution After Scott: Government Unwrapped* (Oxford: Clarendon, 1998) and Ganz, G., ‘Delegated Legislation: A Necessary Evil or a Constitutional Outrage’ in Leyland, P. and Woods, T., (eds.) *Administrative law facing the future : old constraints and new horizons* (London: Blackstone, 1997).

rule-maker the power to change the constraints under which they operate.<sup>35</sup> While such instruments have not been the subject of much proportionality analysis, the existence of this power shows the potential for a HRA challenge to multiple, related decisions from the same institution all of which contribute to a single rights-intrusive outcome.

The foregoing is important for proportionality analysis because it shows that a particular outcome can be the result of a series of decision-making processes. A litigant seeking to have her Convention rights protected may wish to challenge any or all of those levels of decision-making. Where multiple levels of decision-making are being considered it is vitally important that each level be analysed separately. As I have explained in some detail in this chapter, the institutional context of a decision will impact on each stage of the proportionality test. Where multiple levels of government are being challenged at the same time, the institutional qualities of each level must be accounted for if proportionality and deference are to operate effectively.

Returning to Mr Green's example, he may seek to challenge the Convention-compatibility of the decision to deport him, the Immigration Rules and the Immigration Act. At the level of the decision to deport, the UKBA official had no choice in the objectives being pursued, there was no range of options to choose from and the scope of the decision was very narrow. As such, identifying the public interest principle will be straightforward. Factual optimisation and structural deference will be irrelevant, since there is no range of options available. The impact of the deportation on Mr Green's Article 8 rights and on national security will be relatively easy to measure. There may be some scope for epistemic deference with regard to the public interest at this stage, but the court will be able to address the impact on Mr Green's Article 8 rights with some precision.

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<sup>35</sup> See Barber, N.W. and Young, A.L. 'The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty' [2003] PL 112; and Forsyth, C. and Kong, E. 'The Constitution and prospective Henry VIII Clauses' [2003] JR 17.



The challenge to the Immigration Rules will work differently. The Home Secretary's objectives were constrained to some extent by the Immigration Act, so the objective being pursued may be less easy to identify than with the UKBA official. The range of options open to the Home Secretary in setting out the Immigration Rules will be wider than were open to the UKBA official. For example, a provision could have been made for a hearing to be held where someone is suspected of being a threat to national security. This would have been a less rights-intrusive means than requiring deportation. This indicates that factual optimisation will be of particular relevance to a HRA challenge to the Immigration Rules. Legal optimisation may be trickier when looking at the Immigration Rules. The level of public interest achieved by having the rules in their current form may be tough to measure. Balancing that against the deportation of people suspected of being a threat to national security will be a complex task involving some uncertainty. Epistemic deference is therefore likely to be a substantial issue.

A challenge to the Immigration Act 1971 itself would run along the same lines as the challenge to the Immigration Rules, but would be on a bigger scale. Parliament's choice of objectives is very broad, so a reviewing court would need to define the objective of the Immigration Act with some precision. That choice of objectives would be afforded end-setting structural deference. There would have been a substantial range of measures available to Parliament at the time of passing the Act, so there is a lot of scope for factual optimisation and the reviewing court could give a lot of attention to whether the least rights-restrictive options were pursued in the Act. This would be tempered by the fact that the specific option was not chosen by Parliament, but by the Home Secretary. Insofar as factual optimisation applied to the Act, structural deference would also be a consideration. The legal optimisation stage of a review of the Act itself would be very complex, given the wide-ranging effect on rights and public interest issues involved. Difficulties of measurement would give rise to epistemic deference.

I have just set out the application of Alexy's proportionality model to each of the three institutional levels which cumulatively led to Mr Green's deportation. This three-dimensional application of proportionality is extremely complex and some parts of the proportionality test did not arise in any meaningful way at certain stages. Factual optimisation was not an issue at the level of the UKBA official. Legal optimisation became too abstract to be meaningful at the level of the Immigration Act 1971.

It could be argued that best approach to a proportionality review of multi-level decision-making would be a fragmentation of the test. The institutionally relevant stages of the test might be applied to the institutions they most affected. For example, as previously explained, factual optimisation in a binary administrative decision is pointless. If the test is to be spread out across Mr Green's case, then factual optimisation would be most appropriately applied to the Immigration Rules or the Immigration Act and legal optimisation would be best applied to the decision of the UKBA official. This sort of fragmentation would avoid the repetition of stages of the test in institutional settings where they do not provide any useful analysis.

However, the risk with fragmenting the test in this way is that the various stages of the test get applied to institutions where they have no relevance. Proportionality could be misapplied in a way which would undermine the test completely. For example, in Mr Green's case, factual optimisation could be applied only to the UKBA official and legal optimisation could be applied only to the Immigration Rules and the Immigration Act 1971. Such an application of proportionality would provide no meaningful analysis and the outcome would tell the reviewing court very little about the convention compatibility of the decision to deport Mr Green. Such an application of proportionality would undermine the assumptions upon which I have shown the proportionality test to be based. While a fragmented application is possible, it must be done in a way that avoids this type of institutionally perverse reasoning. Such reasoning is unfortunately

quite prevalent in the HRA case law on housing, as I will show in Chapter 6. In order to avoid institutionally perverse applications of proportionality, a safer approach would be to apply each stage of the proportionality test to each level of the challenged decision.

This example shows the complexity of multi-level decision-making for the purposes of proportionality and the manner in which the test becomes stratified. Certain aspects of proportionality (and by extension certain aspects of deference) are applied to different levels of the decision process. The value of a structural, institutionally sensitive model is particularly evident in these cases. Where a court fully understands the proportionality process, the forms of deference, the reasons for deference and the institutional framework of the decision, then the stratification of the test is not necessarily problematic. This type of issue can be seen in the case-law on housing, much of which concerns local authority action within a statutory scheme. However, as will be shown in Chapter 6, when this stratification is done in a slipshod manner, then the proportionality analysis has on occasion been greatly undermined.

### **3.4: INSTITUTIONAL SENSITIVITY AND THE REASONS FOR DEFERENCE**

In this section I will move beyond the impact that institutional factors have on the *operation* of proportionality and deference and consider the impact that such institutional factors have on the *level* of deference to be afforded. When a court is using the proportionality principle to review the Convention-compatibility of a challenged government act, the intensity of the court's review can be tempered by deference to the decision-maker. As has been shown, Alexy accommodates the concept of deference within his model of proportionality and divides it into two forms: structural and epistemic. Structural deference arises in relation to choosing the public interest to be

pursued and in selecting between equally rights-intrusive measures.<sup>36</sup> Epistemic deference relates to how the proportionality test deals with uncertainty.<sup>37</sup> Alexy further sub-divides epistemic deference into ‘normative’ and ‘empirical’. Normative epistemic deference arises where there is doubt as to the balance to be achieved between a right and the public interest. In those circumstances it may be more appropriate to defer to the original decision-maker’s judgment. Empirical epistemic deference arises when it is not possible to precisely measure the level of impact on a right or the level of realisation or importance of the public interest.

For example, whether or not Mr Green poses a threat to national security is a difficult empirical question, which may give rise to empirical epistemic deference. Whether or not his deportation strikes the right balance between his family rights and national security is a contentious normative question, which may give rise to normative epistemic deference.

Empirical and normative uncertainty are qualitatively different. In Chapter 2.4, I showed how these two forms of uncertainty have a different effect on the various stages of the proportionality test. Similarly, in this chapter, I will show that the reasons for affording deference where there is empirical uncertainty are not the same as the reasons for affording normative deference.

Both Alexy and Rivers suggest that the level of deference to be afforded to a decision-maker can be explained in terms of the impact on the protected right. They each provide a slightly different exposition of a principle, which they both call the ‘second law of balancing’.<sup>38</sup> For Alexy it is: ‘the more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premisses.’<sup>39</sup> For Rivers it is:

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<sup>36</sup> See Alexy *TCR*, above n15, at 394-401.

<sup>37</sup> *ibid*, at 414-416.

<sup>38</sup> See Chapter 2.4.3 above.

<sup>39</sup> Alexy *TCR*, above n15 at 418.

‘The more serious a limitation of rights is, the more intense should be the review engaged in by the court.’<sup>40</sup> Alexy’s model is, by its own terms, limited to epistemic deference, since he describes it in terms of certainty. Rivers is prepared to use the second law of balancing in relation to structural deference as well as epistemic deference.

The level of intrusion on the protected right is certainly a legitimate reason for deference and a reviewing court would do well to take it into account.<sup>41</sup> However, affording deference to decision-makers involves more than just an analysis of the level of intrusion on the right. The level of deference to be afforded is inextricably linked to the institutional features of the decision-maker. As has already been seen in this chapter, challenges to government action under the HRA cover a wide range of government activity. There are different reasons for affording deference to different institutions. These can be clearly identified if an institutionally sensitive approach is taken.

As was discussed in Chapter 1, the institutional reasons for deferring to decision-makers have been identified by authors such as Murray Hunt,<sup>42</sup> Jeffrey Jowell<sup>43</sup> and Conor Gearty.<sup>44</sup> The reasons fall into two broad categories: ‘democratic legitimacy’ and ‘institutional competence’. Democratic legitimacy suggests that certain decisions should be taken by the body most answerable to the electorate. Institutional competence

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<sup>40</sup> Rivers ‘Second Law of Balancing’, above n11, at 187.

<sup>41</sup> Even prior to the introduction of the HRA and proportionality in the UK, the British courts recognised that scrutiny would need to be more intense where a fundamental right was at issue. See *R v Ministry of Defence ex parte Smith* [1996] QB 517. See also *R v Secretary of State for the Home Department ex parte Bugdaycay* [1987] AC 514; *R v Secretary of State for the Home Department ex parte Leech* [1994] QB 198.

<sup>42</sup> Hunt, M. ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of ‘Due Deference’ in Bamforth, N. and Leyland, P. (eds.) *Public Law in a Multi-layered Constitution* (Oxford: Hart Publishing, 2003).

<sup>43</sup> Jowell, J. ‘Judicial Deference: Servility, Civility Or Institutional Capacity’ [2003] PL 592; and Jowell, J. ‘Judicial Deference and Human Rights: A Question of Competence’ in Craig, P. and Rawlings, R. (eds.) *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford: Oxford University Press, 2003).

<sup>44</sup> Gearty, C.A. *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004) at 119-120.

suggests that certain decisions should be taken by the body with the greatest degree of expertise.

These reasons fit very well into Alexy's model of deference, which as it stands, accounts for the operation of deference within proportionality but does not explain the different institutional reasons for that deference. An institutionally sensitive model of proportionality and deference needs to account for the reasons for affording a decision-maker the types of deference described by Alexy. In this section I will examine the operation of democratic legitimacy and institutional competence as reasons for deference within the structural model.

As will become clear, structural deference and normative epistemic deference are grounded in democratic legitimacy. Empirical epistemic deference is most closely based on institutional competence, since it requires that the best guess available be followed in cases of uncertainty as to facts. In order to make a determination on deference, a court engaged in a proportionality case must examine whether or not these reasons for deference are actually present. A generalised theory of deference based on democracy and restraint is of little use without institutional sensitivity.

In this section, I will also consider the way in which sections 3 & 4 of the HRA interact to produce very specific issues of proportionality and deference which are unique to legislation. These two provisions can impact on both the proportionality test and deference in a manner which is not possible with other forms of government action and so I will set out the particular features of this distinctive institutional setting.

### *3.4.1: Democratic legitimacy*

Democratic legitimacy is the main reason why a decision-maker would be afforded structural deference or normative epistemic deference. In Alexy's model structural

deference relates to the choosing of objectives and choosing between equally rights-intrusive or equally balanced options. Normative epistemic deference relates to deciding on the right balance to be struck when uncertain moral issues arise. These two forms of deference relate to the answering of important societal questions: What goals should government pursue? Which measure is most appropriate? Which principles does the society prioritise? In a society where a heavy premium is placed on democratic decision-making, these questions should be answered in a way that best reflects the will of the society as a whole. Alexy notes that that the ‘democratically elected legislature should take as many important decisions for society as possible.’<sup>45</sup> As such, the main reason to afford a decision-maker structural deference and normative epistemic deference is democratic legitimacy. Where a court is reviewing the Convention-compatibility of a decision, its measurement of deference will be affected by this criterion. The more democratically legitimate a primary decision-maker is, the more structural or normative epistemic deference it should be afforded.

For example, in passing the Red Act Parliament chose to pursue the objectives of protecting suspected persons and reducing crime and disorder. A court will be very slow to find that an objective pursued by the supreme legislature is illegitimate.<sup>46</sup> This is because of Parliament’s high degree of democratic legitimacy, on the basis of which it is afforded a large amount of structural deference. Conversely, the ban on group worship in the Blue School hypothetical example was instituted by a board of governors of a secondary school. While some school boards do have an element of community participation involved in selecting their members, they do not have the same level of democratic legitimacy as Parliament. Therefore, the governors of Blue School deserve less structural deference.

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<sup>45</sup> Alexy *TCR*, above n15 at 418.

<sup>46</sup> As was noted, the UK test requires the objective to be ‘sufficiently important to justify limiting a fundamental right’ See *de Freitas v Minister for Agriculture and Fisheries* [1999] 1 AC 69, at 80 *per* Lord Clyde.

Democratic legitimacy is also a strong reason for normative epistemic deference, which allows the courts to pay deference to a balancing of principles that has been conducted by another arm of government. This deference is afforded where there is doubt as to the correct balance to be struck. This will be widest for Parliament since it is elected to make normative judgments on behalf of the population as a whole. For example, the Abortion Act 1967 was based on the tension between the right to life of the unborn child and the right to bodily integrity of the mother. Resolving this tension is a deeply normative issue and is fundamentally related to the relative weight a society gives to these two rights. On a question of public morality such as this, it is better to leave the decision to the more democratically accountable body (i.e. Parliament and not the courts<sup>47</sup>).

It is clear that democratic legitimacy is the reason for structural deference and normative epistemic deference. However, democratic legitimacy is not a binary concept which is either present or not present. It can be present to varying degrees. A court reviewing the Convention-compatibility of a governmental action will need to be clear on exactly how much democratic legitimacy the decision-maker can assert. This has been consistently misunderstood in the existing academic literature and case law on proportionality. The executive is repeatedly referred to as being ‘elected’ or ‘democratic’<sup>48</sup> despite the fact that no executive officer in the UK is directly elected to any such position. Where such democratic accountability does attach to the executive, it is derivative, insofar as it relates to Parliamentary scrutiny.

A better view of the variation in levels of democratic legitimacy can be seen in the judgment of Laws LJ in *International Transport Roth GmbH v Secretary of State for the*

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<sup>47</sup> See generally Waldron J. ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346.

<sup>48</sup> *R v DPP ex parte Kebilene* [2000] 2 AC 326, at 381 *per* Lord Hope. Lord Hope referred to the discretionary area of judgment which should be afforded ‘on democratic grounds, to the considered opinion of the elected body or person’. This was notwithstanding the fact that the decision to deport the applicant in that case had been taken in the first instance at a relatively low level within the Home Office.



*Home Department*.<sup>49</sup> He outlined the tensions between democratic legitimacy and the protection of fundamental rights. He held that ‘greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure’<sup>50</sup> reasoning that the tension between democracy and the rule of law is more acute in the case of the legislature than in the case of the executive, which is the legislature’s delegate. Primary legislation is at the apex of democratic legitimacy in the UK. All of the members of the lower (and dominant) house of Parliament are directly elected and Parliament conducts its decision-making in an open and transparent way, involving public debates and recorded votes. Local authorities also have a very high degree of democratic accountability<sup>51</sup> and they exercise administrative powers within a framework of rules, some of which may be of their own making. This high level of democratic legitimacy is a strong reason for structural deference and normative epistemic deference.

The democratic legitimacy of rule-making institutions other than Parliament or local government is less certain. Cabinet ministers produce a very substantial amount of law,<sup>52</sup> but their democratic legitimacy is derivative and limited. The minister is usually an elected MP who has been appointed to cabinet by the Prime Minister.<sup>53</sup> The minister is democratically answerable to her constituents, and to Parliament as a whole.<sup>54</sup> This does not equate to direct democratic accountability, but involves a step of remove from the general population. Furthermore, the system of parliamentary government in place in the UK is such that the executive will, necessarily, be able to command a majority vote in the House of Commons. This reduces the ability of Parliament as a whole to scrutinise the highest levels of the executive, which further reduces the democratic

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<sup>49</sup> [2002] EWCA Civ 158; [2003] QB 728.

<sup>50</sup> *ibid*, at 765.

<sup>51</sup> See generally Carnwath, R. ‘The Reasonable Limits of Local Authority Powers’ [1996] PL 244.

<sup>52</sup> See Ganz, ‘Delegated Legislation’, above n34.

<sup>53</sup> See Turpin, C. and Tomkins, A. *British Government and the Constitution* (6<sup>th</sup> ed. Cambridge: Cambridge University Press, 2007) at 366-376.

<sup>54</sup> See Radford, M. ‘Mitigating the Democratic Deficit? Judicial Review and Ministerial Accountability’ in Leyland, P. and Woods, T., *Administrative Law Facing The Future: Old Constraints and New Horizons* (Oxford: Blackstone, 1997).

legitimacy of rules made by ministers.<sup>55</sup> There is certainly some democratic legitimacy at this level of government, but it is not as strong a reason for structural deference and normative epistemic deference as is the case with Parliament and local government.

At lower levels of government, democratic legitimacy is even more limited. The depiction of the executive as democratically accountable is particularly misleading where the administrative decision-maker is an appointed civil servant. There are thousands of civil servants employed to assist in the ‘development of policy and the delivery of public services.’<sup>56</sup> The personnel of most institutions of government do not change with each election and it takes a very significant act of misconduct to prompt a dismissal. Immigration, policing, public prosecutions and education are just some of the areas where unelected, professional civil servants exercise much of the administrative power. These administrative decision-makers are employed without being democratically accountable in anything other than a highly formal sense. There is therefore little reason to afford such decision-makers structural deference or normative epistemic deference.

The variation in democratic legitimacy is further compounded by the level of oversight the population exercises over a decision-maker. The passage of important legislation will be the subject of public discussion and much of the electorate will be apprised of it. This is because legislation is of such general application. Administrative decisions will apply to an individual or to a relatively small group. As a very small number of people are affected by the decision, the likely democratic ramifications of any great outcry on their part will be greatly limited. This reduces the democratic oversight of a decision and decreases the level of democratic legitimacy of that decision.

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<sup>55</sup> See Laws, Sir J., ‘Law and Democracy’ [1995] PL 72, at 90.

<sup>56</sup> Tomkins, A., ‘The Struggle to Delimit Executive Power in Britain’ in Craig, P. and Tomkins, A., (eds.) *The Executive in Public Law: Power and Accountability in Public Law* (Oxford: Oxford University Press, 2006), at 22.

In certain instances, democratic legitimacy can be afforded by consultation and the involvement of stakeholders (although as Baldwin points out, this argument is not without its difficulties).<sup>57</sup> This highlights the importance of the factual context in which governmental rules are formulated. A high degree of participation, either through Parliamentary scrutiny or through some form of consultation will be a basis for a high degree of democratic legitimacy of the governmental rule itself. For example, in the case of Blue School, if the decision to ban group religious meetings was taken after a meaningful consultation with the parents of students enrolled at the school, then there would be a greater degree of democratic legitimacy.

Overall, where a government decision-maker has more democratic legitimacy, there is a more compelling reason for a court to afford that decision-maker structural deference or normative epistemic deference when reviewing the Convention-compatibility of that decision-maker's actions. Parliament deserves more structural and normative epistemic deference than the executive, because there is a more compelling reason for that deference. Government ministers should get some deference, because they are more democratically accountable than the courts. Where an appointed official has no democratic accountability, there is no reason for granting them deference. It is very important that the factual context in which the decision was made be taken into account when considering the level of structural and normative epistemic deference to be afforded. Many of the arguments made against proportionality are based on a concern that the judiciary is liable as a consequence of applying the test to start providing 'right answers' to political and policy questions. That tendency can be tempered by structural deference and normative epistemic deference, each of which is based, as we have seen, on democratic legitimacy.

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<sup>57</sup> Baldwin *Rules and Government*, above n20, at 44.

### 3.4.2: *Institutional competence*

Alexy's conception of empirical epistemic deference is concerned with how a court should approach findings of fact on issues that are uncertain and indeterminate. This relates to the reliability of the underlying premises upon which a decision is based. A government institution might argue that there is a public health problem, a threat to national security or a threat of a natural disaster. All of these arguments involve educated guesswork of one form or another, which is inherent in the job of governing. In certain circumstances it may be extremely difficult to prove what effect a measure will have on the public interest. In such circumstances, empirical epistemic deference might come into play. It may not always be possible to measure precisely how much a particular measure will realise the public interest or limit a human right. Where questions such as this arise it may be appropriate to afford the decision-maker epistemic deference.

The concept of relative institutional competence has been recognised as a ground for deference in proportionality in the UK both by academic commentators<sup>58</sup> and the courts.<sup>59</sup> This is the main reason for affording a decision-maker empirical epistemic deference. Where the decision-maker has a greater degree of expertise in a particular area, then the decision-maker's assessments of uncertainty can be seen as more reliable, and so the courts will defer to them. The courts should not do this unless they are actually satisfied that the decision-maker's level of expertise is in fact high.<sup>60</sup> It should not be assumed that certain bodies are good at certain things in the absence of evidence.

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<sup>58</sup> See for example Gearty *Principles of Human Rights Adjudication*, above n44 at 117-145; Jowell, 'Servility, Civility Or Institutional Capacity', above n43; Jowell, 'A Question of Competence', above n43; Kavanagh, A. 'Deference or Defiance? The limits of the Judicial Role in Constitutional Adjudication' in Huscroft, G. *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008).

<sup>59</sup> *A & X v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, at 102 *per* Lord Bingham.

<sup>60</sup> Turner, among others, has criticised the over-use of experts and the 'expertization' of public discourse. See Turner, S.P. *Liberal Democracy 3.0* (London: Sage, 2003). These concerns are undoubtedly valid, however within the very specific environment of judicial review, it seems acceptable to defer to expertise in certain circumstances.

Where a court is reviewing the Convention-compatibility of a government activity, it should examine the degree of institutional competence before affording any empirical epistemic deference.

Parliament itself has quite a limited fact finding capacity, so it is difficult to contend that it is relatively more competent to decide issues of factual uncertainty than are the courts. However, Parliament's assessments of fact are essentially derivative from facts found by the executive and so, if those assessments are based on genuine expertise, then they can be deferred to. This can be seen by the way particular government departments will have specific expertise, which will inform proposed legislation very heavily. Most legislation is initiated by ministers, who have large bodies of civil servants at their disposal. In such cases there may be strong reasons for affording legislation empirical epistemic deference, but the institution being granted the deference will in effect be the ministry which initiated the legislation.

Looking at the hypothetical example of the Red Act, it is clear that the measurement of the problem of attacks on terrorism suspects is not conducted by Parliament itself. The assessment of the level of the problem would come from the police and security services, which are under the auspices of the Home Office. While the ban on publishing the names of terrorism suspects was enacted by Parliament, this would have been done on the recommendation of the Home Secretary. A HRA challenge to the ban using a proportionality standard would require not only a measurement of the ban's impact on human rights, but also its level of realisation of the public interest. Deference paid to the measurement of the extent of the problem and/or the degree to which the ban would solve it is deference paid to the police, security services and the Home Office, not deference paid to Parliament.

It is therefore difficult to set out a broad policy about the level of empirical epistemic deference to be afforded to Parliament, since the expertise of Parliament is derivative.

This contrasts with structural deference, where a principled basis for a wide degree of deference for Parliament can be easily established on the basis of the high degree of democratic legitimacy.

Non-parliamentary rule-making bodies often have some relevant expertise in a particular area. This sort of basis fits very well with the concept of empirical epistemic deference. Prison governors are particularly well acquainted with the running of prisons<sup>61</sup> and local authorities are particularly well acquainted with housing policy.<sup>62</sup> When non-parliamentary bodies set out rules of general application, the decision can often be expected to have been informed by the expertise of that body in the specific area. Understandably, a court will have some regard to this expertise when reviewing the Convention-compatibility of a challenged decision. For example, in the Blue School example, the board of governors of the school will have a much better idea of the extent of the problem of religious violence in the school than would a reviewing court. It is unlikely that a court would undermine the governors' assessment of the extent of the problem unless there was some evidence that it is a totally spurious assessment.

Administrative bodies are often given the power to make one-off decisions in individual cases because of the need for a concentration of a particular sort of knowledge and proficiency in a given area. Where there is uncertainty as to whether something is or is not the case, then the level of expertise a body has will be of great relevance for whether or not the decision-maker should be given deference in exercising that power. In the hypothetical example of Mr Green, the UKBA official is part of an executive body created to specialise in immigration issues. The assessment of Mr Green's threat to national security will most probably have been based on information from the security services. Each of these two institutions has a particular level of expertise, which

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<sup>61</sup> See for example *Hirst v Secretary of State for the Home Department* [2002] EWHC 602 (Admin).

<sup>62</sup> See for example *R (Baker) v First Secretary of State*[2003] EWHC 2511 (Admin).

provides a strong reason for empirical epistemic deference concerning their factual assessments.

However, it should be borne in mind that within the realm of administrative decision-making, expertise is focused directly on an instant case rather than on a policy or goal. This may have both strengths and weaknesses. While the expertise may permit a very nuanced and detailed determination, it may also be affected by more general ideas about what the purpose of the power is and what the nature of the area is. It is important to ensure that deference is afforded on the basis of an actual exercise of expertise. A further point is that something might be within the particular expertise of the judiciary, in which case there is a reason for less deference because of the *court's* expertise. Institutional competence is a reason for deference where the court cannot determine the issue adequately itself. Institutional competence is therefore *relative*.

If empirical epistemic deference is to be applied effectively, account should be taken of the source of the expertise. As has been shown, this will vary across institutions and will be exercised in different ways. The most important implication of this is the assessment of the impact of a measure on competing principles. Where the decision-maker is better placed than the court to make this assessment, then the court will afford it empirical epistemic deference based on institutional competence.

### *3.4.3: Sections 3 & 4 of the HRA and Parliament*

A further institutional distinction arises in relation to the potential outcomes of a successful HRA challenge to an Act of Parliament. It has been argued that the effect of the HRA is such that 'Parliament is no longer supreme and that its processes may be

subject to judicial scrutiny and criticism'.<sup>63</sup> However this scrutiny operates in a very specialised way with regard to primary legislation.<sup>64</sup> All other forms of governmental activity can be struck down by the courts for incompatibility with the Convention. This is not possible with primary legislation. The courts have two courses of action when they find a difficulty with a piece of primary legislation on HRA ground. First, they must try to read the legislation in a Convention-compatible manner where possible.<sup>65</sup> If such a reading is not possible then the legislation can be declared incompatible.<sup>66</sup> The effect of such a declaration is merely that Parliament is invited to change the legislation and the incompatible Act will remain in force until Parliament chooses to make such a change.

The rarefied mechanism of sections 3 and 4 of the HRA raises questions about the manner in which deference should be afforded to Parliament. There has been a substantial amount of academic commentary on the relationship between sections 3 and 4.<sup>67</sup> I am not attempting to resolve all of the issues raised in those debates. When the Act was introduced, it was thought that this was the most appropriate mechanism and I am not seeking to challenge that. My purpose here is to explain the operation of sections 3 and 4 in terms of the structural model of proportionality and deference that I have been outlining.

While at first glance, section 3 might seem the more deferential course, section 4 can actually have less impact on Parliament's original decision. Klug has argued that no

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<sup>63</sup> Green, N., 'Proportionality and the Supremacy of Parliament in the UK' in Ellis, E., (ed.) *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart, 1999). See also Loughlin, M., *Sword and Scales: An Examination of the Relationship Between Law & Politics* (Oxford: Hart, 2000) at 38-41.

<sup>64</sup> See generally Gearty, C.A. 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 LQR 248 and Gearty *Principles of Human Rights Adjudication*, above n44, at 8-30.

<sup>65</sup> Human Rights Act 1998, Section 3.

<sup>66</sup> Human Rights Act 1998, Section 4.

<sup>67</sup> See for example: Nicol, D. 'Statutory Interpretation and Human Rights after *Anderson*' [2004] PL 274; Kavanagh, A. 'Unlocking the Human Rights Act: The "Radical" Approach to Section 3(1) Revisited' [2005] EHRLR 259; Young, A.L. 'Ghaidan v Godin-Mendoza: Avoiding the Deference Trap' [2005] PL 23; and Kavanagh, A. 'Choosing Between Sections 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after *Ghaidan v. Mendoza*' in Fenwick, H., Phillipson, G. & Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007).



deference whatever should be afforded to Parliament, since the mechanisms set out for review of primary legislation in the HRA already include such a large measure of deference.<sup>68</sup> Since a declaration of incompatibility does not affect the status of the challenged statute, there is a large degree of deference built into the system. While this is true of section 4, it cannot be said of the operation of section 3 which has been applied in a quite forthright manner by the judiciary. Section 3 has been used to ‘read down’ legislation; in effect substituting a less rights-restrictive measure for the measure set out in the legislation<sup>69</sup> The courts are also quite content to define legislation in a manner which is totally at odds with the intention of Parliament.<sup>70</sup> This is notwithstanding their own injunction to themselves to interpret and not to legislate.<sup>71</sup>

The choice between Sections 3 and 4 can have significant implications for the operation of proportionality and deference. ‘Reading down’ under section 3 will require the use of factual optimisation. The very nature of section 3 interpretation requires a reviewing court to examine whether there is another, less rights-intrusive way of interpreting the statute. Where a court is satisfied that a less rights-restrictive means of achieving the public interest is available and that it can be accommodated within the language of the statute, then that alternative measure will be substituted. This means that two things occur simultaneously: the court finds that a measure has failed the factual optimisation stage *and* the court rectifies that failure. This is far less likely to occur with non-parliamentary rules; those are usually struck down and sent back to their maker. It is only section 3 that allows the court to make a finding that the measure is disproportionate *and* remedy that lack of proportionality.

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<sup>68</sup> Klug, F. ‘Judicial Deference under the Human Rights Act 1998’ [2003] EHRLR 125.

<sup>69</sup> See for example *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545.

<sup>70</sup> See *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45; and *Sheldrake v Director of Public Prosecutions - Attorney General's Reference (No 4 of 2002)* [2005] 1 AC 264. See further Chapter 5 below.

<sup>71</sup> See *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45, at 87 *per* Lord Steyn; and *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] QB 728, at 758 *per* Simon Brown LJ. See also Kavanagh, A. ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998’ (2004) 24 OJLS 259.

In Alexy's terms this can be described as a total denial of structural deference through a very intensive application of factual optimisation. The court asks if there was a less rights-restrictive alternative and if one can be found that fits the words of the statute (even if they are stretched) then the court can implement that alternative itself. This can happen even where there are multiple alternative measures available. Because the court inserts a *specific* less rights-restrictive measure in place of the challenged measure, Parliament is not afforded the opportunity to choose a less rights-restrictive measure for itself. (Admittedly Parliament always has the option to legislate for such a measure, but that is after the fact of proportionality analysis.) The important thing for the structural model of proportionality and deference is that section 3 can be used *within* factual optimisation in a way that entails an automatic restriction of structural deference. I do not wish to express a view on whether this is a positive or negative aspect of section 3.

According to Klug's analysis, a declaration of incompatibility entails a wide degree of deference; section 4 is therefore arguably more deferential than section 3. However, the deference involved in a section 4 declaration cannot be explained as deference *within* the structural model of proportionality. In Alexy's analysis deference is afforded to the legislature where a legislative measure is deemed to be proportionate, having taken account of structural or epistemic deference within the proportionality analysis. Section 4 arises where a court has found a measure to be disproportionate. It is therefore a sort of 'deference after the fact'. To this extent, section 4 can perhaps be seen as providing the courts with the freedom to engage in a very intensive proportionality analysis of primary legislation, without the need to give much regard to epistemic or structural deference, since a level of deference is already built into the system.

Section 4 can be accommodated into Alexy's model by considering the reasons for deference discussed above. Democratic legitimacy is a less compelling reason if a finding of incompatibility is not going to affect the outcome, since the decision will still

ultimately be taken by Parliament. As such, the level of structural deference or normative epistemic deference to be afforded under section 5 need not be that large, and in some cases such deference may be unnecessary. Conversely, where there is uncertainty as to facts, empirical epistemic deference may still be appropriate if the legislation is based on facts found by an appropriately competent body, such as a government department with a large degree of expertise in a particular area. This sort of approach can facilitate the development of a ‘constitutional dialogue’ between Parliament and the courts.<sup>72</sup> The courts can be strident in their analysis of legislation, because the court’s decision is only a response to legislation, not a final determination of its validity.

### 3.5: CONCLUSION

The purpose of the proportionality principle under the HRA is to assist judges in determining whether a particular governmental act which impacts on Convention rights is compatible with the Convention. The range of governmental activity in the UK is broad enough that institutional differences will impact on the way a court’s proportionality assessment operates.

In this chapter I have sought to develop Alexy’s structural model of proportionality and deference to take account of the different forms of governmental action which can be subjected to proportionality review. I have classed governmental activity into three forms: modified adjudication; non-parliamentary rule-making; and primary legislation. I have shown how the choice of objectives, the range of options and the scope of the

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<sup>72</sup> Clayton, R. ‘Judicial Deference and “Democratic Dialogue”’: The Legitimacy of Judicial Intervention under the Human Rights Act 1998’ [2004] PL 33. See also Hickman, T.R. ‘Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998’ [2005] PL 306.

challenged decision can vary across different institutions of government. I have explained the way in which these differences can affect the operation of Alexy's model of proportionality and deference. The choice of objectives will affect the operation of the legitimate aim stage of the test as well as affecting how clearly the principles at stake in the proportionality analysis are defined. The extent of the choice of objectives available to a decision-maker will also impact on structural deference. I have shown how the range of options affects factual optimisation and structural deference. I have highlighted the fact that in certain situations, where the range of options is very small, these two aspects of proportionality can be rendered meaningless. I have also shown how the scope of decision-making will have a significant impact on legal optimisation and epistemic deference.

In the second section of this chapter I set out the issues relating to government action which is the outcome of multiple decisions, made at different levels of government. I have shown the complexity involved in such situations. These types of cases raise the possibility of stratifying the proportionality analysis and I have shown the pitfalls involved with this. This highlights the need for institutional sensitivity in proportionality analysis.

I have also given detailed consideration to the reasons for affording a decision-maker deference and I have linked them into the structural conceptions of deference in Alexy's model. The level of intrusion upon the human right is undoubtedly a valid reason for a low level of deference, but there are also institutional reasons and I have sought to elaborate on their impact on the structural model. I have shown how democratic legitimacy is the basis for structural deference and normative epistemic deference. I have shown how institutional competence is the basis for empirical epistemic deference. I have also illustrated how the levels of democratic legitimacy and institutional competence will vary across the institutions of government in the UK. In addition to

this, I have addressed the particular issues which sections 3 and 4 of the HRA throw up for a court faced with the problem of the amount of deference to be paid to Parliament. This discussion of the reasons for deference has again shown the importance of institutional sensitivity in proportionality and deference.

In order to show that the structural, institutionally sensitive model set out above is applicable in the UK, I will now undertake a detailed analysis of the existing case law under the HRA in three specific fields. I contend that all of the features of Alexy's structural model of proportionality and deference can be seen at work in the jurisprudence of the UK Courts, and that these various features operate differently in different institutional settings. I will examine the case law in three discrete case studies. The case studies are based on institutional distinctions, which show the value of an institutionally sensitive approach to the structure of proportionality and deference.

As I have shown in this chapter, there is a particularly pronounced fault-line in the test between administrative decision-making and the exercise of rule-making powers. Administrative decision-making is adjudicatory and of individual application while rule-making powers concern policy and are of general application. This distinction is the basis upon which I have chosen two of my case studies. Immigration decisions are primarily concerned with administrative decisions and they are the subject matter of Chapter 4. There have been a number of significant criminal justice cases dealing with primary legislation and some dealing with executive rule-making. These cases will be examined in the second case study in Chapter 5. These two case studies have been chosen because the governmental activities under consideration in each of them are at opposite ends of the institutional spectrum. This substantial contrast will enable a detailed elaboration of institutional factors.

In the third case study, set out in Chapter 6, I will look at proportionality cases in the field of housing. These cases have involved decisions taken at a single level of

government as well as at multiple levels. In the housing case study I will illustrate the impact that multi-level decision-making can have on the operation of proportionality. In some of the multi-level cases the optimisation model can be seen to work very well. In others, confusion concerning the stratification of proportionality has caused questionable outcomes.

In these three case studies I will show that all of the elements of the structural model of proportionality and deference are present in the UK case law, provided account is taken of institutional differences. The case studies will show that the structural model is applicable to the HRA case law and that it provides a significant improvement on existing explanations of the operation of proportionality in the UK. To date, little doctrinal order has been shown in the case law. These case studies will go some way to remedying this deficit.

## *Chapter 4: Case Study One: Proportionality and Administrative Decision-Making – Immigration*

In Chapter 2, I set out the elements of Alexy's structural theory of proportionality. Alexy describes the minimal impairment and overall balance stages of proportionality in terms of the factual and legal optimisation of principles. He divides deference into 'structural' and 'epistemic' and integrates these into specific stages of the proportionality test. In Chapter 3.2, I explained three key areas of difference between institutions which are subject to rights-based judicial review by the courts. These were: 1) the choice of objectives available to the decision-maker; 2) the range of measures available to the decision-maker in order to pursue those objectives; and 3) the scope of the decision insofar as it applied to a specific individual or applied generally. These areas of difference are in effect three scales along which can be found various forms of government activity. In Chapter 3.4, I discussed the institutional reasons why a decision-maker would be afforded deference by a reviewing court, which I grouped under the headings of democratic legitimacy and institutional competence.

In order to show the operation of the structural, institutionally sensitive model of proportionality and deference in the UK I have chosen three case studies, the first of which is immigration. There has been a substantial body of judicial consideration of the

compatibility of immigration decisions with the European Convention on Human Rights ('the Convention'), which was incorporated into UK law by the Human Rights Act 1998 ('the HRA'). Therefore, there is much case law upon which to draw for an analysis of the structural model. Where the Home Secretary seeks to deport a person, that decision can, in certain circumstances, be appealed to a statutory body.<sup>1</sup> The decisions of the statutory body can be appealed to the courts.<sup>2</sup> In much of the case law, the courts have focused on how proportionality should have been addressed by a statutory authority. Nonetheless, insight into the operation of proportionality in the context of review of immigration decisions can be gleaned from this.

Where a court is called upon to review an immigration decision on HRA grounds, the first instance decision will ordinarily be found at the extreme end of the three areas of difference identified in Chapter 3.2. First instance immigration decisions are ordinarily made by appointed officials. The decision-maker will not choose the objective which they are pursuing. This means that a reviewing court will have little cause to afford structural deference to the choice of legitimate objective, since that objective will have been set externally.<sup>3</sup> Immigration officials do not have a wide range of measures available to pursue their objectives. They are usually confined to refusal of leave to remain in the UK. As the range of measures is so confined, the factual optimisation stage of the test will be of very limited application, since it involves an analysis of whether the least rights-intrusive option was chosen. The absence of a significant factual optimisation stage will eliminate the need for structural deference. Following on

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<sup>1</sup> The Immigration Appeal Tribunal (IAT) was set up under the Immigration Appeals Act 1969. This has now been replaced by the Asylum and Immigration Tribunal, which was established under the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. These bodies can hear an appeal on human rights grounds. See section 65 Immigration and Asylum Act 1999 and section 84 Nationality, Immigration and Asylum Act 2002.

<sup>2</sup> Since these tribunals are 'public authorities' for the purposes of section 6 of the HRA, they can also be judicially reviewed on Convention grounds. However, an appeal is the more common means of challenging their decisions.

<sup>3</sup> However, it is possible that structural deference to the body which *did* set the policy will be appropriate. This issue will be considered in more detail in Chapter 6, when multi-level decision-making will be examined.



from this, legal optimisation will be a very significant element in these decisions. It has the potential to be very effective because the scope of the decision is so limited; it will be possible to measure the impact on the affected rights with some degree of certainty. A heavy focus on legal optimisation would indicate that any deference paid to the decision-maker will be epistemic deference, since it is more closely connected with legal optimisation than is structural deference.

Immigration decisions are multi-level decisions in the sense that I described in Chapter 3.3. However, the vast bulk of HRA-based cases on immigration have involved challenges to the administrative decision only and not to the rules within which that decision was made. So, while the immigration decisions are multi-level, the case law dealing with them has been concerned with a single level. As such, immigration cases are not an especially good example of proportionality cases dealing with multi-level decisions. Housing cases have involved far more judicial analysis of the proportionality of multiple interacting levels of government. These cases are considered in Chapter 6.3.

The reasons for affording deference to an immigration official will primarily be based on institutional competence. Immigration officers will have specific expertise related to their field and will be able to draw on expert information from other government agents, such as the security services. However, there is little reason to afford deference to an immigration official on the basis of democratic legitimacy. In all but one of the cases considered in this chapter, the primary decision-maker was an appointed official with no meaningful direct accountability to the electorate.

This chapter is divided into three substantive sections. In the first, I will examine the identification of human rights and public interest principles in immigration cases. In the second, I will look at factual optimisation, which is of limited application in this institutional setting. In the third section I will discuss the use of legal optimisation in immigration proportionality cases. This has been the key battleground in these decisions

and epistemic deference has had an important role. As I will show, the approach to proportionality and deference in this thesis helps to impose a sense of order on the existing case law.

#### **4.1: THE IDENTIFICATION OF PRINCIPLES**

The starting point of Alexy's structural model is that the proportionality analysis requires the balancing of two competing principles, ordinarily a fundamental rights principle and a public interest principle. In the UK the fundamental rights protections are contained in the Convention. The Convention contains norms of broad application and so the precise principles to be balanced may not be explicitly stated in the text and often need to be derived from the Convention norm by the courts. As was discussed in Chapter 2.2, not every public interest objective will have enough normative force to count as a 'principle' and be justified as a basis for limiting human rights. The courts will be guided in this by the terms of the proportionality test and the text of the Convention.

Inevitably certain patterns emerge and some principles recur. In this section, I will show that the UK courts have been identifying and deriving Convention rights principles and public interest principles in proportionality cases dealing with immigration. Certain key principles have recurred and the courts have been guided by the jurisprudence of the European Court of Human Rights ('the ECHR').<sup>4</sup>

It is important to note at this stage of the analysis that the principles identified are optimisation requirements. They are reasons which suggest a certain outcome, but do not conclusively require it. Principles do not include a rule for their own realisation and

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<sup>4</sup> This is in accordance with section 2 of the HRA.

they must be optimised by balancing them against a competing public interest principle.<sup>5</sup> The recognition of principles derived from Convention rights at this point in the analysis does not seek to imply that those principles are conclusive, quite the contrary. As shall be seen in the later sections, many of these principles were not in fact prioritised after the proportionality analysis was complete. At this stage, I am merely seeking to establish the identification of principles as a preliminary step in the proportionality analysis.

#### *4.1.1: Human rights principles*

A great deal of the proportionality case law on the subject of immigration has concerned Article 8 of the Convention, in particular the right to respect for family life. Much of the case law has related to the maintenance of family units and the prevention of separation of family members. Non-separation of family members has not always been the precise principle identified; other human rights principles have been derived from Article 8.

##### *Prevention of permanent separation of family members*

Perhaps the most obvious principle to be derived from the Article 8 right to respect for family life is that family members ought not to be permanently separated from one another. There are a series of cases where the courts accepted that families should not ordinarily be forced to move *en masse* to another country where all but one of them are entitled to reside in the UK. This principle is evident in cases such as *Samaroo v Secretary of State for the Home Department*.<sup>6</sup> The applicant was a Guyanan national who had lived in the UK since 1988. He was married to a Guyana-born UK citizen and had three stepchildren and one child, all of whom had been born in the UK. The court accepted that it was unlikely that his family would move to Guyana with him in the

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<sup>5</sup> See further Chapter 2.2 & 2.3.

<sup>6</sup> [2001] EWCA Civ 1139.

event that he was deported, and so the Article 8 principle at stake was the separation of the members of a family unit.

A similar principle arose in the case of *Edore v Secretary of State for the Home Department*.<sup>7</sup> The applicant had been in the UK illegally since 1990 and during that period had two children with a married man, whose wife and three other children all lived in the UK. The children's father was very involved in the lives of the two children he had with the applicant. However, due to his existing family in the UK, he was not in a position to move to Nigeria with the applicant in the event that she was deported. The human rights principle at issue in the case was that children should have access to their father, notwithstanding the fact that the parents and children were not all residing together as a family unit. This suggests that it is the closeness of the familial ties that is the basis for this principle of non-separation, rather than any formal requirement of co-habitation.

Similar Article 8 principles arose in the cases of *Secretary of State for the Home Department v Rehman*<sup>8</sup> and *Huang v Secretary of State for the Home Department*.<sup>9</sup> In *Huang* the House of Lords held that the Article 8 guarantee of respect for family life included not only a negative duty on the state not to interfere, but also a positive duty to respect family life.

*R(Acan) v Immigration Appeal Tribunal*<sup>10</sup> concerned the reuniting of family members rather than their separation. The applicants were four Ugandan siblings aged between 14 and 20. They all had the same father but two different women had each given birth to two of the children. One of these mothers (whom the court referred to as the 'sponsor') had been primarily responsible for all four children until she moved to the UK in 1994.

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<sup>7</sup> [2003] EWCA Civ 716; [2003] 1 WLR 2979.

<sup>8</sup> [2001] UKHL 47; [2003] 1 AC 153.

<sup>9</sup> [2007] UKHL 11; [2007] 2 AC 167.

<sup>10</sup> [2004] EWHC 297 (Admin).

Since then the children had lived with the sponsor's mother and sister respectively, but now wished to live with the sponsor in the UK. The sponsor herself had been given four years exceptional leave to remain in 2000 after an unsuccessful asylum claim and she made an application for the children to join her in 2001. Gibbs J recognised that the applicants' right to family life entailed the principle that they should be permitted to live with the sponsor.

In *Beoku-Betts v Secretary of State for the Home Department*<sup>11</sup> the House of Lords held that the rights to be considered when examining the proportionality of a proposed deportation were not merely the family rights of the person being deported, but also the family rights of the other members of the family group who would be left behind in the event of a deportation.

#### *Prevention of temporary separation of family members*

The Article 8 right to respect for family life has also been found to include the principle that family members should not be separated temporarily. One of the earliest cases to explicitly consider proportionality in immigration was *R (Mahmood) v Secretary of State for the Home Department*.<sup>12</sup> The applicant was a Pakistani national whose asylum claim in the UK had failed and who had married a Pakistan-born British citizen two weeks before receiving a deportation order. He was entitled to reside in the UK on the basis of the marriage but did not meet the requirement of entry clearance, since he had originally entered the UK illegally. If he were to return to Pakistan, there was no doubt but that his application for entry clearance would be granted and he could return to the UK once this had been processed. The Convention right principle being considered in *Mahmood* could not have concerned permanent separation and so it is clear that the

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<sup>11</sup> [2008] UKHL 39; [2009] 1 AC 115.

<sup>12</sup> [2001] 1 WLR 840.

right in Article 8 includes the principle that family members should not be temporarily separated either.

The principle of not temporarily separating family members has been a recurring theme in the case law on proportionality and immigration. For example, the applicant in *R (Ala) v Secretary of State for the Home Department*<sup>13</sup> was an ethnic Albanian from Kosovo who applied for asylum in the UK. In 1999 he married a UK citizen who had a teenage daughter and in 2001 his wife gave birth to another child. The Home Secretary sought to send the applicant to Germany (where he had made his first failed asylum claim) in order to gain entry clearance. The High Court examined the case on the basis that Article 8 provides a principle against the temporary separation. Similarly, in *Shala v Secretary of State for the Home Department*<sup>14</sup> the applicant's asylum claim had been rejected but during his time in the UK he had married a UK resident and developed a strong bond with her children. When the Home Secretary sought to deport him and require him to seek entry clearance, the Court of Appeal proceeded on the basis that Article 8 entailed the principle that the family should not be separated temporarily. The same principle can be seen in later Court of Appeal cases such as in *Secretary of State for the Home Department v Akaeke*<sup>15</sup> and *Mukarkar v Secretary of State for the Home Department*<sup>16</sup> and in the House of Lords in *Chikwamba v Secretary of State for the Home Department*<sup>17</sup>

*No principle of a choice of place of residence*

There are limits to the principles that can be derived from a Convention provision. For example, in *R (Mahmood) v Secretary of State for the Home Department*<sup>18</sup> the Court of Appeal stressed that Article 8 did not encompass a general principle that a married

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<sup>13</sup> [2003] EWHC 521 (Admin).

<sup>14</sup> [2003] EWCA Civ 233.

<sup>15</sup> [2005] EWCA Civ 947.

<sup>16</sup> [2006] EWCA Civ 1045.

<sup>17</sup> [2008] UKHL 40; [2008] 1 WLR 1420.

<sup>18</sup> [2001] 1 WLR 840.

couple should be entitled to choose their place of residence.<sup>19</sup> In making this finding, Laws LJ cited with approval the ECHR decision of *Abdulaziz, Cabales and Balkandali v United Kingdom*.<sup>20</sup> In his assessment of the *Abdulaziz* case, Laws LJ found the absence of a general choice of residence principle within Article 8 was not a matter of the margin of appreciation being afforded to a member state of the Council of Europe. He found instead that this was a feature of the substantive right itself. In this way, the Court of Appeal has shown a willingness to use ECHR cases in the derivation of Convention rights principles for the purposes of proportionality analysis. This is notwithstanding the important differences between the Convention based review in the ECHR and in domestic courts.

#### *Making relationships beyond the family*

*B v Secretary of State for the Home Department*<sup>21</sup> concerned an Italian national<sup>22</sup> who had been convicted of assaulting his son and of offences of gross indecency involving his daughter. He no longer had any contact with his former wife or either of his children. He could not therefore make out a case based on an Article 8 right to remain with his family. He challenged the Home Secretary's attempt to deport him in the Court of Appeal. Sedley LJ, giving the leading judgment, cited the ECHR case of *Niemietz v Germany*<sup>23</sup> which establishes the principle that the right to private life in Article 8 of the Convention included the right to 'establish and develop relationships with other human beings'.<sup>24</sup> This indicates that the courts are prepared to recognise a Convention principle that non-familial social networks are not to be disrupted, which is derived from the right to respect for private life, rather than family life. This again shows that

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<sup>19</sup> [2001] 1 WLR 840, at 854.

<sup>20</sup> (1985) 7 EHRR 471.

<sup>21</sup> Unreported, Court of Appeal, 18 May 2000.

<sup>22</sup> While this case predated the entry into force of the HRA, it concerned an EU national and so the Court of Appeal considered the application of both EU law and Article 8 of the Convention.

<sup>23</sup> (1993) 16 EHRR 97.

<sup>24</sup> *B v Secretary of State for the Home Department* Unreported, Court of Appeal, 18 May 2000 at paragraph 37.

the UK Courts are guided by ECHR jurisprudence when seeking to establish the principles to be derived from a Convention rights norm.

*The protection of mental health*

The applicant in *R (Razgar) v Secretary of State for the Home Department*<sup>25</sup> was an Iraqi who had been refused asylum in Germany and had subsequently arrived in the UK and made an asylum claim. There was evidence that he had been tortured in Iraq and he claimed to have been mistreated while in Germany. The Home Secretary sought to return him to Germany on the basis of the Dublin Convention. He had serious mental health problems and argued that he would not get adequate treatment in Germany, but that such treatment was available to him in the UK. In examining the human right principle at stake, the House of Lords looked to the ECHR case of *Bensaid v United Kingdom*<sup>26</sup> in which it was held that Article 8:

‘protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.’<sup>27</sup>

This is a clear example of both courts looking to define the principles which can be derived from a Convention rights norm. The derivation is itself interesting, as the principle that an individual’s mental stability should be preserved is derived from the human rights principles of identity, personal development and the establishment of relationships. The mental stability principle is derived from principles which are themselves sub-principles of the broader human rights norm. This indicates the

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<sup>25</sup> [2004] UKHL 27; [2004] 2 AC 368.

<sup>26</sup> (2001) 33 EHRR 205.

<sup>27</sup> *ibid*, at 220. Cited by Lord Bingham: [2004] UKHL 27; [2004] 2 AC 368, at 382.



complexity of the process of identifying Convention rights principles and highlights the importance of explicitly recognising the process by which that derivation occurs.

### *Freedom of expression*

*R(Farrakhan) v Secretary of State for the Home Department*<sup>28</sup> was a case which concerned an order made in 1986 by the then Home Secretary excluding the applicant from entering the UK. The applicant was a well known figure and the leader of a group known as ‘The Nation of Islam’, based in the United States of America and he wished to come to the UK in order to express his beliefs directly to his British followers. In identifying the human rights principle to be protected, the Court of Appeal held that the applicant had a right under Article 10 freely to express his views, which entailed a corollary right of his supporters in the UK to receive his views. It was effectively the Article 10 rights of the supporters that were the basis of the proportionality challenge, since they were within the jurisdiction.

#### *4.1.2: Public interest principles*

Not every public interest goal will qualify as a ‘principle’. The determination of whether a public interest goal meets the standard of a principle is a complex normative question. As was discussed in Chapter 2.2, the structural model of proportionality and deference does not provide a mechanism for deciding this issue. The model treats public interest principles as inputs of the proportionality process and assumes that courts will determine which public interests meet the required normative standard. Reasonable disagreement about this issue of political morality is to be expected but such disagreement can be accommodated within the framework provided by the structural

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<sup>28</sup> [2002] EWCA Civ 606; [2002] QB 1391.

model. The value of the model on this point is that it allows those normative debates to take place at the appropriate stage of the proportionality analysis (i.e. at the very start). This avoids the problems associated with these normative debates obscuring the proportionality process itself.

In the UK, there is, as yet, no comprehensive test for deciding whether a public interest is of sufficient weight to qualify as a principle. To date, two overlapping factors have been considered in deciding this issue, each of which allows for a certain amount of normative disagreement. The first is contained in the first stage of the UK proportionality test as laid out in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*.<sup>29</sup> This stage states that the public interest objective must be ‘sufficiently important to justify limiting a fundamental right’.<sup>30</sup> In addition to this, the courts have been guided by the public interest reasons listed in the limitation clauses of specific Articles of the Convention.<sup>31</sup> The reasons stated in the Convention are very broad principles from which specific sub-principles can be derived; in much the same way as occurs with the Convention rights themselves. These two factors have aided the UK Courts in their assessment of which public interest goals will be accepted for the purposes of limiting a human right. This process of assessment is the means by which certain public interests can be classified as ‘principles’ for the purposes of Alexy’s model.

It is noteworthy that for the most part, immigration cases in the UK have tended to use the limitation clause in Article 8(2) as the basis for public interest principles, rather than

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<sup>29</sup> [1999] 1 AC 69.

<sup>30</sup> *ibid*, at 80, as adopted by the House of Lords in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532; *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45 and in a modified form in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167.

<sup>31</sup> The most relevant Article for the purposes of this chapter is Article 8. Article 8(2) gives six reasons for limiting the right: 1) National security, 2) public safety 3) the economic well-being of the country 4) the prevention of disorder or crime 5) the protection of health or morals 6) the protection of the rights and freedoms of others.

the ‘legitimate objective’ part of the *de Freitas* test (although it has been cited in some of the immigration cases<sup>32</sup>).

### *Control of immigration*

The most obvious public interest principle to be applied in immigration cases is the control of immigration generally. Decisions of European Commission of Human Rights (which were upheld by the ECHR) indicate that this public interest principle is derived from the Article 8(2) ground of the interests of the ‘economic well-being of the country’.<sup>33</sup> Immigration control has been repeatedly accepted as a legitimate objective for the purposes of limiting Article 8 in HRA decisions of the UK Courts, without any detailed consideration of its derivation. In *Edore v Secretary of State for the Home Department*<sup>34</sup> Simon Brown LJ cited with approval dicta of Moses J in *R (Ala) v Secretary of State for the Home Department*<sup>35</sup> to the effect that ‘[t]here is no dispute that the Secretary of State’s decision was taken in pursuance of a legitimate aim, namely effective immigration control.’<sup>36</sup> Similarly, the analysis of Gibbs J in *R (Acan) v Immigration Appeal Tribunal*<sup>37</sup> proceeds entirely on the basis that the limitation of the claimant’s Article 8 rights must be in ‘proportion to the requirements of immigration control’<sup>38</sup> While it might be lamentable that the courts have not been more explicit in their derivation of this principle from Article 8(2) it does seem evident that that is its source.

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<sup>32</sup> See *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, at paragraph 16.

<sup>33</sup> See *Ahmut v Netherlands* (1997) 24 EHRR 62; *Gül v Switzerland* (1996) 22 EHRR 93.

<sup>34</sup> [2003] EWCA Civ 716; [2003] 1 WLR 2979.

<sup>35</sup> [2003] EWHC 521 (Admin).

<sup>36</sup> *ibid*, at paragraph 39.

<sup>37</sup> [2004] EWHC 297 (Admin).

<sup>38</sup> *ibid*, at paragraph 99.

In *Huang v Secretary of State for the Home Department*<sup>39</sup> the House of Lords held that there were various sub-principles related to immigration control. Lord Bingham, giving the judgment of the house listed the following:

‘... the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on.’<sup>40</sup>

This indicates that public interest principles can have derivative sub-principles in the same way that human rights do.

An interesting institutional feature of the immigration case law is that the objective of immigration control is repeatedly referred to as being set externally from the decision-maker in the instant case. In the Court of Appeal decision in *Huang v Secretary of State for the Home Department*<sup>41</sup> Laws LJ stated that ‘[h]ere the legitimate aim is the maintenance of the integrity of the state’s immigration policies, given by statute and by immigration rules’.<sup>42</sup> In *R (Razgar) v Secretary of State for the Home Department*<sup>43</sup> Lord Bingham identified the need to implement a ‘firm and orderly immigration policy’<sup>44</sup> as a legitimate aim. However, he also indicated that where a removal is in pursuance of a lawful immigration policy, it will almost always be ‘necessary’ in the

<sup>39</sup> [2007] UKHL 11; [2007] 2 AC 167.

<sup>40</sup> *ibid*, at 185.

<sup>41</sup> [2005] EWCA Civ 105; [2006] QB 1.

<sup>42</sup> *ibid*, at 10.

<sup>43</sup> [2004] UKHL 27; [2004] 2 AC 368.

<sup>44</sup> *ibid*, at 389-390 *per* Lord Bingham.

interests of one of the legitimate aims listed in Article 8(2), in the absence of bad faith, ulterior motive or a deliberate abuse of power. This ‘lawfulness’ criterion as the basis for a strong presumption of both ‘necessity’<sup>45</sup> and a legitimate aim suggests that it is immigration legislation which is the source of the legitimate aim. This is very much in line with the arguments I set out in Chapter 3.2. Both Laws LJ and Lord Bingham are expressly recognising that the administrative decision-maker is not free to set their own objectives, which are in fact contained in rules of general application. Furthermore, by raising a strong presumption of a legitimate objective, Lord Bingham is suggesting a wide degree of policy choice freedom for the rule-maker when setting goals in the field of immigration control. This is structural deference at the legitimate objective stage of proportionality, but it is being afforded to the rule-maker, not the administrative decision-maker.

*The prevention of queue-jumping*

*R (Mahmood) v Secretary of State for the Home Department*<sup>46</sup> was the first in a series of cases that were concerned with ‘queue-jumping’. As the applicant was married to a UK citizen, there was no dispute that he would be entitled to reside in the UK, provided he first returned to his country of origin and applied for entry clearance there. Lord Phillips noted that the applicant had conceded that ‘the decision of the Secretary of State was taken in the interests of immigration control, which control is imposed in the interests of legitimate aims set out in the second paragraph of article 8.’<sup>47</sup> Laws LJ held that ‘[f]irm immigration control requires consistency of treatment between one aspiring

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<sup>45</sup> ‘Necessity’ is another term used to describe minimal impairment or factual optimisation. This aspect of the immigration cases is discussed further below at 4.2.

<sup>46</sup> [2001] 1 WLR 840.

<sup>47</sup> [2001] 1 WLR 840, at 857. He went on to cite ECHR jurisprudence directly on this point: ‘as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.’ *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, at 497; cited with approval: [2001] 1 WLR 840, at 858.

immigrant and another<sup>48</sup> which suggests that the prevention of queue-jumping was a sub-principle being pursued, which was derived from the principle of immigration control, itself derived from Article 8(2) by the ECHR.

*Secretary of State for the Home Department v Akaeke*<sup>49</sup> was based on the same principle and the same issue arose. Carnwath LJ, giving the leading judgment, accepted that the '[m]aintenance of a fair and consistent immigration policy demands that even applicants with an indisputable claim to enter the country should not be able to jump the queue by entering illegally'.<sup>50</sup> This again affirms the prevention of queue-jumping as a sub-principle of immigration control.

More recently, the prevention of queue jumping has had less judicial support as a public interest principle under the HRA. In *Chikwamba v Secretary of State for the Home Department*<sup>51</sup> Lord Brown (with whom the other Law Lords agreed) seemed to undermine the derivation of the prevention of queue jumping as a principle in the first place. He noted that in prior cases queue jumping had been given as a reason for forcing people to return to their country of origin to apply for entry clearance. However, he maintained that there was no actual delay for others in the queue and that '[o]n the contrary, the very fact that those within the policy do not apply for entry clearance shortens rather than lengthens that queue'.<sup>52</sup> He went on to suggest that the real principle being pursued in such cases was 'one of deterring people from coming to this country in the first place without having obtained entry clearance'.<sup>53</sup> This would suggest the pending demise of the prevention of queue-jumping as a legitimate objective.

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<sup>48</sup> [2001] 1 WLR 840, at 850.

<sup>49</sup> [2005] EWCA Civ 947.

<sup>50</sup> [2005] EWCA Civ 947, at paragraph 4.

<sup>51</sup> [2008] UKHL 40; [2008] 1 WLR 1420.

<sup>52</sup> [2008] UKHL 40; [2008] 1 WLR 1420, at 1431.

<sup>53</sup> *ibid*, at 1431.

*Prevention of crime – deportation of convicted offenders*

In *B v Secretary of State for the Home Department*<sup>54</sup> the applicant had been convicted of serious crimes against members of his own family and there was understandable concern that he might threaten public safety. The Court of Appeal did not think it necessary to make a specific determination on the public policy being pursued, but recognised that it could come within a number of the headings of Article 8(2) including the prevention of crime and the protection of the rights of others.<sup>55</sup> Sedley LJ explicitly excluded the possibility that the legitimate objective was deportation, since nothing short of deportation could achieve that aim.<sup>56</sup> Sedley LJ also noted that an analysis of the limitation of rights under Article 8(2) of the Convention was ‘likely to engage questions of propensity rather than of past conduct’.<sup>57</sup> This is an important addendum to the principle and indicates that prior wrongdoing alone may not be sufficient as a basis for a public interest principle in favour of deportation.

A similar principle arose in *Samaroo v Secretary of State for the Home Department*<sup>58</sup> which involved an application by a Guyanan national who had lived in the UK since 1988. He had been convicted of drug trafficking offences in 1994 and, upon his release in 2000, the Home Secretary sought to deport him. The Court of Appeal identified the ‘prevention of crime and disorder’<sup>59</sup> as the public interest principle which was to be balanced against the applicant’s Convention right to family life. It is interesting to note that while Dyson LJ used the specific words of Article 8(2) when describing the legitimate aim, he also noted that it satisfied the *de Freitas/Daly* standard of ‘sufficient importance to justify limiting a fundamental right’.<sup>60</sup>

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<sup>54</sup> Unreported, Court of Appeal, 18 May 2000.

<sup>55</sup> *ibid*, at paragraph 38.

<sup>56</sup> Unreported, Court of Appeal, 18 May 2000, at paragraph 34.

<sup>57</sup> *ibid*, at paragraph 38.

<sup>58</sup> [2001] EWCA Civ 1139.

<sup>59</sup> *ibid*, at paragraph 20.

<sup>60</sup> [2001] EWCA Civ 1139, at paragraph 20.

*Prevention of disorder*

In *R (Farrakhan) v Secretary of State for the Home Department*<sup>61</sup> the public interest to be pursued was the prevention of disorder, an aim specifically recognised by Article 10(2) of the Convention. The Home Secretary was of the view that the applicant's presence in the UK would pose a risk to community relations, given the forthright nature of his views and the fact that he was a controversial figure. Here again, the Court was following the text of the Convention for guidance on whether or not an objective was legitimate.

*National Security*

*Secretary of State for the Home Department v Rehman*<sup>62</sup> was not strictly speaking a proportionality case, but it did involve issues of the definition of the public interest which are of great relevance to proportionality and deference. The applicant was a Pakistani national who had been permitted to enter the UK in 1993 for a period of four years on the basis that he would be working as a minister of religion. The Home Secretary was of the view that he was the British point of contact for a fundamentalist militant group and that he was actively recruiting people in Britain for that group. The applicant disputed this. The group he was suspected of working with only carried out their militant activities within the sub-continent and there were no suggestions that they had plans to target the UK. The Home Secretary's decision to exclude the applicant was appealed to the Special Immigration Appeals Commission (SIAC) which held that in order for a person to be deemed a threat to national security, the person had to engage in, promote or encourage violent activity targeted at the United Kingdom, its system of government or its people. The Court of Appeal overturned the SIAC's ruling and the applicant brought an appeal to the House of Lords. The House was explicit that the

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<sup>61</sup> [2002] EWCA Civ 606; [2002] QB 1391.

<sup>62</sup> [2001] UKHL 47; [2003] 1 AC 153.



applicant's Article 8 rights could be limited on the basis of national security in accordance with Article 8(2).<sup>63</sup> The House accepted that national security could include the public interest principle of the prevention of threats to a foreign state that were not imminent threats to the UK. This is a very broad reading of the public interest principle of national security.

#### *4.1.3: Rational Connection*

Questions of suitability or rational connection have arisen in two prominent queue-jumping cases. In *Shala v Secretary of State for the Home Department*<sup>64</sup> the Home Secretary had delayed a great deal in processing the applicant's case and Keane LJ held that allowing the applicant to apply for leave to remain in from within the UK would not encourage others to exploit established procedures. While it was not expressly stated, this reasoning indicated that the Court was doubtful whether there was a rational connection between the measure and the public interest principle of preventing queue-jumping.

Similarly in *Secretary of State for the Home Department v Akaeke*<sup>65</sup> there had been very long delays in the applicant's case, which the special adjudicator in the case had described as 'a public disgrace'. This view was affirmed by the Immigration Appeals Tribunal. Carnwath LJ found that 'the tribunal was entitled to take the view that confidence was unlikely to be materially improved by maintenance of a rigid policy of temporary expulsions.'<sup>66</sup> As with the *Shala* case this reasoning suggests that severe delay can give rise to the conclusion that deportation is not a suitable measure to pursue the prevention of queue jumping. Without any deterrent effect, the measure bears no

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<sup>63</sup> [2001] UKHL 47; [2003] 1 AC 153, at 187 *per* Lord Steyn.

<sup>64</sup> [2003] EWCA Civ 233.

<sup>65</sup> [2005] EWCA Civ 947.

<sup>66</sup> *ibid.*, at paragraph 31.

rational connection to the aim. The reasoning in *Akaeke*, like the reasoning in *Shala*, does not make it explicitly clear whether the measure fell at the rational connection stage or the overall balance stage. However, it is important to note that issues of rational connection have been considered by the UK courts in immigration cases.

#### **4.2: FACTUAL OPTIMISATION (MINIMAL IMPAIRMENT)**

The choice of least intrusive means has not been a significant element of proportionality analysis in the vast majority of immigration cases (in many of the immigration cases, the term ‘necessity’ is used to describe the minimal impairment/factual optimisation test.) As was discussed in Chapter 3.2, appointed officials who are responsible for one-off administrative decisions tend to have a very limited range of measures open to them in order to pursue the public interest. In most immigration cases, they are faced with a binary choice between allowing the applicant to remain in the UK and deporting them.

This means that factual optimisation tends to have a very limited role in immigration decisions. Since there are only two measures available, the question of whether there is a less rights-restrictive measure for achieving the public interest becomes meaningless. Ian Leigh has suggested that the minimal impairment test has been effectively ruled out in certain immigration cases because of the courts’ view that certain restrictions on rights ‘*flow axiomatically* from deportation’.<sup>67</sup>

This in turn minimises the role of structural deference, which is closely related to factual optimisation and arises where a reviewing court defers to a decision-maker’s choice from a number of equally rights-intrusive measures. If the choice of measures is

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<sup>67</sup> Leigh, I. ‘The Standard of Judicial Review after the Human Rights Act’ in Fenwick, H., Phillipson, G. & Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007), at 196 (emphasis in original).

absent, then there is little cause for structural deference. Even if this was not the case, appointed decision-makers have very limited democratic legitimacy and so there might not be much basis for affording structural deference in any event.

The policy choices underlying the decision in immigration cases will invariably have been made elsewhere at a different time, whether in the Immigration Rules, legislation or some other statement of governmental policy, meaning that the decision-maker is following objectives which have been set externally. This also means that in order to conduct an examination of whether there was a less rights-intrusive measure available, the reviewing court would need to examine the framework of rules within which the challenged decision was made. Deference to such rules would depend on the institution from which they emanated. Gibbs J has held that in a case which ‘concerns rules as opposed to an Act of Parliament ... this court could disapply or strike down as unlawful any rule which was shown to be contrary to the Human Rights Act and therefore unlawful.’<sup>68</sup> Nonetheless, as was noted above, challenges to the rules in immigration cases have been uncommon, and most cases have tended to focus on the proportionality of the specific decision relating to the applicant.

In *B v Secretary of State for the Home Department*<sup>69</sup> Sedley LJ implied a limited role for factual optimisation. He held that the UK is not required to keep someone whose conduct strikes deeply at the social values of the society. This suggests that deportation is the least restrictive measure available to achieve the aim of pursuing public policy. There was no half-way house measure available in the *B* case which would also have afforded the same protection of the public interest principle at stake. The decision was therefore reached primarily on the basis of overall balancing with no express consideration of the least restrictive means part of proportionality analysis. Similarly, in

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<sup>68</sup> *R (Acan) v Immigration Appeal Tribunal* [2004] EWHC 297 (Admin), at paragraph 91.

<sup>69</sup> Unreported, Court of Appeal, 18 May 2000.

*R (Mahmood) v Secretary of State for the Home Department*<sup>70</sup> the Court gave no significant consideration to whether there were less restrictive alternatives available. As with *B* this analysis suggests a limited role for factual optimisation.

A slightly more sophisticated approach was taken in *Samaroo v Secretary of State for the Home Department*.<sup>71</sup> Dyson LJ held that ‘in deciding what proportionality requires in any particular case, the issue will usually have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual’s rights?’<sup>72</sup> He then went on to state the second stage as: ‘does the measure have an excessive or disproportionate effect on the interests of affected persons?’<sup>73</sup> This is a very clear endorsement of both factual and legal optimisation as the basis for proportionality review.

Dyson LJ referred to Lord Steyn’s discussion of proportionality in the *Daly* case and noted that ‘it is clear that what Lord Steyn said about proportionality was intended to be of general application.’<sup>74</sup> This is a recognition that the basic structure of proportionality is to be universally used across the range of rights and governmental action. However, Dyson LJ sought to differentiate between a decision in a specific case and a blanket policy. He held that as *Daly* and *de Freitas* had both concerned blanket policies that were overly broad in scope they could be held to fail the minimal impairment stage of proportionality. As *Samaroo* involved a specific decision, Dyson LJ was not prepared to countenance that the right to family life had been restricted any more than was necessary. He therefore held that the case fell to be decided on the question of overall balance alone. This is a direct judicial acceptance that there is a universal structure to proportionality but that there is a limited role for factual optimisation in certain types of

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<sup>70</sup> [2001] 1 WLR 840.

<sup>71</sup> [2001] EWCA Civ 1139.

<sup>72</sup> *ibid*, at paragraph 19.

<sup>73</sup> *ibid*, at paragraph 20.

<sup>74</sup> *ibid*, at paragraph 17.

case. By implication this also discounts the possibility of structural deference in such cases, since it is also dependent on a choice of measures.

A brief examination of the subsequent cases on immigration and proportionality shows that factual optimisation plays a limited role or no role in the vast majority. There is an absence of any meaningful consideration of the minimal impairment arm of proportionality in *Shala v Secretary of State for the Home Department*.<sup>75</sup> Even though the *Daly* case was cited, the minimal impairment analysis which it implies was not conducted. Similarly in *R (Ala) v Secretary of State for the Home Department*,<sup>76</sup> *Edore v Secretary of State for the Home Department*<sup>77</sup> and *R (Acan) v Immigration Appeal Tribunal*<sup>78</sup> the legal optimisation test does all of the work of proportionality and factual optimisation is nowhere to be seen.

These four cases are all good examples of an issue which recurs throughout the proportionality case law in this area. In each case the primary decision-maker was faced with the binary choice of removing the applicant or permitting them to remain. This did not allow for any significant leeway in terms of choosing from among a range of measures on the basis that one was more proportionate than the other. The number of options available was two. As a result, the question of whether the least intrusive means of achieving the public interest aim was used is functionally irrelevant. In each of these cases the analysis of proportionality fundamentally turned on the question of overall balance, rather than the question of minimal impairment.

In *Machado v Secretary of State for the Home Department*<sup>79</sup> the Court of Appeal set out the proportionality test in terms almost identical to the test in *Daly*<sup>80</sup> and so expressly included consideration of minimal impairment. Sedley LJ contended that minimal

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<sup>75</sup> [2003] EWCA Civ 233.

<sup>76</sup> [2003] EWHC 521 (Admin).

<sup>77</sup> [2003] EWCA Civ 716; [2003] 1 WLR 2979.

<sup>78</sup> [2004] EWHC 297 (Admin).

<sup>79</sup> [2005] EWCA Civ 597.

<sup>80</sup> See *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532.

impairment ‘commonly requires an appraisal of the relative importance of the state’s objective and the impact of the measure on the individual.’<sup>81</sup> Notwithstanding this, the analysis of the primary decision-maker’s decision is couched almost entirely in terms of balancing and the issue of whether there was a less rights-restrictive means of achieving the public interest is not addressed at all.

In *R (Razgar) v Secretary of State for the Home Department*<sup>82</sup> Lord Bingham set out five questions which a statutory appellate authority would have to ask when reviewing an immigration decision. The questions relate to: whether the right is affected; whether the right is engaged, whether the deportation is in accordance with law; whether the deportation is necessary for the pursuance of a legitimate objective; and whether the deportation is proportionate to the legitimate objective pursued. He then found that where the deportation was lawful it would almost always be proportionate, noting that: ‘decisions taken pursuant to the lawful operation of immigration control [would] be proportionate in all save a small minority of exceptional cases’.<sup>83</sup> He was of the view that a lawful deportation would be necessary for the pursuance of the aim in the absence of bad faith, ulterior motive or abuse of power. This is an interesting conclusion to draw. The *Razgar* decision suggests that the decision as to whether a deportation is the least intrusive means it is actually set at the level of the law regulating the deportation, not at the level of the deportation decision itself. This is similar to the reasoning that was used in *Samaroo*. In *Razgar* Lord Bingham seems to have placed great emphasis on the structural deference to be afforded to the setting out of immigration law, rather than to the individual decision-maker in a specific immigration case.<sup>84</sup>

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<sup>81</sup> [2005] EWCA Civ 597, at paragraph 12.

<sup>82</sup> [2004] UKHL 27; [2004] 2 AC 368.

<sup>83</sup> *ibid*, at 390.

<sup>84</sup> Proportionality analysis of multi-level decisions will be considered further in Chapter 6.3.

In the Court of Appeal decision in *Huang v Secretary of State for the Home Department*<sup>85</sup> Laws LJ stated that the policy questions involved in the case had already been set down by the Immigration Rules and that the adjudicator was not reviewing those. This case again deems factual optimisation to be a non-issue in immigration cases regarding administrative decisions. When the case was further appealed to the House of Lords,<sup>86</sup> the House expressly endorsed the *Daly* test and extended it to include overall balancing along the lines of the test in the Canadian case of *R v Oakes*.<sup>87</sup> Even though factual optimisation is a central part of both the *Daly* and *Oakes* tests, factual optimisation was noticeably absent from the House's reasoning in *Huang*.

In *Huang* the House considered the role of democratic legitimacy in deference. Lord Bingham, giving the judgment of the House, used the example of housing policy, which he described as being the product of sustained democratic discussion with the interests of all sides represented. He contrasted this with the Immigration Rules, which are not the product of sustained active debate in Parliament and are not based on any representation of the interests of non-nationals. This finding suggests that if policy makers are to be afforded structural deference based on democratic legitimacy, then that democratic legitimacy will need to be established as a fact, rather than being an institutional principle. This is an interesting departure from Bingham's comments in *Razgar* where he contended that any decision that was lawfully made (i.e. within the parameters of the Immigration Rules) would be necessary almost by definition. The line of reasoning in *Huang* shows the impact that the actual features of specific institutions can have on the level of deference to be paid.<sup>88</sup>

Despite the lack of any use of factual optimisation in the majority of immigration cases, it is still possible to apply this part of the test if the institutional setting is appropriate. *R*

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<sup>85</sup> [2005] EWCA Civ 105; [2006] QB 1.

<sup>86</sup> [2007] UKHL 11; [2007] 2 AC 167.

<sup>87</sup> [1986] 1 SCR 103.

<sup>88</sup> See Chapter 3.4.

*(Farrakhan) v Secretary of State for the Home Department*<sup>89</sup> is one of the only immigration cases where the court engaged in a direct assessment of the minimal impairment of the challenged measure. The applicant had been refused a visa to travel to the UK, where he had hoped to address followers of his high profile organisation. The Court of Appeal looked at the features of the restriction and held that Mr Farrakhan's freedom of expression was only restricted to a limited extent, as he was only being denied access to a particular forum and there was nothing stopping him from disseminating his ideas in the UK through any means other than physical presence in the country. This examination of the level of impairment and the other options open to Mr Farrakhan is evidence of factual optimisation.

The Court in *Farrakhan* placed great emphasis on the fact that the decision has been reached by the Home Secretary personally. The Court's willingness to give detailed consideration to the issue of minimal impairment in this case is indicative of the significance of institutional differences as between a cabinet minister and an appointed decision-maker. The Home Secretary would have had a greater choice of means than the administrative officials. Notwithstanding the principle that immigration decisions made in the Home Secretary's name are attributable to the Home Secretary, the reality of most immigration cases is very different and this is highlighted by the Court's focus on the exceptionality of the fact that the Home Secretary did make the decision personally in this case. The significance of this is expressly noted in the *Farrakhan* case and it is further evidence that factual optimisation is of limited relevance to one-off decisions made by administrators.

The use of factual optimisation in *Farrakhan* shows that the various sub-elements of the proportionality test are themselves consistent and universal, but that the institutional setting of a particular decision can lead to particular elements being de-emphasised.

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<sup>89</sup> [2002] EWCA Civ 606; [2002] QB 1391.



Since there was a range of options and a choice of goals available to the Home Secretary in *Farrakhan*, the factual optimisation test could be effectively applied in a way which was not possible in other cases, such as *Samaroo*.

The preceding consideration of the leading cases in this area gives a clear indication that factual optimisation is of very limited importance in immigration decisions. As a governmental activity, such decisions are predominantly concerned with one-off administrative decisions, where the decision-maker has a limited choice of measures and no rule-setting power. It is clear that such activity gives little scope for factual optimisation by the primary decision-maker, despite what the phrasing of the proportionality test in the UK suggests. However, as has been shown, this is not a failure of proportionality, it is a feature of the institutional setting in which the primary decision is made.

### **4.3: LEGAL OPTIMISATION (OVERALL BALANCE)**

This final stage of the proportionality test requires an overall balance to be struck between the public interest principle and the human rights principle. Alexy calls this ‘legal optimisation’, which is summed up in his first law of balancing: ‘the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.’<sup>90</sup> As has been seen, administrative decision-makers often have limited ability to set the rules within which they operate or to choose from a range of alternative measures to achieve an objective. It is therefore unsurprising that in the bulk of the case law on proportionality and immigration, the reviewing court focused very heavily on legal optimisation.

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<sup>90</sup> Alexy, R. and Rivers, J. (Translator) *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002) (*TCR*) at 102. See above, Chapter 2.3.3.

In judicial review of one-off administrative decisions, legal optimisation will entail a detailed analysis of the impact of the measure on the human rights principle at stake in the specific case and the level of realisation and/or importance of the public interest principle. Unlike a consideration of a rule or policy that is of general application, an overall balancing analysis of an administrative decision need only be concerned with the facts of the specific case before it, rather than paying much regard to the impact of a rule in the abstract. As I discussed in Chapter 3.2.2, this analysis is likely to be easier for a court which is reviewing an administrative decision than it would be for review of a rule.

Legal optimisation has been repeatedly applied in immigration proportionality cases. In *Samaroo v Secretary of State for the Home Department*,<sup>91</sup> Dyson LJ placed heavy emphasis on legal optimisation noting that: ‘[i]t is important to emphasise that the striking of a fair balance lies at the heart of proportionality’.<sup>92</sup> He held that ‘[b]roadly speaking, the more serious the interference with a fundamental right and the graver its effects, the greater the justification that will be required for the interference.’<sup>93</sup> This is almost identical to Alexy’s description of the legal optimisation test in his ‘law of balancing’.<sup>94</sup>

Similarly, in *R (Mahmood) v Secretary of State for the Home Department*,<sup>95</sup> legal optimisation was central to the decision of the Court of Appeal. As was noted above, the case concerned the balancing of the principle that the applicant’s family life should not be disrupted with the public interest principle in preventing queue-jumping in the immigration process. It was not disputed that the applicant would be successful if he made an application for leave to enter from Pakistan. The Court of Appeal held that,

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<sup>91</sup> [2001] EWCA Civ 1139.

<sup>92</sup> *ibid*, at paragraph 26.

<sup>93</sup> *ibid*, at paragraph 28.

<sup>94</sup> Alexy *TCR*, at 102.

<sup>95</sup> [2001] 1 WLR 840.

while a return to Pakistan to make such an application would be disruptive, there was no reason why the whole family could not go to Pakistan while he made the application. The Court was conscious of the fact that the applicant's wife had married him knowing that his immigration status was dubious. Furthermore, the Court held that the threat that removal posed to the applicant's current employment in the UK was not a sufficient reason for permitting him to stay. This weighing up of the factors in the specific case shows the Court engaging in some level of legal optimisation of competing principles, (notwithstanding the fact that the decision is phrased in terms of reviewing the reasonableness of the original decision, see further below at 4.3.2.)

In *Samaroo* and *Mahmood*, legal optimisation was the main basis for the decision. However it is not necessary for legal optimisation to take over from factual optimisation as can be seen in *R (Farrakhan) v Secretary of State for the Home Department*.<sup>96</sup> As was discussed above, the Court of Appeal engaged in a factual optimisation in *Farrakhan*, but the decision also considered legal optimisation. The Court was satisfied that the Home Secretary had decided to exclude the applicant from the UK for the purpose of the prevention of disorder. Lord Phillips MR, giving the judgment of the Court held that the Home Secretary had 'struck a proportionate balance between that aim and freedom of expression, to the extent to which that was in play on the facts of this case.'<sup>97</sup> In addition to being an endorsement of the overall balancing process in proportionality, the *Farrakhan* decision shows how the full range of the proportionality test can be used when a decision involves both policy choice and a specific case. The availability of legal optimisation in addition to factual optimisation was further underlined in the later case of *Huang v Secretary of State for the Home Department*.<sup>98</sup> The distinction between *Farrakhan* and cases where factual optimisation was not

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<sup>96</sup> [2002] EWCA Civ 606; [2002] QB 1391.

<sup>97</sup> [2002] EWCA Civ 606; [2002] QB 1391, at 1419.

<sup>98</sup> [2007] UKHL 11; [2007] 2 AC 167.

applied is the institutional setting of the decision, particularly the range of measures open to the decision-maker.

Deference to a primary decision-maker can be integrated into legal optimisation. At this stage of proportionality, the deference paid to the primary decision-maker is usually empirical epistemic deference, which is concerned with the reliability of factual assessments.<sup>99</sup> The level of realisation of a public interest goal and the level of intrusion on a Convention right may not be easily quantifiable or even knowable. As such, the appropriate weight to be given to each principle will not always be easy to gauge. Where this is the case, the reviewing court may take the view that the primary decision-maker is in a better position than the court to make an assessment of either the level of intrusion on the protected human right or the level of realisation or importance of the public interest. Empirical epistemic deference has repeatedly arisen in the immigration case law.

The other form of deference which has been seen as relevant in immigration cases is normative epistemic deference. This applies where there is uncertainty as to the correct balance to be struck. A reviewing court may take the view that the primary decision-maker has given a certain basic level of protection to both the human rights and the public interest principle. In such cases, the court may afford normative epistemic deference to the decision-maker. As I will show, while this form of deference was applied repeatedly in immigration cases, it has been roundly rejected after a series of cases culminating in the *Huang* decision. The reasoning of this rejection is in line with the reasons for deference I set out in Chapter 3.4 and highlights the importance of institutional sensitivity.

In the rest of this section I will show how the courts have applied legal optimisation in a way which makes space for both empirical and normative epistemic deference, but that

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<sup>99</sup> See Chapter 2.4.2.

the latter was ultimately rejected on grounds related to institutional sensitivity. I will also discuss the extensive consideration which has been given to delay in immigration cases and show how it underlines the importance of legal optimisation.

#### *4.3.1: Legal optimisation and empirical epistemic deference*

One of the earliest immigration proportionality cases is *B v Secretary of State for the Home Department*<sup>100</sup> in which the Court of Appeal paid great attention to the overall balance of the challenged measure. The Home Secretary sought to deport the applicant on the basis that he had been convicted of serious crimes against his own children. The Home Secretary's decision was appealed to the Immigration Appeal Tribunal ('the IAT'), which upheld it. The parties in the case agreed to treat the IAT decision as the first instance decision for the purposes of the Court of Appeal case. Sedley LJ held that the applicant's opportunity to re-offend would be greatly limited were he to remain in the UK and that his extremely strong links to this country were such that to deport him would be a very serious restriction of his Article 8 rights. He held that the overall balance between public interest and individual rights had not been adequately struck and that removal would be disproportionate. He stated that: '[w]hat is proposed in the present case, although in law deportation, is in substance more akin to exile. As such it is in my judgment so severe as to be disproportionate to this man's particular offending, serious as it was, and to his propensities.'<sup>101</sup> This is an excellent example of legal optimisation of a human rights principle and a public interest principle.

In reaching its decision on legal optimisation, the Court of Appeal was open to empirical epistemic deference based on institutional competence. The Court held that

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<sup>100</sup> Unreported, Court of Appeal, 18 May 2000. Although the case pre-dates the entry into force of the HRA, the proportionality analysis was based on the Convention on the basis that the applicant was a national of an EU state and so was entitled to respect for his Convention rights under Article 6 of the consolidated Treaty on European Union. See paragraphs 13-15 of the judgment.

<sup>101</sup> *ibid*, at paragraph 37.

the IAT's decision included findings of primary fact, inferences of fact, propositions of law, and reasoning.<sup>102</sup> Given the IAT's knowledge of the specific circumstances of another country (although not adduced in this case), its findings would be given great deference unless they could be shown to be wrong. However, the Court held that the IAT's inferences from fact, its propositions of law and its reasoning for its decision would all be scrutinised and if a Court disagreed with them, the decision should be overturned. This early decision gives a narrow scope for deference in legal optimisation and limits it to empirical epistemic deference based on institutional competence exclusively.

As was noted above, legal optimisation was the central plank of the decision in *Samaroo v Secretary of State for the Home Department*<sup>103</sup> Notwithstanding certain compassionate circumstances of the applicant's situation, Dyson LJ held that a fair balance had been struck between the applicant's right to family life and the public interest of preventing and deterring drug trafficking. Dyson LJ went on to find that the Home Secretary was entitled to place great weight on the importance of preventing drug trafficking. He found that the Home Secretary is in a better position than the Court to judge the deterrent effect of the deportation and that the subject matter was such that conclusive proof of the deterrent effect would be impossible.<sup>104</sup> This suggests a large degree of empirical epistemic deference on the grounds of institutional competence with regard to assessing the level of achievement of the public interest.

In *R (Farrakhan) v Secretary of State for the Home Department*<sup>105</sup> The Court held that 'the Secretary of State is far better placed to reach an informed decision as to the likely consequences of admitting Mr Farrakhan to this country than is the court.'<sup>106</sup> The court

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<sup>102</sup> Unreported, Court of Appeal, 18 May 2000, at paragraph 26.

<sup>103</sup> [2001] EWCA Civ 1139.

<sup>104</sup> *ibid.*, at paragraph 39-40.

<sup>105</sup> [2002] EWCA Civ 606; [2002] QB 1391.

<sup>106</sup> *ibid.*, at 1418.

therefore deferred to his assessment of the level of detriment that the applicant's presence in the UK would be to the public interest. This was a consideration of empirical epistemic deference within the legal optimisation stage of the proportionality test.

In *Shala v Secretary of State for the Home Department*<sup>107</sup> Keene LJ explicitly used the language of legal optimisation noting that the proportionality issue was whether the decision-maker had 'struck a fair balance between that legitimate objective and the appellant's right under Article 8.'<sup>108</sup> He went on to hold that there would be a 'significant margin of discretion' applied when assessing whether the decision-maker was mistaken in the 'relative weight which he has attached to the conflicting interests'.<sup>109</sup> The basis for this deference was that immigration control was within the constitutional responsibility of the Home Secretary. This indicates a large measure of empirical epistemic deference for the decision-maker, based on institutional competence.

The issue of empirical epistemic deference in matters of national security was considered at length in *Secretary of State for the Home Department v Rehman*.<sup>110</sup> Lord Slynn expressly excluded the possibility of the Home Secretary using national security as a blanket justification for excluding non-nationals. He held that some possibility of risk or danger to the nation must exist; however it does not necessarily need to be a direct threat targeting the UK. Lord Slynn held further that:

'There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that

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<sup>107</sup> [2003] EWCA Civ 233.

<sup>108</sup> *ibid*, at paragraph 11.

<sup>109</sup> [2003] EWCA Civ 233, at paragraph 13.

<sup>110</sup> [2001] UKHL 47; [2003] 1 AC 153.

all the material before him is proved, and his conclusion is justified to a “high civil degree of probability”. Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be a deportation for the public good.’<sup>111</sup>

Echoing these sentiments, Lord Hoffmann held that:

‘The question of whether something is “in the interests” of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.’<sup>112</sup>

These two quotations indicate that the Courts are prepared to afford a large degree of epistemic deference to the executive, on institutional competence grounds, when the public interest being pursued is national security.

In *R (Razgar) v Secretary of State for the Home Department*<sup>113</sup> Lord Bingham set out five questions to be considered by a special adjudicator when deciding whether a decision to deport a person is proportionate (the details of the first four questions are discussed above in section 4.2). As was noted above, Lord Bingham’s reasoning indicated a minor role for the minimal impairment limb of proportionality in deportation cases. The fifth question was whether the deportation was proportionate to the legitimate aim pursued. Lord Bingham held that the adjudicator’s role must always involve the striking of a fair balance between the rights of the individual and the interests of the community. Lord Bingham also placed great emphasis on the severity of

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<sup>111</sup> [2001] UKHL 47; [2003] 1 AC 153, at 184.

<sup>112</sup> *ibid.*, at 192.

<sup>113</sup> [2004] UKHL 27; [2004] 2 AC 368.



the applicant's situation, which is another indication of the courts' fact-sensitivity in the overall balancing exercise in these cases.

In *Razgar* Lord Bingham mentioned his anticipation that almost all lawful deportations would be 'necessary' and those that were not would involve exceptional circumstances. This 'exceptional circumstances' criterion was taken up by Laws LJ in the Court of Appeal decision in *Huang v Secretary of State for the Home Department*.<sup>114</sup> Laws LJ interpreted Lord Bingham's dictum as setting out a requirement of 'exceptional circumstances' for applicants in deportation decisions where the planned deportation was pursuant to lawful authority. This greatly restricted the process of overall balancing in immigration decisions. Laws LJ's formulation requires a court to find exceptional factors in the applicant's favour, rather than weighing up all the factors which the court deems relevant. This is a *de facto* blanket empirical epistemic deference with regards to public interest factors. The exceptional circumstances test sets a higher threshold for factors related to the intrusion on human rights. By extension, this means that the relative importance of the public interest will be increased in all cases and so the overall balance will be weighted in favour of the public interest. As a result, public interest factors will not need to be as convincing as they would otherwise be.

The skewing effect of the 'exceptional circumstances' test on legal optimisation can be seen in *Mukarkar v Secretary of State for the Home Department*.<sup>115</sup> The applicant was approaching his 65<sup>th</sup> birthday and suffered from very ill health. All of his children lived in the UK and once he was 65 years old he would be entitled to reside with them. The Court of Appeal considered the exceptional circumstances test set out by Laws LJ in *Huang*. While the applicant in *Mukarkar* was ultimately successful, the human rights argument had to be much stronger than would have been necessary in an ordinary legal

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<sup>114</sup> [2005] EWCA Civ 105; [2006] QB 1.

<sup>115</sup> [2006] EWCA Civ 1045.

optimisation. The Court noted that a removal from the UK, even for a short period, would cause a serious disruption to the applicant.

In the House of Lords decision in *Huang*<sup>116</sup> Lord Bingham, giving the judgment of the House, referred to his previous comments in *Razgar* and emphasised that they were not intended to set down a test of exceptional circumstances, as had been suggested.<sup>117</sup> The House gave overall balance a resounding endorsement within proportionality analysis and emphasised that the striking of a fair balance between the rights of the individual and the interests of the community was a part of the proportionality test which was inherent in the whole Convention.

In *EB (Kosovo) v Secretary of State for the Home Department*<sup>118</sup> Lord Bingham reaffirmed the importance of overall balance, referring specifically to the *Huang* judgment. He also gave detailed consideration to the effect that delay can have on the balancing exercise. This will be discussed further below, but for the purposes of empirical epistemic deference, one point he raised is of particular interest. Lord Bingham noted that if the delay in an asylum application is caused by a ‘dysfunctional system which yields unpredictable, inconsistent and unfair outcomes’<sup>119</sup> then less weight would be afforded to the requirements of firm and fair immigration control. As I discussed in Chapter 3.4, the main reason to afford empirical epistemic deference is that the primary decision-maker has superior expertise in the relevant field. These dicta of Lord Bingham suggest that where that quality of a decision-maker’s findings is in doubt because the decision-maker is using a flawed system, less empirical epistemic deference

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<sup>116</sup> [2007] UKHL 11; [2007] 2 AC 167.

<sup>117</sup> A very similar issue arose in relation to the separation of families in a series of immigration decisions. The statutory immigration authorities had developed a practice of deciding whether deportation was proportionate on the basis of whether there were ‘insurmountable obstacles’ to the entire family unit leaving the UK and living in the deportee’s country of residence. The ‘insurmountable obstacles’ test was roundly rejected by the Court of Appeal in *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5. The Court of Appeal based its reasoning on the House of Lords decision in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 11; [2008] 3 WLR 178.

<sup>118</sup> [2008] UKHL 11; [2008] 3 WLR 178.

<sup>119</sup> *ibid*, at 185.

is to be afforded. This approach shows the courts being sensitive to the actual level of expertise displayed in a given case, rather than affording deference solely because a particular institution has a general level of expertise.

#### *4.3.2: Legal optimisation and normative epistemic deference*

In *R (Mahmood) v Secretary of State for the Home Department*<sup>120</sup> the Court of Appeal engaged in a detailed weighing up of the factors in the specific case. As was discussed above, this evidenced a legal optimisation approach to the Court's reasoning. However, the ultimate outcome of the case was that the Court found that it was open to a reasonable decision-maker to find that deportation was justified under Article 8(2). The Court was of the view that its role was supervisory and that it must afford some principled distance from democratic decision-makers. The Court held that the courts should only intervene where the decision that had been made was outside the range of responses which would be made by a reasonable decision-maker.<sup>121</sup> If the challenged decision fell within that range, then the decision-maker was to be afforded a 'margin of discretion'.<sup>122</sup> The Court of Appeal held that there were reasonable grounds for the decision-maker's finding that deportation was justified under Article 8(2) and so the decision was upheld.

In terms of the structural model of proportionality, this 'margin of discretion' is normative epistemic deference in legal optimisation.<sup>123</sup> Normative epistemic deference arises where a certain basic level of protection has been given to both the human right and the public interest and so the reviewing court defers to the decision-maker's assessment of the correct balance to be struck between the two principles. As I

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<sup>120</sup> [2001] 1 WLR 840.

<sup>121</sup> *ibid.*, at 856, *per* Lord Phillips.

<sup>122</sup> [2001] 1 WLR 840, at 855, *per* Laws LJ.

<sup>123</sup> See Chapter 2.4.2.

discussed in Chapter 3.4.1, democratic legitimacy is the primary reason to afford a decision-maker normative epistemic deference and this is borne out in the Court of Appeal's judgment in *Mahmood*. Laws LJ paid significant attention to the democratic legitimacy of 'those functions of government which are controlled and distributed by powers whose authority is derived from the ballot box'<sup>124</sup> and the Court noted the need for deference where there were economic or social policy questions involved.

However, the setting of such policy was not at issue in *Mahmood* and as has been shown, is rarely an issue in HRA challenges to one-off immigration decisions. The institutional context of these decisions is such that there is arguably very little role for that sort of deference based on democratic legitimacy. This indicates the significance of institutional sensitivity in developing a model of proportionality. Had there been a greater degree of institutional sensitivity in *Mahmood*, then this inconsistency could have been avoided.

As was noted above, in *Samaroo v Secretary of State for the Home Department*,<sup>125</sup> the Court of Appeal decision turned primarily on legal optimisation and the Court afforded the IAT a degree of empirical epistemic deference. However, the Court of Appeal also held that the courts' role is not to make their own proportionality decision but to supervise the Home Secretary's decision and to apply anxious scrutiny as to whether a fair balance was struck. Dyson LJ found that it was not up to the courts to engage in their own balancing assessment if the primary decision-maker's balancing was reasonable. Dyson LJ's analysis, like that of the Court of Appeal in *Mahmood* indicates a willingness to afford *normative* epistemic deference in the legal optimisation stage of immigration cases.

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<sup>124</sup> [2001] 1 WLR 840, at 855.

<sup>125</sup> [2001] EWCA Civ 1139.

This line of reasoning can be seen further in *Edore v Secretary of State for the Home Department*.<sup>126</sup> The case concerned the proper interpretation of section 65 of the Immigration and Asylum Act 1999, which permits an appeal to a statutory authority where a person alleges that an immigration decision was in breach of their human rights.<sup>127</sup> These statutory authorities apply a proportionality test in the same way as the courts. The Court of Appeal held that in order for the challenged decision to be deemed proportionate, the decision needed to strike a fair balance between the competing principles. Simon Brown LJ held that the statutory authorities should not disrupt the finding of the decision-maker on proportionality so long as it was reasonable.<sup>128</sup> In *Edore* the Court of Appeal held that having regard to the facts of the case, the decision reached was outside the range of reasonable balances which could be struck. This indicates that the decision-maker had exceeded the normative epistemic deference that it was afforded with regard to legal optimisation.

Normative epistemic deference to the balancing done by the primary decision-maker eventually became known as the ‘*M (Croatia)* issue’.<sup>129</sup> In *M (Croatia) v Secretary of State for the Home Department*<sup>130</sup> the IAT held that statutory authorities should ‘normally hold that a decision to remove is unlawful only where the disproportion is so great that no reasonable Secretary of State could remove in those circumstances.’<sup>131</sup>

Understandably, the courts are loath to intrude on the powers of the other arms of government and are seeking a principled basis on which to set the level of scrutiny.

However deference to all ‘reasonable’ decisions on proportionality has not proved to be

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<sup>126</sup> [2003] EWCA Civ 716; [2003] 1 WLR 2979.

<sup>127</sup> This provision was superseded by section 84 of the Nationality, Immigration and Asylum Act 2002. There are some distinctions between this mechanism and judicial review, however they mostly relate to findings of fact (see further *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, at 184, *per* Lord Bingham). As such, the case law dealing with section 65/section 84 is instructive on the courts’ approach to proportionality.

<sup>128</sup> [2003] EWCA Civ 716; [2003] 1 WLR 2979, at 2987.

<sup>129</sup> See *M (Croatia) v Secretary of State for the Home Department* [2004] UKIAT 24. The term ‘*M (Croatia)* issue’ was used by Laws LJ in *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105; [2006] QB 1.

<sup>130</sup> [2004] UKIAT 24.

<sup>131</sup> *ibid*, at paragraph 28.

a workable basis on which to do this. In these cases, substantial normative epistemic deference was being applied in circumstances where there was no possibility of factual optimisation. The *M (Croatia)* approach, like much of the spatial discussion of proportionality, oversimplifies proportionality to the point of rendering it a minor offshoot of *Wednesbury* unreasonableness. It is perfectly understandable that the courts might wish to defer to the decision-maker's findings of fact. However, the normative epistemic deference afforded in these cases is also inappropriate because it lacks institutional sensitivity. As I argued in Chapter 3.4.1, the reason to afford a decision-maker normative epistemic deference is that the decision-maker is more democratically legitimate than the courts. This is not true of immigration decision-makers and the decision to afford this type of deference shows a lack of institutional sensitivity with regard to proportionality. There is no reason to afford normative epistemic deference to a decision-maker on the basis of institutional competence, since the decision-maker's ability to conduct a balancing exercise is no greater than that of the courts. To afford normative epistemic deference in balancing on the basis of institutional competence would be to undermine the competence of the courts and shirk their responsibility to adjudicate on matters of human rights.

This logic can be seen in the reasoning of the Court of Appeal and House of Lords in *Huang v Secretary of State for the Home Department*<sup>132</sup> which finally put the *M (Croatia)* issue to rest. In the Court of Appeal Laws LJ, giving the judgment of the Court, gave a detailed consideration of the issue of deference based on democratic legitimacy, which he found to be directly related to the formulation of policy. He went on to hold that where non-policy questions were in issue, the decision-maker was not to be afforded deference on the basis of democratic legitimacy and that there was no

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<sup>132</sup> [2005] EWCA Civ 105; [2006] QB 1 and [2007] UKHL 11; [2007] 2 AC 167.

question of deference to policy in any of the three cases before the Court.<sup>133</sup> As such the duty of the statutory appeal authority in these cases was the protection of individual fundamental rights. This is a dismissal of normative epistemic deference in immigration cases and is an express recognition of the effect that the institutional setting of such decisions will ultimately have on the operation of proportionality analysis.

Laws LJ also recognised the need for some means of deciding the intensity of proportionality review. He held that it must vary with the subject matter but suggested that there were no ‘principles with sharp edges’<sup>134</sup> and that there probably never would be. He suggested the approach that the greater the interference with the right, the more intensive should be the review. This is in line with the formal principle suggested by Rivers.<sup>135</sup> The level of interference with a human right is certainly one valuable basis for measuring the appropriate level of deference. As was discussed in Chapter 3.4, institutional reasons for deference need not detract from this criterion; they can operate in addition to it.

The House of Lords upheld the decision of the Court of Appeal in *Huang*.<sup>136</sup> Lord Bingham expressly discounted the argument that a statutory authority was limited to reviewing the immigration decision based on irrationality. He accepted that consideration could be given to the assessments made by the decision-maker but was very clear that:

‘[t]he giving of weight to the factors upon which the original decision is based is *not* ‘deference’. It is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a

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<sup>133</sup> [2005] EWCA Civ 105; [2006] QB 1, at 31-32.

<sup>134</sup> *ibid*, at 29.

<sup>135</sup> See Rivers, J. ‘Proportionality and Variable Intensity of Review’ (2006) 65 CLJ 174.

<sup>136</sup> [2007] UKHL 11; [2007] 2 AC 167.

given subject matter and access to special sources of knowledge and advice.<sup>137</sup>

While Lord Bingham eschews the term ‘deference’, for the purposes of the structural model, it is clear that he is rejecting normative epistemic deference and endorsing empirical epistemic deference. He rejects the notion of deference to the balance struck, but accepts the notion of deference to findings of fact. Lord Bingham’s finding indicates that when undertaking the overall balancing stage of the proportionality test, the reviewing court or tribunal should take account of the findings of the primary decision-maker but not abrogate its responsibility to engage in its own analysis of the proportionality of the decision. This is in line with the criticisms of the *M (Croatia)* issue which I set out above. Lord Bingham’s reasoning in *Huang* shows that empirical epistemic deference can operate within the overall balancing stage of proportionality review, without the court abrogating that stage of analysis.

As was mentioned above in relation to structural deference, the *Huang* decision also shows that the reasons for deference are an important factor in deciding whether deference should be paid. The basis for affording normative epistemic deference is the democratic legitimacy of the primary decision-maker. In rejecting the use of normative epistemic deference in *Huang*, the House of Lords also rejected the argument that there was substantial democratic legitimacy in the immigration rules. The immigration rules do not enjoy the level of sustained democratic debate that housing policy does and such debates as there are on the immigration rules do not take account of the interests of potential immigrants.<sup>138</sup> Admittedly this is an indictment of the democratic legitimacy of the Immigration rules, rather than of the decisions of immigration officials; however,

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<sup>137</sup> [2007] UKHL 11; [2007] 2 AC 167, at 185.

<sup>138</sup> *ibid.*, at 186.



if the rules lack democratic legitimacy, then those who apply them cannot claim to have any, and so the basis for normative epistemic deference is absent.

### 4.3.3. *Legal optimisation and delay*

The courts have repeatedly found delay to be of great weight within legal optimisation. When a court is balancing the benefit to the public interest relative to the intrusion on the applicant's Convention rights the legal optimisation process requires an analysis of the impact of the measure on each of the two competing principles. The repetition of delay as a significant factor indicates the sort of patterns that can emerge in the balancing stage when there have been a series of cases on similar points. Alexy contends that each time a court makes a decision on proportionality, a conditional, fact-sensitive rule of precedence between the two competing principles is established. Other, similar, cases will tend to follow this rule insofar as their facts are similar. As I discussed in Chapter 2.2, this model of proportionality is particularly appropriate in a common law jurisdiction, where the body of precedent builds up over time. In this section, I will show how a series of cases, beginning with *Shala v Secretary of State for the Home Department*<sup>139</sup> established delay as a significant factor to be considered in the legal optimisation of competing principles in immigration decisions.

In *Shala* the Court of Appeal weighed up the factors to be considered in balancing the public interest principle of preventing queue-jumping with the Article 8 principle that the applicant's family life should not be disrupted. Schiemann LJ pointed out that at the time the applicant entered the UK he had been a meritorious candidate for asylum and had there not been such a substantial delay, he would not have had any difficulty getting refugee status. Keane LJ held that it would be a disproportionate intrusion on his Article

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<sup>139</sup> [2003] EWCA Civ 233.

8 rights if he were made to suffer as a result of a delay that was entirely the fault of the Home Office itself. As was noted above, there were doubts raised in this case about whether the deportation bore a rational connection to the public interest principle at stake. Nonetheless, the Court did go on to consider the balancing stage of proportionality and its reasoning is instructive in that it put great emphasis on the delay as a factor tending to tilt the balance in the applicant's favour.

In *R (Ala) v Secretary of State for the Home Department*<sup>140</sup> the Home Secretary sought an order that the applicant's case was 'manifestly unfounded'. Such an order would require the court to be satisfied that it was not possible for the applicant's case to succeed if it was heard by a statutory appellate body. After examining the balance struck by the Home Office between the public interest in preventing queue-jumping and the applicant's Article 8 rights, Moses J held that the failure to take account of the delay in processing the claim meant that it was not 'manifestly unfounded.' In doing so, Moses J specifically noted that: 'Shala is authority for the proposition that the consequences of considerable delay are a relevant factor in striking the balance.'<sup>141</sup>

*R (Acan) v Immigration Appeal Tribunal*<sup>142</sup> was a case where the applicant's case had been certified as manifestly unfounded. Gibbs J quashed that certification after having considered the balance between the aim of immigration control and the applicants' rights to family life. He held that there was at least an arguable case that the decision to refuse them entry was disproportionate. He considered the *Shala* decision as being of value in his reasoning, but was careful to take account of differences of fact between the cases. He held that: '[w]hilst the case of *Shala* was, as I have said, very different,

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<sup>140</sup> [2003] EWHC 521 (Admin).

<sup>141</sup> *ibid*, at paragraph 51.

<sup>142</sup> [2004] EWHC 297 (Admin).

nevertheless the delay here was an arguably highly relevant factor to the claimants' case.'<sup>143</sup>

A more direct endorsement of *Shala* was given by Owen J in *Mthokozisi v Secretary of State for the Home Department*.<sup>144</sup> The applicant had arrived in the UK at the age of 13 and claimed asylum. There was considerable delay and by the time his application was rejected, he was an adult and the outcome was different than it would have been if he had still been under 18. Owen J placed heavy emphasis on the importance of delay finding that:

‘*Shala* is authority for the wider proposition that when striking the balance between an applicant's rights under Article 8 and the legitimate objective of the proper maintenance of immigration control, the decision-maker must have regard to delay in determining an application for asylum and its consequences.’<sup>145</sup>

In *Secretary of State for the Home Department v Akaeke*<sup>146</sup> there were concerns over whether the measure was suitable to achieve the aim pursued, just as there had been in *Shala*.<sup>147</sup> However, as with *Shala* the court did address the overall balance point. There had been extreme delays in processing Mrs Akaeke's case and the Court, citing *Shala*, held that unreasonable delay was a ‘relevant’ factor to be weighed by the reviewing tribunal. This shows that the delay was part of the overall balancing test. As with *Shala*, it is not entirely clear whether the deportation failed the proportionality test on the basis of the threshold criterion of suitability or on overall balancing. However, the IAT had considered the ‘striking of a fair balance’<sup>148</sup> and had given great weight in that balance to the delay. As the decision of the IAT was upheld by the Court of Appeal, this would

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<sup>143</sup> [2004] EWHC 297 (Admin), at paragraph 103.

<sup>144</sup> [2004] EWHC 2964 (Admin).

<sup>145</sup> *ibid*, at paragraph 29

<sup>146</sup> [2005] EWCA Civ 947.

<sup>147</sup> See above at 4.1.2.

<sup>148</sup> Cited at [2005] EWCA Civ 947, at paragraph 11.

appear to be an endorsement of legal optimisation approach with delay as a major factor, notwithstanding the focus on rational connection.

In *Strbac v Secretary of State for the Home Department*<sup>149</sup> the applicant and his wife had come to the UK from Croatia in 1999 and claimed asylum. There was some delay in processing their application and by the time it was considered, the situation in Croatia had improved to a significant extent and there was no longer any basis for an asylum claim. The Court of Appeal rejected the notion of a concrete rule whereby delay always leads to a breach of Article 8. Laws LJ took the view that delay was only a relevant factor to be considered in balancing and that *Shala* did not set out a ‘a principle which, with some qualifications, came close to a rule’<sup>150</sup>

In *EB (Kosovo) v Secretary of State for the Home Department*<sup>151</sup> Lord Bingham gave detailed consideration to the way in which delay can affect balancing. He explained that it could arise in three ways. Where the delay leads to the establishment of deeper ties with people legally residing in the UK, then it may strengthen the Article 8 claim. Conversely, where a person’s immigration status is uncertain, then any relationships built with that person are built in the knowledge that he may not be entitled to remain in the UK. The third sense in which delay arises is where the system as a whole is dysfunctional and produces ‘unpredictable, inconsistent and unfair outcomes’<sup>152</sup> in which case it will reduce the weight to be given to the public interest principle of firm and fair immigration control.

Lord Bingham held that ‘[A]rticle 8 calls for a broad and informed judgment which is not to be constrained by a series of prescriptive rules.’<sup>153</sup> However, the line of reasoning is indicative of the manner in which the proportionality analysis leads to *conditional*

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<sup>149</sup> [2005] EWCA Civ 848.

<sup>150</sup> *ibid.*, at paragraph 25.

<sup>151</sup> [2008] UKHL 11; [2008] 3 WLR 178.

<sup>152</sup> *ibid.*, at 185.

<sup>153</sup> *ibid.*, at 188 *per* Lord Bingham.

rules generated by the operation of precedent which can then be followed in later, *similar* cases. According to Alexy's model, once two principles have been factually<sup>154</sup> and legally optimised in a particular set of facts, then a fact-specific rule arises. Later cases with the same facts will follow this. Later cases where the facts are considerably different will not. The rejection by the House of a prescriptive rule on delay can be accommodated within this, because of the House's recognition of delay as an important factor. The dominance of the initial *Shala* decision in the later cases on delay shows how this process works and the way in which it links together successive proportionality decisions. Where a court is undertaking a proportionality analysis and there is a previous case, with similar facts, then the court will take account of the analysis in that previous case.

#### 4.4: CONCLUSION

In this chapter I have shown the operation of the structural model of proportionality and deference in the specific institutional setting of immigration decisions under the HRA. The courts have been engaged in an exercise of identifying Convention principles and public interest principles and then balancing them against each other. The main principles to be balanced in immigration cases have recurred repeatedly. The human rights principles are predominantly based on Article 8 of the Convention and the public interest principles are predominantly derived from Article 8(2).

There has been little scope for factual optimisation in these cases, notwithstanding the fact that this element was expressly confirmed by the House of Lords in *Huang*. As I have shown, immigration officials are almost always faced with a binary choice, and so

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<sup>154</sup> Although as I have shown, there tends to be very little cause for factual optimisation in immigration cases because of the institutional setting.

there is no meaningful range of measures available to them. As such, the question on minimal impairment does not arise in a meaningful way. This in turn reduces the need for structural deference.

Proportionality analysis in HRA immigration decisions has been dominated by legal optimisation. Throughout the case law, the key issue has been whether the court was satisfied that a proportionate overall balance was struck between the Convention right principle and the public interest principle at stake. This has involved empirical epistemic deference where there has been uncertainty as to the measurement of specific facts. There was for some time also a use of normative epistemic deference, which was afforded to the primary decision-maker's findings as to the balance struck. However this was ultimately rejected in *Huang* and there are good institutional grounds for doing so. Normative epistemic deference is linked to democratic legitimacy, which is not something which immigration officials can lay much claim to. Deference to these decision-makers is more properly of the empirical epistemic kind, which is based on their institutional competence.

I have also shown how certain factors, in particular delay, have recurred in this balancing exercise. This is indicative of the manner in which proportionality adjudication builds up a body of fact-specific rules.

In cases such as *Samaroo* and *Razgar* the courts intimated that minimal impairment is in fact connected to the policy underlying the immigration decision and not the specific decision itself. This is an indication of 'multi-level decision-making'.<sup>155</sup> While the courts have expressly accepted the possibility of striking down the underlying policy<sup>156</sup> challenges to the policy have been rare. It is perhaps understandable that, to date, applicants have chosen to challenge the decision rather than the rule, as it is an easier

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<sup>155</sup> See Chapter 3.3.

<sup>156</sup> See *R (Acan) v Immigration Appeal Tribunal* [2004] EWHC 297 (Admin), at paragraph 91 *per* Gibbs J.

target and much more fully within the administrative law tradition in the UK. It is therefore clear that immigration decisions involve the interaction of two forms of governmental activity at two separate levels, only one of which has been challenged in the bulk of immigration decisions. Again this reinforces the crucial role that institutional factors play in the operation of proportionality analysis.

Decisions involving proportionality challenges to multiple levels of decision-making simultaneously will be considered in Chapter 6. Prior to that, in the next chapter, I will move to the opposite end of the institutional spectrum and test the structural, institutionally sensitive model of proportionality and deference in rule-making decisions.

## *Chapter 5: Case Study Two: Proportionality and Rule-making – Criminal Justice*

In this chapter I will explore the structure of proportionality and deference in cases where the courts are reviewing the compatibility of government rule-making decisions with the European Convention on Human Rights ('the Convention'). In this chapter I am again concerned with showing that a structural, institutionally sensitive model of proportionality and deference can be shown to operate in the existing case law under the Human Rights Act 1998 ('the HRA').

The structural model of proportionality and deference describes proportionality in terms of the factual and legal optimisation of principles. Deference is classified as normative or epistemic and these two forms of deference are integrated into the structure of the proportionality test itself. In Chapter 3.2, I identified three specific areas of difference between institutions that would affect the operation of proportionality and deference: choice of objectives, range of measures and scope of the decision. In Chapter 4, I examined the case law at one extreme of these three scales. In this chapter I will look at cases at the other extreme. There have been a number of significant criminal justice cases which have dealt with the proportionality of rules, as opposed to one-off decisions and it is these rule-making cases that I wish to focus on here. I have defined criminal



justice broadly to include prisons and anti-terrorism laws as well as more mainstream substantive criminal law.

The first area of difference identified in Chapter 3.2 was the choice of objectives. Rule-makers will have a wider choice of objectives available to them than immigration officials. These objectives will need to satisfy the first limb of the UK proportionality test, in that they must be ‘sufficiently important to justify limiting a fundamental right’.<sup>1</sup> In choosing which objectives to pursue, the rule-maker may be afforded structural deference concerning policy choice.

The second area of difference discussed in Chapter 3.2 was the range of measures available to pursue a public interest objective. Most of the time, immigration officials effectively have no choice of measures. However, rule-makers will often have a substantial range of measures open to them. This indicates that factual optimisation will have a much greater role in these decisions than it had in the decisions discussed in Chapter 4. Where there are two or more ways of achieving a particular public interest objective, then the issue of which one impairs the affected human right to the least extent will become central to the proportionality analysis. Related to this stage of the proportionality test is structural deference, which affords a decision-maker a choice between equally rights-intrusive options. Once factual optimisation is being applied, this form of deference has the potential to arise. As was discussed in Chapter 2, empirical epistemic deference may also arise in relation to factual optimisation, because it may not always be possible to measure precisely the extent to which a challenged measure achieves the public interest or impairs a human right.

The third area of difference identified in Chapter 3.2 was the scope of the decision. Rules by their nature are forward looking and apply generally across a group. The group

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<sup>1</sup> *de Freitas v Minister for Agriculture and Fisheries* [1999] 1 AC 69, at 80 *per* Lord Clyde. Cited with approval in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 and *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45.

may vary in size: an Act of Parliament can apply to the entire state, whereas a rule in a prison will only apply to that specific prison population. In either instance, the breadth of the decision will be wider than was the case with immigration decisions. This will make measurement of the impact on the protected right and the achievement of the public interest more difficult, which in turn increases the likelihood that empirical epistemic deference will come into play.

It is important to note that these three areas of difference give rise to points on a scale and the closer to one end of a scale of difference a decision is, the greater the level of emphasis on certain aspects of proportionality and deference. As with Chapter 4, I am seeking to establish that certain elements of proportionality and deference are emphasised and others are minimised depending on where the challenged governmental activity falls along those three scales. I am not seeking to show that there is one proportionality test for rule-making and another for administrative decisions. Rather, I am seeking to elaborate on the way in which the institutional setting of a proportionality challenge will affect the operation of the multi-stage test, which is of universal application across the various fields of governmental activity.

As I noted in Chapter 3.1, I am intentionally focusing on cases at opposite ends of these scales, but I am conscious that there are many forms of government activity which fall at mid-points on the three scales. The smaller distinctions between mid-points are doubtless important for the structural model; however in this thesis I will be focusing to a large extent on the end points. The starker contrast between the farthest examples will enable a fuller examination of the parameters of institutional sensitivity.

In Chapter 3.4 I identified the two main institutional reasons for affording deference to a decision-maker: democratic legitimacy and institutional competence. The former is a reason for affording structural deference and normative epistemic deference and the latter is a reason for affording empirical epistemic deference. In rule-making cases,

there is likely to be much more scope for democratic legitimacy as a reason for deference. Many rule-making bodies enjoy substantial democratic legitimacy, most obviously Parliament itself. This reason for deference was present to a very limited extent in Chapter 4, but it is of far more weight in rule-making cases. Institutional competence is also likely to be of significance as a reason for deference in this chapter.

A further institutional factor was identified in Chapter 3 which is very specific to primary legislation: the interaction between sections 3 and 4 of the HRA. Section 3 has the potential to cut short a proportionality analysis by ending the analysis at the point of factual optimisation. Admittedly, where a measure is deemed to fail the factual optimisation stage, there may be little reason for continuing with the analysis, since the measure is disproportionate. However, even allowing for this, section 3 permits the courts to substitute their own, less rights-restrictive, rule in place of the challenged rule. This denies Parliament the opportunity to choose its own less rights-restrictive substitute rule, which would be possible if section 4 was used. As such, section 3 eliminates the possibility of structural deference within the proportionality test.

I have defined criminal justice broadly, to include terrorism and prisons in addition to the mainstream body of criminal law. Although most of the cases in this chapter are concerned with primary legislation, I have included some which involved non-parliamentary rule-making. Some of these cases also have a multi-level decision-making aspect to them although this is not commonly explored in these cases. Multi-level decisions are discussed more fully in Chapter 6.

This chapter is divided into four substantive sections, the first three of which are along the same lines as the three sections in Chapter 4. In the first section I will show how the UK courts have gone about identifying the principles to be balanced in proportionality cases dealing with criminal justice. In the second section I will move on to examine the operation of the factual optimisation arm of the proportionality test and the manner in

which structural and epistemic deference fit into this stage. I will also examine the operation of section 3 of the HRA in this second section. In the third section I will examine the operation of legal optimisation and the issues of epistemic deference which arise at that stage of the test. In the fourth section, I will show how the UK Courts have explained the institutional reasons for deference in a manner which is in line with my analysis in Chapter 3.4.

### **5.1: THE IDENTIFICATION OF PRINCIPLES**

As was discussed in previous chapters, the proportionality test is fundamentally concerned with the balancing of conflicting principles, one a human rights principle and the other a public interest principle. The principled nature of human rights adjudication is well summed up by Simon Brown LJ in *International Transport Roth GmbH v Secretary of State for the Home Department*, when he noted that ‘[a]ll that the Convention really provides are the central principles and touchstones by which such a judgment can be made.’<sup>2</sup> This candid admission of the sometimes ephemeral nature of adjudication under the HRA is both an indication of its core elements and a spur to develop a deeper understanding of the structure of that adjudication. If there is nothing concrete to dictate the outcome of cases, then the process by which cases are reasoned becomes all the more important.

In order for the test to work, the precise principles being balanced must be explicit. The source of such principles in the UK is the Convention, but the exact principle being applied may not necessarily be stated in the text of the convention. As will be shown below, the UK courts often look to derivative principles from within the Convention

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<sup>2</sup> [2002] EWCA Civ 158; [2003] QB 728, at 754.

rights. In doing so, guidance is often sought from decisions of the European Court of Human Rights ('the ECHR'). The public interest principle being pursued also needs to be made explicit prior to the balancing analysis. In this section I will show the principles that the UK courts have identified in criminal justice proportionality cases.

### *5.1.1: Human rights principles*

The two most obviously relevant provisions of the Convention in these cases are Articles 5 & 6, which deal with the right to liberty and fair trial respectively. However, other provisions have been applied too.

#### *Liberty*

Article 5 of the Convention guarantees the right to liberty and security of the person. One of the most forthright considerations of the meaning of this right is to be found in the decision of the House of Lords in *A&X v Secretary of State for the Home Department*.<sup>3</sup> The case concerned the detention without trial of non-UK nationals whom the Home Secretary suspected of involvement in terrorism. In considering the nature and scope of the right to liberty, the House made explicit reference to ECHR jurisprudence, notably *Chahal v UK*.<sup>4</sup> The case was primarily concerned with whether the derogation to Article 5 was Convention-compatible and the House was clear that compatibility depended on balancing Article 5 with the public interest.

#### *Fair trial*

In a number of cases, including *R v Lambert*,<sup>5</sup> *International Transport Roth GmbH v Secretary of State for the Home Department*<sup>6</sup> and *Brown v Stott*<sup>7</sup> the courts have found

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<sup>3</sup> [2004] UKHL 56; [2005] 2 AC 68.

<sup>4</sup> (1997) 23 EHRR 413.

<sup>5</sup> [2001] UKHL 37; [2002] 2 AC 545.

<sup>6</sup> [2002] EWCA Civ 158; [2003] QB 728.

<sup>7</sup> [2003] 1 AC 681.

that the requirement that a trial be fair was absolute. On the face of it this would suggest that the right to fair trial is a rule rather than a principle. However, the contents of the right are not cut and dried. In *Brown v Stott*, Lord Bingham noted that ‘what a fair trial requires cannot, however, be the subject of a single, unvarying rule or collection of rules.’<sup>8</sup> *Salabiaku v France*<sup>9</sup> makes it clear that provisions which allow for the shifting of either the legal or evidential burden of proof to the accused can be Convention-compatible. *Salabiaku* was cited by the House of Lords in *R v Director of Public Prosecutions ex parte Kebilene*<sup>10</sup> in which Lord Hope noted that:

‘The cases show that, although article 6(2) is in absolute terms, it is not regarded as imposing an absolute prohibition on reverse onus clauses, whether they be evidential (presumptions of fact) or persuasive (presumptions of law). In each case the question will be whether the presumption is within reasonable limits.’<sup>11</sup>

Lord Hope then proceeded to cite numerous international examples of proportionality cases and engaged in a proportionality analysis of the challenged measure. As such, the fair trial protections in Article 6 can operate as principles for the purposes of the structural model of proportionality and deference.

An example of a sub-principle that can be derived from Article 6 is the right of access to a court. However, as was recognised by the ECHR in cases such as *Golder v United Kingdom*<sup>12</sup> and *Ashingdane v United Kingdom*<sup>13</sup> the right of access to the courts can be qualified. This reasoning was expressly endorsed by Lord Bingham in *Brown v Stott*<sup>14</sup> who held that equality of arms and the privilege against self incrimination are also sub-

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<sup>8</sup> [2003] 1 AC 681, at 693.

<sup>9</sup> (1991) 13 EHRR 379.

<sup>10</sup> [2000] 2 AC 326.

<sup>11</sup> *ibid*, at 385.

<sup>12</sup> (1979-80) 1 EHRR 524.

<sup>13</sup> (1985) 7 EHRR 528.

<sup>14</sup> [2003] 1 AC 681.

principles derived from Article 6. He cited ECHR jurisprudence in support of these principles. He held that:

‘The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for.’<sup>15</sup>

He went on to note that:

‘The court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention’.<sup>16</sup>

The central thrust of these cases is that the fairness of the trial must not be compromised. In establishing the fairness or otherwise, the court can look at the sub-principles, which may be limited proportionately, provided the overall fairness remains. The dicta of Lord Bingham show that both factual and legal optimisation are important in assessing the effect of Article 6.

#### *Presumption of innocence*

Article 6(2) expressly states that ‘everyone charged with a criminal offence shall be presumed innocent until proved guilty’. This has been the basis of numerous proportionality cases. For example in *R v Director of Public Prosecutions ex parte*

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<sup>15</sup> [2003] 1 AC 681, at 704.

<sup>16</sup> *ibid*, at 704.

*Kebilene*<sup>17</sup> Lord Hope expressly recognised this fundamental principle and cited a long line of domestic UK case law which upheld the principle even prior to the introduction of the HRA. The *Kebilene* decision concerned a reverse burden of proof clause: section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989. Lord Hope specifically noted that under the HRA, parliament would also be restricted by this principle in a way that it had not been previously, indicating the strength with which the principle now applies.<sup>18</sup>

The later case of *R v Lambert*<sup>19</sup> also dealt with a reverse burden of proof clause, this time in section 28 of the Misuse of Drugs Act 1971. Again, Lord Hope placed emphasis on the importance of the principle of the presumption of innocence. He was very clear that the presumption was a principle and not a rule. He cited the ECHR decisions in the cases of *Salabiaku v France*<sup>20</sup> and *Ashingdane v United Kingdom*<sup>21</sup> and he noted that in those cases the ECHR had expressly held that the principle of the presumption of innocence could legitimately be limited in the public interest provided it met a proportionality test.

In *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)*<sup>22</sup> the House also relied on Article 6(2) as the relevant human rights principle. Again the decision of *Salabiaku* was an important element in the House's reasoning on the scope of that principle.

#### *Private communication with Legal Representatives*

In *R (Daly) v Secretary of State for the Home Department*,<sup>23</sup> the House of Lords accepted a HRA challenge from a prisoner whose letters from his solicitor were being

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<sup>17</sup> [2000] 2 AC 326.

<sup>18</sup> *ibid*, at 377 *per* Lord Hope.

<sup>19</sup> [2001] UKHL 37; [2002] 2 AC 545.

<sup>20</sup> (1991) 13 EHRR 379.

<sup>21</sup> (1985) 7 EHRR 528.

<sup>22</sup> [2004] UKHL 43; [2005] 1 AC 264.

<sup>23</sup> [2001] UKHL 26; [2001] 2 AC 532.



examined, but not read, in his absence by prison staff as part of the standard cell searching policy. The Article 8 right to respect for correspondence was deemed to give rise to the principle that legal correspondence should not be read by others.

### *Private life*

In a series of cases concerning the notification requirements for people convicted of sexual offences, the Courts have accepted that such notification was an interference with the Article 8 right to respect for private and family life. Examples of these cases include *R (F) v Secretary of State for the Home Department*,<sup>24</sup> *A v Scottish Ministers*,<sup>25</sup> *Forbes v Secretary of State for the Home Department*<sup>26</sup> and *Gallagher, Re an Application for Judicial Review*.<sup>27</sup> In each of these cases the courts referred to the decision of the ECHR in *Adamson v United Kingdom*<sup>28</sup> in which the Convention compatibility of the notification requirements was unsuccessfully raised.

### *Freedom of Expression*

In *Hirst v Secretary of State for the Home Department*<sup>29</sup> a prisoner who was the spokesperson for a body representing prisoners throughout the country wished to be interviewed on radio regarding issues relating to prisoners. In considering the nature of the rights principle at stake, the High Court made explicit reference to the decision of the ECHR in the case of *Golder v United Kingdom*.<sup>30</sup> In each of these cases the courts recognised that the Article 10 principle of freedom of expression applied.

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<sup>24</sup> [2008] EWHC 3170; [2009] 2 Cr App R (s) 325; and [2009] EWCA Civ 792.

<sup>25</sup> [2007] CSOH 189; [2008] SLT 412.

<sup>26</sup> [2006] EWCA Civ 962; [2006] 1 WLR 3075.

<sup>27</sup> [2003] NIQB 26.

<sup>28</sup> (1999) 28 EHRR 209 CD.

<sup>29</sup> [2002] EWHC 602 (Admin).

<sup>30</sup> (1979-80) 1 EHRR 524.

## *Property*

*International Transport Roth GmbH v Secretary of State for the Home Department*<sup>31</sup>

concerned a scheme whereby property could be seized if it had been involved in illegal immigration, most notably trucks and other vehicles. The Court of Appeal recognised that Article 1 of the First Protocol to the Convention guaranteed the right to private property and that this principle would have to be considered in relation to criminal penalties.

### *5.1.2: Public interest principles*

Certain public interests are of sufficient importance to qualify as principles, which can be balanced against human rights principles. The identification of such principles is an important preliminary issue for the proportionality test. As was discussed in Chapters 2.2 and 4.1.2, the structural model does not provide a mechanism for determining which public interest goals will qualify as principles. This is a normative question and the structural model seeks to provide a framework within which normative debate on this issue can be accommodated.

There is no comprehensive legal test for determining this issue in the UK, and so the courts have been guided by the requirements of the first stage of the proportionality test and the text of the Convention (as interpreted by ECHR jurisprudence). The first stage of the UK proportionality test is unequivocal that the objective of the challenged measure must be ‘sufficiently important’ to justify limiting a fundamental right’.<sup>32</sup> This is usually known as the ‘legitimate objective’ stage of the test. This stage requires a reviewing court to consider whether a public interest goal qualifies as a principle, but its

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<sup>31</sup> [2002] EWCA Civ 158; [2003] QB 728.

<sup>32</sup> *de Freitas v Minister for Agriculture and Fisheries* [1999] 1 AC 69, at 80 *per* Lord Clyde. Cited with approval in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 and *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45.

formulation gives little methodological assistance to the court beyond posing the initial question.

In the case study on immigration, it was evident that the courts were guided by Article 8(2) when seeking to determine whether an objective was legitimate. With Articles 8-11 and Article 1 of the First Protocol, the courts have an explicit provision in the text to assist them in determining whether or not an objective is legitimate. Some of the cases in this chapter involve the right to fair trial and the presumption of innocence, both of which are guaranteed by Article 6 of the Convention. There is no express limitation clause for Article 6, although both the UK Courts<sup>33</sup> and the ECHR<sup>34</sup> have repeatedly confirmed that Article 6 may be subject to proportionality analysis in order to determine the precise parameters of the rights contained in it. The text of Article 6 does not give any list of the public interests which will be accepted as legitimate aims for any such proportionality analysis. However, the UK courts have been guided by ECHR case law in determining whether certain public interests are of sufficient weight to form the basis of a proportionate limitation of Article 6 rights. As I will show in this section, the public interest principles that have been recognised by the courts are very much in line with the principles covered in those Articles that do have limitation clauses.

The decision-makers in the cases considered in this chapter have much more freedom in choosing which public interest they wish to pursue than was the case in the previous chapter. This means that there may be a reason for affording some structural deference to the choice of objective, since there may be multiple legitimate objectives available.

### *Prevention of terrorism*

In *R v Director of Public Prosecutions ex parte Kebilene* Lord Hope based his analysis of the limitation of Article 6 on the prevention of terrorism. He cited ECHR

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<sup>33</sup> See for example *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45, at 65 *per* Lord Steyn; and *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545, at 588 *per* Lord Hope.

<sup>34</sup> See *Salabiaku v France* (1991) 13 EHRR 379; and *Ashingdane v United Kingdom* (1985) 7 EHRR 528.

jurisprudence on reverse burdens of proof<sup>35</sup> and accepted that Article 6 could be limited such that there was a 'fair balance' between 'the demands of the general interest of the community and the protection of the fundamental rights of the individual.'<sup>36</sup> He found in this case that the legitimate objective is the 'strong interest in preventing acts of terrorism before they are perpetrated'.<sup>37</sup> The limitation clauses of the other Articles repeatedly refer to national security and the protection of the rights of others. While Lord Hope did not make any express reference to either of these, it can easily be argued that the aim pursued in this case fits into the general rubric of the limitation of Convention rights; the prevention of terrorism does not seem a particularly controversial choice as a legitimate aim.

In the more recent case of *A&X v Secretary of State for the Home Department*<sup>38</sup> a majority of the House of Lords was prepared to accept that there was an ongoing risk of a terrorist attack on the UK and that this gave rise to a principle that the state could limit rights for the prevention of terrorism. The case concerned a derogation to Article 5 of the convention which had to be justified on the basis of Article 15.<sup>39</sup> The public interest principle was expressly stated in Article 15, the text of which requires there to be a 'public emergency threatening the life of the nation' in order for a derogation to be permitted. The majority of the House of Lords were prepared to accept the view of the Home Secretary on this point. Lord Bingham cited ECHR jurisprudence to the effect that widespread loss of life need not have occurred for a public emergency to exist.<sup>40</sup> He also expressed the view that 'great weight should be given to the judgment of the Home

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<sup>35</sup> *Salabiaku v France* (1991) 13 EHRR 379; *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35.

<sup>36</sup> [2000] 2 AC 326, at 384.

<sup>37</sup> *ibid*, at 387 *per* Lord Hope.

<sup>38</sup> [2004] UKHL 56; [2005] 2 AC 68.

<sup>39</sup> Article 15 requires a proportionality test to be applied in order to determine if the derogation is justified. See Dijk, P. van and Hoof, G.J.H. van *Theory and Practice of the European Convention on Human Rights* (4<sup>th</sup> ed., Oxford: Intersentia, 2006) at 1062-1064.

<sup>40</sup> *Lawless v Ireland (No 3)* (1979-80) 1 EHRR 15.

Secretary<sup>41</sup> on the issue of whether such an emergency existed. This is an example of empirical epistemic deference. Lord Bingham knew that it is not possible precisely to measure the threat and so he deferred to the Home Secretary who is more institutionally competent to make the assessment.

*Control of the possession of drugs*

*R v Lambert*<sup>42</sup> concerned a reverse burden provision in the misuse of drugs legislation. As with *Kebilene*, the case concerned Article 6, and so the text of the Convention did not provide specific guidance on what was a legitimate aim. Lord Hope referred to the ECHR *Salabiaku* case<sup>43</sup> and noted that the ‘statutory objective is to penalise the unauthorised possession of dangerous or otherwise harmful drugs’.<sup>44</sup> This objective seemed to pass muster with the House of Lords. It could be closely associated with public goals which are contained in other provisions of the Convention, such as the protection of public health and the protection of the rights of others.

*Prevention of drunk driving*

In two important proportionality decisions, *Brown v Stott*<sup>45</sup> and *Sheldrake v Director of Public Prosecutions; Attorney General’s Reference (No 4 of 2002)*<sup>46</sup> it has been held that it is legitimate for the state to pursue the aim of preventing drunk driving. Both cases involved reverse burden provisions, and so were limitations of Article 6. In *Brown v Stott*<sup>47</sup> Lord Steyn held that the challenged provision addressed the legitimate objective of trying to tackle the high rate of road traffic accidents resulting in death and serious injuries. He held that the Home Secretary was ‘entitled to take into account that it was necessary to protect other Convention rights, viz the right to life of members of

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<sup>41</sup> [2004] UKHL 56; [2005] 2 AC 68, AT 102.

<sup>42</sup> [2001] UKHL 37; [2002] 2 AC 545.

<sup>43</sup> *Salabiaku v France* (1991) 13 EHRR 379.

<sup>44</sup> [2001] UKHL 37; [2002] 2 AC 545, at 588.

<sup>45</sup> [2003] 1 AC 681.

<sup>46</sup> [2004] UKHL 43; [2005] 1 AC 264.

<sup>47</sup> [2003] 1 AC 681.

the public exposed to the danger of accidents: see article 2(1).<sup>48</sup> The legitimacy of the aim in this case is therefore derived from the protection of the rights of others. Lord Steyn also examined the level of deference to be afforded to Parliament in setting its legislative objectives. He held that ‘the legislature was in as good a position as a court to assess the gravity of the problem and the public interest in addressing it.’<sup>49</sup> This is evidence of end-setting structural deference at the legitimate objective stage of proportionality.

*Protection of complainants in rape cases*

In *R v A (No 2)*<sup>50</sup> the House of Lords considered the operation of the so called ‘rape shield’ law contained in section 41 of the Youth Justice and Criminal Evidence Act 1999. The Act had been explicitly targeted at the need to protect complainants in sexual offences cases from being questioned on their prior sexual conduct. Lord Steyn noted that this measure was designed to combat the ‘twin myths’ that unchaste women are more likely to consent and are less credible.<sup>51</sup> As with the other fair trial cases, the text of the Convention does not provide express guidance on what is a legitimate aim for the purposes of Article 6. Lord Steyn made reference to the infliction of ‘unacceptable humiliation on complainants in rape cases’<sup>52</sup> and Lord Hope commented that enforcement of the law would be impaired if the system did ‘not protect the essential witnesses from unnecessary humiliation or distress’<sup>53</sup> These comments indicate that the prevention of crime (through encouraging reporting of rape) and the protection of the Article 8 privacy rights of witnesses were the basis for accepting the legitimate aim. As with many of the other Article 6 cases, there is no clear reference to either of these

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<sup>48</sup> [2003] 1 AC 681, at 711.

<sup>49</sup> *ibid*, at 711.

<sup>50</sup> [2001] UKHL 25; [2002] 1 AC 45.

<sup>51</sup> *ibid*, at 59.

<sup>52</sup> *ibid*, at 59.

<sup>53</sup> *ibid*, at 82.

points, but the aim can nonetheless be justified on these grounds and such grounds are implicit in the reasoning of the House.

*Prevention of illegal immigration*

In *International Transport Roth GmbH v Secretary of State for the Home Department*<sup>54</sup>

Simon Brown LJ accepted that the prevention of illegal immigration was a legitimate aim. He noted that: ‘[t]he increasing scale of illegal entry into the United Kingdom over recent years is well known. It is acknowledged by all to represent a grave social evil.’<sup>55</sup>

As was made clear in the preceding chapter, the control of immigration has often been cited as a public interest principle in proportionality cases under the HRA. What is significant about the *Roth* case is that it was applied in a proportionality case concerning Article 6, (which contains no specific limitation clause) and Article 1 of the First Protocol (which permits limitation of the right to property in the ‘general interest’).

*Maintenance of prison order and discipline*

There have been a number of cases dealing with human rights claims by prisoners which relate to their conditions. For example the leading case of *R (Daly) v Secretary of State for the Home Department*<sup>56</sup> concerned the need to search prisoners’ cells. The applicant accepted that the challenged measure was ‘for the purpose of security, preventing crime and maintaining order and discipline’.<sup>57</sup> Since the applicant had accepted the legitimacy of the aim, there was little reason to examine it in detail. However, it is worth noting that Article 8(2) expressly allows for the limitation of the right to respect for correspondence in the interests of preventing disorder or crime. As such, the legitimacy of this aim can easily be accommodated within the text of the Convention.

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<sup>54</sup> [2002] EWCA Civ 158; [2003] QB 728.

<sup>55</sup> *ibid*, at 737.

<sup>56</sup> [2001] UKHL 26; [2001] 2 AC 532.

<sup>57</sup> *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at 541.

*Hirst v Secretary of State for the Home Department*<sup>58</sup> concerned restrictions on the freedom of expression of prisoners. The claimant wished to be the subject of a radio station interview via the telephone. The Home Secretary defended the blanket ban on such contact with the media on the basis that it would be too difficult to monitor and regulate such an interview. The Home Secretary sought to justify this restriction on prisoners' right to freedom of expression under Article 10 on the grounds that it was necessary for the prevention of crime and disorder and the protection of information given in confidence. Both of these objectives are expressly recognised in Article 10(2) and Elias J accepted that the aim was legitimate.

#### *Prevention of sex crime*

As was noted above, there have been a number of cases<sup>59</sup> concerning the laws relating to the so-called 'sex offenders register' which is currently governed by the notification requirements in Part 2 of the Sexual Offences Act 2003. In each of these cases the courts referred to the decision of the ECHR in *Adamson v United Kingdom*.<sup>60</sup> In *Adamson* the ECHR was satisfied that notification requirements were in pursuit of the prevention of crime and the protection of the rights and freedoms of others, which are two of the specific aims listed in Article 8(2) of the Convention.<sup>61</sup> It has been emphasised by the UK courts that this aim is *prevention* of further offending, rather than punishment for past offences.<sup>62</sup>

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<sup>58</sup> [2002] EWHC 602 (Admin).

<sup>59</sup> *Gallagher, Re an Application for Judicial Review* [2003] NIQB 26. *Forbes v Secretary of State for the Home Department* [2006] EWCA Civ 962; [2006] 1 WLR 3075. *A v Scottish Ministers* [2007] CSOH 189; [2008] SLT 412. *R (F) v Secretary of State for the Home Department* [2008] EWHC 3170; [2009] 2 Cr App R (s) 325; and [2009] EWCA Civ 792.

<sup>60</sup> (1999) 28 EHRR 209 CD.

<sup>61</sup> See *Adamson v United Kingdom* (1999) 28 EHRR 209 CD.

<sup>62</sup> See *Gallagher, Re an Application for Judicial Review* [2003] NIQB 26. *Forbes v Secretary of State for the Home Department* [2006] EWCA Civ 962, at paragraph 16.



### 5.1.3: Rational connection

The issue of rational connection has been addressed occasionally by the UK Courts. As was noted in Chapter 4.1.3, this issue has sometimes been conflated with consideration of legal optimisation in immigration decisions. This has also occurred with criminal justice decisions. For example, in *A&X v Secretary of State for the Home Department*<sup>63</sup> Lord Bingham expressed concern about the efficacy of the challenged measure. Section 23 of the Anti-Terrorism Crime and Security Act allowed for the indefinite detention, without trial, of foreign nationals suspected of involvement in international terrorism but permitted them to leave the country in order to end their detention. Lord Bingham pointed out that in many cases, the option of deportation would permit suspects to go abroad and carry out their terrorist activities there. His analysis of this point is very closely wrapped up in his consideration of factual optimisation (see below) and it is not entirely clear on which point the case was decided. Similarly, the judgment of Lord Hope contains a detailed consideration of whether the measure was ‘strictly necessary’ which concludes by stating that there was no rational connection. Again it is very difficult to assess which arm of proportionality the challenged law failed on. It is nonetheless worthwhile to note that issues of rational connection have been addressed in these cases.

## 5.2: CHOICE OF LEAST INTRUSIVE MEANS: FACTUAL OPTIMISATION

Factual optimisation has been a key element of many criminal justice proportionality cases in a way that sets them apart from the immigration decisions considered in the preceding chapter. Factual optimisation requires a court to address whether the means

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<sup>63</sup> [2004] UKHL 56; [2005] 2 AC 68.

chosen to pursue the public interest principle have impaired the human rights principle as little as possible. As I explained in Chapter 3.2.1, this part of the proportionality test will be greatly affected by the range of measures available to the rule-maker. At the level of parliament, the range of measures is very wide, at the lower levels of decision-making, the options may be much narrower, as with a policy in a prison. In either case, rule-makers will have more choice of measure than is available to immigration officials, and so, as I will show in this section, factual optimisation has much more scope to operate in such cases. In addition to establishing the use of factual optimisation in the UK, this section will also show how the courts' reasoning on questions of deference in factual optimisation can be described in terms of structural and epistemic deference.

The earliest HRA proportionality case dealing with criminal justice legislation was *R v A (No 2)*.<sup>64</sup> The case involved a challenge to section 41 of the Youth Justice and Criminal Evidence Act 1999 ('the 1999 Act') which prevented the inclusion of a complainant's prior sexual conduct in sexual offence trials. Such evidence could only be admitted with leave of the court and even then, only where the prior sexual conduct took place as part of the same event, or was so similar to the event in question that it could not be a coincidence. The accused had had sex with the complainant at various points over the preceding few weeks, most recently a week before the alleged rape. The complainant had had sex with a friend of the accused earlier on the evening of the alleged rape. The House of Lords considered whether the provision intruded as little as possible onto the right of the accused to a fair trial under Article 6.

Lord Steyn applied the proportionality test used by the Privy Council in the *de Freitas* case. This test entails three parts: legitimate objective, rational connection and minimal impairment.

'In determining whether a limitation is arbitrary or excessive he

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<sup>64</sup> [2001] UKHL 25; [2002] 1 AC 45.

said that the court would ask itself:

“whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”

Their Lordships accept and adopt this threefold analysis of the relevant criteria.’<sup>65</sup>

The overall balancing requirement is notable by its absence (although it was alluded to in the judgment of Lord Hope). Lord Steyn stated that the minimal impairment arm of the test was the ‘critical matter’<sup>66</sup>. He went on to consider whether the provisions of the 1999 Act impaired the right to fair trial no more than was necessary to accomplish the objective. He found that the ordinary meaning of the words in the 1999 Act were such that they could not permit the admission of the evidence that the accused and the complainant had been in a sexual relationship previously. Lord Steyn was of the view that in some cases, the blanket ban on all such questioning could be incompatible with the right to fair trial in that it would exclude evidence that was ‘logically relevant’ to the issue of consent. For Lord Steyn, this would be going too far. His finding is clearly an example of factual optimisation insofar as he is trying to find the most rights-compatible meaning that is factually possible.

Lord Steyn held that the interpretative obligation in section 3 of the HRA should be used to ‘read down’ section 41 of the 1999 Act so that a trial judge should not exclude evidence where to do so would be incompatible with Article 6. He held that such an

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<sup>65</sup> *de Freitas v Minister for Agriculture and Fisheries* [1999] 1 AC 69, at 80 *per* Lord Clyde; cited with approval at [2001] UKHL 25; [2002] 1 AC 45, at 65, *per* Lord Steyn.

<sup>66</sup> [2001] UKHL 25; [2002] 1 AC 45, at 65.

interpretation would ensure that section 41 ‘achieved a major part of its objective but its excessive reach will have been attenuated’.<sup>67</sup> In doing this, Lord Steyn found an alternative, less rights-restrictive measure which still protected the public interest principle at stake.<sup>68</sup>

In *R (Daly) v Secretary of State for the Home Department*<sup>69</sup> the House of Lords considered a challenge to a provision in the prison rules, which permitted the searching of cells in the absence of the prisoner. As part of these searches, correspondence – including correspondence with legal representatives – would be inspected but not read by prison staff. The House found that this went further than was necessary to achieve the aim of preventing the prisoners from being sent anything that might endanger prison security or be used to commit a crime within the prison. The main thrust of the decision was set out in the judgment of Lord Bingham (who concerned himself primarily with common law rights), although it was the speech of Lord Steyn that contained a detailed exposition of the nature and scope of proportionality. Nonetheless, Lord Bingham’s speech did involve factual optimisation, albeit in relation to common law rights rather than Convention rights. He considered the blanket nature of the ban and whether it was more rights-intrusive than was necessary to achieve its aim. He held that:

‘The policy cannot in my opinion be justified in its present blanket form. The infringement of prisoners’ rights to maintain the confidentiality of their privileged legal correspondence is greater than is shown to be necessary to serve the legitimate public objectives already identified.’<sup>70</sup>

Lord Bingham bolstered his finding with a discussion of a number of other mechanisms which could be used but which would be less rights-intrusive. While he found that it

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<sup>67</sup> [2001] UKHL 25; [2002] 1 AC 45, at 68.

<sup>68</sup> Lord Hope expressly concurred with Lord Steyn’s direction to trial judges. See [2001] UKHL 25; [2002] 1 AC 45, at 69 *per* Lord Steyn; and at 87-88 *per* Lord Hope.

<sup>69</sup> [2001] UKHL 26; [2001] 2 AC 532.

<sup>70</sup> *ibid*, at 543.

would be inappropriate for the House to formulate a specific rule to replace the one challenged, he clearly gave examples of rules that would be acceptable. This is again an indication not only of the operation of factual optimisation in the UK case law. It also shows that in order for factual optimisation to operate, there must be a range of measures available which are capable of achieving the public interest principle. It is also of significance that the House declared the incompatible sections of the Prison Security Manual to be void. This would not have been possible with primary legislation, but it shows the capability of the courts to quash rules at other levels without the need to send them back to the original rule-maker for revision.

Having shown the operation of factual optimisation in these two leading examples, I will now move on to show how factual optimisation has operated in other criminal justice cases. In doing so, I will also address the manner in which factual optimisation interacted with the different forms of deference.

### *5.2.1: Factual optimisation and structural deference*

As was discussed in Chapter 2.4.1, structural deference can arise in factual optimisation where a primary decision-maker has a choice of measures available to achieve the public interest. If there are multiple measures available, each of which have the same impact on the protected human right, then the courts will defer to the decision-maker's choice of measure. This relationship between factual optimisation and structural deference can be seen in the criminal justice case law.

In *Brown v Stott*<sup>71</sup> Lord Steyn engaged in an assessment of the alternative means that were available to the legislature in its efforts to combat dangerous driving, the aim

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<sup>71</sup> [2003] 1 AC 681.

which the challenged measure pursued.<sup>72</sup> The measure at issue was section 172 of the Road Traffic Act 1988, which required a person keeping a vehicle to identify the driver when there is an allegation that the vehicle was involved in one of a specified list of offences, including driving under the influence of alcohol. In the instant case, this had given rise to the defendant giving information which could be used as evidence against her. Lord Steyn looked at two alternatives to the measure: Parliament could merely have called upon the police and the prosecuting authorities to ‘redouble their efforts’, however he accepted that such a policy could be regarded as inadequate. Alternatively Parliament could have introduced a reverse burden of proof on the owner of the vehicle to show that he or she was not the driver at the time the alleged offence was committed. On the basis of the earlier ECHR reverse burden cases, Lord Steyn took the view that a reverse burden clause would have been lawful in this instance. He also held that such a reverse burden clause and section 172 involved the same level of intrusion on Article 6, stating that: ‘[i]n their impact on the citizen the two techniques are not widely different.’<sup>73</sup> Set in this context, his acceptance of section 172 as Convention-compatible can be seen to be based on a factual optimisation of the principles at stake, since he concluded that the least rights-intrusive means of achieving the aim had in fact been used.

As regards deference, Lord Steyn concluded that it was for Parliament to choose between the equally rights-restrictive measures:

‘It really then boils down to the question whether in adopting the procedure enshrined in section 172(2), rather than a reverse burden technique, it took more drastic action than was justified. While this is

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<sup>72</sup> [2003] 1 AC 681, at 710.

<sup>73</sup> *ibid*, at 710.

ultimately a question for the court, it is not unreasonable to regard both techniques as permissible in the field of the driving of vehicles.’<sup>74</sup>

Lord Steyn is separating out two questions: the question of whether a measure is factually optimised – which is for the court to decide – and the question of which one of the range of factually optimised measures available should be deployed – which is for Parliament to decide. This shows structural deference within the factual optimisation stage of proportionality.

The petitioner in *A v Scottish Ministers*<sup>75</sup> was a 28-year-old man who had been convicted of two counts of attempted rape when he was 15. As a result of these convictions, he was subject to the notification requirements in the Sexual Offences Act 2003 (the ‘sex offenders register’) for the rest of his life. The petitioner had no means of reviewing their continuation. Lord Turnbull in the Court of Session gave detailed consideration to whether this was the least rights-intrusive means available for achieving the legitimate public interest aim. He paid particular attention to the effect that introducing a system of review would have and noted that ‘[i]t would have the disadvantage of uncertainty, it would be resource intensive and it would create the risk that the data base of information was incomplete.’<sup>76</sup> He ultimately took the view that the scheme as it stood had sufficient flexibility already and that it was not difficult for the petitioner to comply with the notification requirements. The reasoning is to some extent conflated with the analysis of legal optimisation, but it is clear that Lord Turnbull was satisfied that the minimal impairment criterion was satisfied.

Lord Turnbull also made explicit reference to the importance of permitting Parliament to choose between equally proportionate measures, stating that ‘[t]he question is whether the measures complained of fall within the umbrella of proportionality. If they

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<sup>74</sup> [2003] 1 AC 681, at 711.

<sup>75</sup> [2007] CSOH 189; [2008] SLT 412.

<sup>76</sup> *ibid.*, at 424.

do it is for Parliament to decide which of a range of measures to implement.’<sup>77</sup> This is a clear example of structural deference in factual optimisation. Lord Turnbull’s references to representative legislature and democratic government make it clear that his reason for affording deference is the democratic legitimacy of Parliament.

As was noted above, the House of Lords in *R v A (No 2)*<sup>78</sup> ‘read down’ section 41 of the Youth Justice and Criminal Evidence Act 1999 so that it would be Convention-compatible. In his analysis of section 3 of the HRA, Lord Steyn accepted that the ordinary meaning of the words in section 41 could not support a Convention-compatible reading, but went on to find that an interpretation that went beyond the ordinary meaning could be used if this would bring about a Convention-compatible result. He noted that the HRA required a broader version of statutory interpretation than had been used previously.<sup>79</sup> Conversely, Lord Hope was not prepared to read in a general provision, instead finding that if a trial judge felt that section 3 had to be applied in a particular case, then that might be appropriate, but he was not prepared to change the system as a whole, because the system as a whole could not be shown to be disproportionate. In reaching this conclusion, Lord Hope noted that ‘there is no single answer to the problem as to how best to serve the legitimate aim. There are choices to be made.’<sup>80</sup>

This difference between their Lordships can be understood as a dispute over the level of structural deference to be afforded to Parliament within factual optimisation. There is no structural deference when section 3 is used, because it inserts one specific measure in place of the challenged one (albeit an altered version of the original measure). This prevents Parliament from having any choice of measure at all, unless it devises a new scheme entirely. Admittedly, Lord Hope agreed with the model direction which Lord

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<sup>77</sup> [2007] CSOH 189; [2008] SLT 412, at 424.

<sup>78</sup> [2001] UKHL 25; [2002] 1 AC 45.

<sup>79</sup> *ibid*, at 68.

<sup>80</sup> *ibid*, at 85.



Steyn proposed should be given to trial judges. However, his analysis suggests that he would prefer to afford Parliament greater structural deference in factual optimisation.

A number of important proportionality decisions have dealt with reversals of the onus of proof in various statutory regimes. In 2000, the House of Lords considered the case of *R v Director of Public Prosecutions ex parte Kebilene*<sup>81</sup> which concerned section 16A of the Prevention of Terrorism (Temporary Provisions) 1989 Act. Section 16A set out a system whereby a person who had in their possession certain articles in circumstances which gave rise to a suspicion that it would be used for a terrorist purpose would be guilty of an offence. There was no requirement that the prosecution prove that it was in fact held for a terrorist purpose, but it was open to an accused person to prove that their purpose was innocent. There was also an assumption as regards possession, which again could be rebutted by the accused. Both the Court of Appeal and the House of Lords held that this mechanism not only placed an evidential burden on the accused person, but in fact reversed the legal burden of proof. The House declined to make a final ruling on the proportionality for jurisdictional reasons.<sup>82</sup> However, Lord Hope gave a detailed and considered analysis of whether this was the least intrusive means of achieving the aim sought. He considered the distinction between shifting the evidential burden and shifting the full persuasive burden and was clearly of the view that an evidential burden would be a less rights-intrusive means of pursuing the aim of the prevention of terrorism.<sup>83</sup>

Although no section 3 interpretation was made in the *Kebilene* case, Lord Steyn did describe section 3 as imposing a ‘strong interpretative obligation’,<sup>84</sup> suggesting that if a ruling had been procedurally possible in this case, the section would have been ‘read

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<sup>81</sup> [2000] 2 AC 326.

<sup>82</sup> This was for various procedural reasons including the circumstances under which the Director of Public Prosecutions can be judicially reviewed. There was also an issue related to whether or not the HRA applied to the case since it had not yet come into force.

<sup>83</sup> [2000] 2 AC 326, at 378-380 *per* Lord Hope.

<sup>84</sup> *ibid*, at 366 *per* Lord Steyn.

down' in accordance with section 3. As was noted above in relation to *R v A (No 2)* such a reading would display a very limited amount of structural deference in factual optimisation.

The rationale set out in *Kebilene* was followed by *R v Lambert*<sup>85</sup> which was heard after the entry into force of the HRA and did not involve any of the jurisdictional issues of judicial review involved in *Kebilene*. The *Lambert* decision concerned an offence under section 5 of the Misuse of Drugs Act 1971 ('the 1971 Act'). Section 28 of the 1971 Act provided an accused person with a defence if he could prove that he neither knew nor believed nor had reason to believe that the substance in his possession was a controlled drug. The House found that this provision shifted the burden of proof onto the accused. A majority of the House also considered that this was not the least intrusive means of achieving the public interest principle of preventing the possession of unlawful and otherwise dangerous drugs. In reaching this conclusion, the majority considered what the effect of 'reading down' the section would be. The Lords were content that a shifting of the evidential burden, rather than the legal burden would be sufficient to optimise the public interest principle but would also be less intrusive on the human rights principle.

This shows that in gauging whether the measure was factually optimised, the House considered an alternative measure. The House was satisfied that it was less rights-intrusive than the challenged measure and so their Lordships were content to find that the challenged measure was Convention incompatible. However, rather than making a declaration to that effect, the House substituted the less restrictive measure in place of the disproportionate one, using section 3.<sup>86</sup> Lord Hope was eager to stress that what the House was doing was mere interpretation and was in no way to be thought of as judicial legislation. He argued that a section 3 reading down would only be possible where it

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<sup>85</sup> [2001] UKHL 37; [2002] 2 AC 545.

<sup>86</sup> *ibid*, at 571, *per* Lord Steyn.

was not contradictory to a decision that had clearly been made by Parliament.<sup>87</sup> However, there may have been other less rights-restrictive alternatives available, besides the one inserted by the court. The use of section 3 prevented the court from affording Parliament structural deference in choosing between the less rights-restrictive measures. By inserting a specific rights compatible meaning, the House was choosing the least rights-restrictive option itself. To that extent, there was no structural deference afforded to Parliament within factual optimisation.

It is worth noting that Lord Hutton, who was in the minority in *Lambert*, found that the provision was in fact Convention-compatible. He took the view that a shifting of the legal burden was required to achieve the public interest aim being pursued and that an evidential burden would not be sufficient. This is a factual optimisation analysis which came down on the side of the impugned measure – Lord Hutton took the view that the challenged measure was the least rights-restrictive available that would still achieve the public interest.

Following on from *Kebilene* and *Lambert* was *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)*<sup>88</sup> which involved two different cases, both of which involved reverse burden of proof provisions. Lord Bingham held that section 11(2) of the Terrorism Act 2000 placed a legal burden on an accused to disprove that he was a member of a terrorist organisation at any time since it became such an organisation and that he had never participated in its illegal activities.

Unsurprisingly perhaps, the House found both of these to be incompatible with the Convention. Again, the public interest principle was being pursued by means of a reversal of the burden of proof and again, the House found that an evidential burden would be a less rights-intrusive means of achieving the aim. *Sheldrake*, like *Lambert*

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<sup>87</sup> [2001] UKHL 37; [2002] 2 AC 545, at 585.

<sup>88</sup> [2004] UKHL 43; [2005] 1 AC 264.

resulted in the offending provision being ‘read down’ under section 3 in order to redress the incompatibility. In both cases the provisions were to be read as imposing an evidential burden only.

As section 118 of the Terrorism Act 2000 listed a number of burdens that were evidential only, Lord Bingham accepted that it was the intention of Parliament to create a legal burden in section 11(2). However, he was content that reading that down to an evidential burden was not dismissing the will of Parliament, holding that ‘[s]uch was not the intention of Parliament when enacting the 2000 Act, but it was the intention of Parliament when enacting section 3 of the 1998 Act.’<sup>89</sup> Again, this shows a very low level of structural deference as to the choice of measure.

It must be considered whether this approach in these reverse burden of proof cases is more or less deferential than if a declaration of incompatibility had been made. On the one hand, the courts in these cases went out of their way not to expressly declare that legislation was Convention incompatible. On the other hand, in order to do so, the courts have twisted the meaning of the statutes in question to an extent that arguably (and in the case of *Sheldrake* openly) undermined the intention of Parliament at the time of the passage of the challenged legislation. By attempting to be deferential to the institution of Parliament, the courts have, in some instances acted in a manner that is directly contradictory to the intention of the legislation being challenged. The effect of this is that section 3 affords Parliament a lesser degree of structural deference than a declaration of incompatibility.

As I stated in Chapter 3.4.3, I am not seeking to express a view on whether this is a positive or negative aspect of the HRA. My purpose here is merely to show the different operation of deference under sections 3 and 4 and to establish that section 3 entails a lesser degree of structural deference.

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<sup>89</sup> [2004] UKHL 43; [2005] 1 AC 264, at 314.

### 5.2.2: *Factual optimisation and empirical epistemic deference*

Epistemic deference relates to issues of uncertainty when they arise in a proportionality analysis (see Chapter 2.4.2). When a court is assessing whether or not a particular government measure is the least restrictive measure available, questions of uncertainty can arise in relation to both the level of intrusion on the protected right and the level of realisation of the public interest. This can affect a court's assessment of factual optimisation. In such instances, the court may afford the decision-maker empirical epistemic deference.

Factual optimisation can be seen in *A&X v Secretary of State for the Home Department*<sup>90</sup> in which the House of Lords considered the Convention compatibility of section 23 of the Anti-Terrorism Crime and Security Act 2001. The section had been based on a derogation from Article 5 of the Convention on the basis of a threat to the life of the nation posed by international terrorism. Article 15 of the Convention states that any derogation must not go beyond what was 'strictly required by the exigencies of the situation'. This imposes a proportionality test on the measure.<sup>91</sup> Lord Bingham equated the derogation test with proportionality and cited the test set out in *de Freitas*. As was noted above there is no express overall balancing requirement in the wording of the *de Freitas*, although Lord Bingham also cited the Canadian test in *R v Oakes*,<sup>92</sup> which does include the overall balancing test. At it transpired, the case was decided on the basis of factual optimisation.

Having stated the test, Lord Bingham then went on to examine whether or not the appellants' proportionality arguments had merit and he found that they did. He was

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<sup>90</sup> [2004] UKHL 56; [2005] 2 AC 68.

<sup>91</sup> See van Dijk and van Hoof *Theory and Practice of the European Convention on Human Rights*, above n39 at 1062-1064; and Arai-Takahashi, Y. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the jurisprudence of the ECHR* (Oxford: Intersentia, 2002), at 176-188.

<sup>92</sup> [1986] 1 SCR 103.

concerned that the regime which was applied to UK nationals who were suspected of being a similar terrorist danger was very different from that applied to non-nationals; the UK national system did not entail detention in prison. He elaborated on the details of the regime imposed on UK nationals and noted that it would be hard to see why such a system could not inhibit terrorism.<sup>93</sup> This is a very clear and direct example of a minimal impairment or factual optimisation analysis. The House examined the alternatives available to the challenged measure and found that they were not the least intrusive means available. As the impugned measure was an Act of Parliament, there was a very wide range of alternative measures which could have been deployed to achieve the public interest aim. There was therefore potentially no impediment to the control system used for UK nationals being extended to foreign suspects. The challenged provision was therefore declared incompatible with the Convention.

In reaching its decision, the House also gave consideration to the role of deference in this case on the basis of ‘relative institutional competence’.<sup>94</sup> The analysis is couched in terms of empirical epistemic deference. Lord Bingham held that the finding on whether there was a threat to the life of the nation involved a ‘factual prediction of what various people around the world might or might not do’.<sup>95</sup> He accepted that this was a pre-eminently political decision. This is a recognition of empirical epistemic deference: there was uncertainty as to the level of national security threat, and so the Lords were prepared to give ‘great weight’ to the assessment of the Home Secretary and Parliament as to what the level of that threat is. However Lord Bingham also held that the right to liberty in Article 5 is very much within the expertise of the courts, and so far less deference should be afforded where government action is related to that right.<sup>96</sup> This is an example of far less empirical epistemic deference being afforded on the basis that the

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<sup>93</sup> [2004] UKHL 56; [2005] 2 AC 68, at 106-107.

<sup>94</sup> *ibid*, at 102.

<sup>95</sup> *ibid*, at 102.

<sup>96</sup> The reasoning of Lord Bingham was echoed by Lord Hope. See: [2004] UKHL 56; [2005] 2 AC 68, at 134-135.

judiciary have as much, if not more, expertise in this field than do the other branches of government.

In *Hirst v Secretary of State for the Home Department*<sup>97</sup> the factual optimisation stage went in favour of a finding that the challenged measure was disproportionate, despite the fact that the High Court made substantial reference to empirical epistemic deference. The case concerned a policy of the Home Secretary that prevented prisoners from being interviewed on radio. The claimant was the head of a prisoners' representative body and wished to be interviewed regularly to discuss issues related to prisons and prisoners interests. Elias J cited the Court of Appeal decision in *Samaroo v Secretary of State for the Home Department*<sup>98</sup> as authority for the proposition that the minimal impairment analysis would only be relevant where the restriction on freedom of expression was in addition to the punishment of imprisonment, rather than being an inherent part of it. His reasoning was that where the restriction was intrinsic to the punishment, then it was not open to the Home Secretary to choose a less restrictive means:

‘Once it is determined that the appropriate sentence requires the denial of the right to exercise freedom of speech in certain contexts, then there is no other step which can secure that particular objective. If that element of the sentence were not imposed, the sanction would be a different and lesser one.’<sup>99</sup>

Elias J held that the restriction on freedom of expression was not part of the punishment, and so the factual optimisation stage of the test could be used. Before coming to a conclusion on factual optimisation, Elias J expressed a large degree of confidence in the Home Office's ability to assess and address the requirements of prison management. He found that:

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<sup>97</sup> [2002] EWHC 602 (Admin).

<sup>98</sup> [2001] EWCA Civ 1139.

<sup>99</sup> [2002] EWHC 602 (Admin), at paragraph 33.

‘In this case the policies are based on the experience and knowledge of the Home Office about the working of prisons and the cast of mind and attitude of prisoners. I accept that it would be absurd to require the government to adopt a policy which it considered to be wholly inappropriate and potentially damaging merely so that its predictions of disaster could be shown to be correct. It cannot be right to require the adoption of harmful policies simply to provide the empirical evidence needed to satisfy a court that the authority was right all along and that any interference with human rights was justified.’<sup>100</sup>

This confirms that empirical epistemic deference can be afforded to decision-makers in cases where there is uncertainty as to the achievement of the public interest. It is noteworthy however, that there is little mention of any structural deference in the judgment. Elias J seemed to be content that the High Court could legitimately scrutinise the levels of protection afforded to rights in this instance without making policy undemocratically. It is also important that all of the various arguments for restricting freedom of expression of prisoners were examined quite closely by Elias J, notwithstanding his comments regarding deference.

The Court ultimately compared the outright ban on radio interviews with a system proposed by the claimant which would permit the interview but with significant safeguards directed at serving the objectives of the ban. Elias J was satisfied that the ‘the proposed conditions go a considerable way to meeting the concern of the prison authorities’.<sup>101</sup> On this basis, the policy was quashed, which shows that the blanket ban failed the factual optimisation stage of proportionality.

It is noteworthy that the Court was not prepared to quash the section of the prison rules

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<sup>100</sup> [2002] EWHC 602 (Admin), at paragraph 81.

<sup>101</sup> *ibid.*, at paragraph 83.



upon which the policy of a blanket ban was based, but it did quash the policy itself on the basis that it was a disproportionate interference with the claimant's Article 10 rights, insofar as it made no allowances for any exceptions to the rule. This is a significant outcome. The *Hirst* case involved three levels of rules. There was the Prisons Act 1952, which gave the Secretary of State the power to make rules for prisons by statutory instrument. There were the various statutory instruments and there was the policy made under them. The High Court chose to quash the lowest level of rule in this case. It could feasibly (if the challenge had been made) have examined the proportionality of any of the levels. Also, as has been discussed, the Court noted that if a restriction on freedom of expression was inherent in the punishment, then there would be no place for factual optimisation (although that was not held to be the case in *Hirst* itself). This suggests that in the event that a restriction is deemed to be part of punishment, then a factual optimisation challenge would need to be directed higher up the ladder, at the Prison Rules or the Prisons Act itself.<sup>102</sup>

The case of *Gallagher, Re an Application for Judicial Review*<sup>103</sup> was a challenge to the notification requirements for sex offenders contained in the Sex Offenders Act 1997 and subsequent legislation. Kerr J in the High Court of Northern Ireland accepted that the notification requirements were onerous and were becoming increasingly so with each new piece of legislation. On this basis, the court examined whether the intrusion on the Article 8 right was proportionate to the legitimate aim of prevention of crime contained in Article 8(2).

Kerr J gave some consideration to the notification requirements in other jurisdictions where mechanisms for review were available. This examination of the alternatives available shows that he was engaged in a factual optimisation analysis. While he accepted that the availability of such measures in other jurisdictions was 'undoubtedly

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<sup>102</sup> Multi-level decisions such as this are explored further in the context of Housing rights in Chapter 6.3.

<sup>103</sup> [2003] NIQB 26.

relevant to the issue' that fact alone could not 'dictate the outcome of the scheme's proportionality.'<sup>104</sup>

In discussing this, Kerr J made much of the fact that the decision to introduce the notification measures without a system of review had been made by Parliament and held that other countries' approaches 'while interesting as examples of alternative methods, cannot automatically provide the answer'<sup>105</sup> and that 'legislation should reflect the perceived needs of the particular society it is designed to serve.'<sup>106</sup>

While he accepted that the applicant had been inconvenienced by the system, he refused to consider the proportionality of the measure solely in relation to the individual concerned, stating that '[t]he scheme as a whole must be examined to see whether it goes beyond what is necessary to achieve the aim of protecting the public and deterring sex offenders from engaging in further criminal behaviour.'<sup>107</sup>

He held that the automatic nature of the notification requirements was a necessary element of the scheme on the basis that: '[i]f individual offenders were able to obtain exemption from the notification requirements this could – at least potentially - compromise the efficacy of the scheme.'<sup>108</sup> This is the language of factual optimisation. Kerr J is expressing the view that no less restrictive mechanism will in fact achieve the required level of public interest. His deference to Parliament is epistemic empirical deference, which arises where there is uncertainty as to precise measurements in proportionality analysis. Kerr J is of the view that the levels of public interest protection in the current scheme would not be met by the alternative proposed. In reaching that conclusion, he pays a good degree of deference to the fact that Parliament has chosen this measure.

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<sup>104</sup> [2003] NIQB 26, at paragraph 22.

<sup>105</sup> *ibid.*, at paragraph 21.

<sup>106</sup> *ibid.*, at paragraph 21.

<sup>107</sup> *ibid.*, at paragraph 19.

<sup>108</sup> *ibid.*, at paragraph 25.

### 5.2.3. *Factual optimisation and section 4 of the HRA*

As I discussed in Chapter 3.4.3, section 4 of the HRA involves an in-built deference to Parliament, in that the challenged legislation continues to apply after a declaration of incompatibility until such time as Parliament chooses to repeal it. Therefore, there may be less reason to afford deference within the proportionality analysis in section 4 cases, because deference is already included in the mechanism.

This is illustrated in the recent case of *R (F) v Secretary of State for the Home Department*.<sup>109</sup> The case involved a factual optimisation analysis, but with no mention of deference and no consideration of legal optimisation. The case concerned the application of the sex offenders register to two claimants: the first claimant ('F') had been convicted of the relevant sexual offence at the age of 11 and would be on the sex offenders register for the rest of his life. The second claimant (Thompson) had committed his crimes as an adult. In the Divisional Court, Latham LJ, with whom the other members of the Court agreed, considered the impact of the sex offenders register on F. He paid particular attention to the fact that he was a child at the time of the offences and that there was no means by which he could seek a review of their continued application. Latham LJ stated that '[i]f the question is whether the requirements, at least in the context of a child, are the minimum necessary to achieve the legislation (sic) legitimate objective, it seems to me that in the absence of an opportunity for review, the only answer must be no.'<sup>110</sup> With regard to Thompson, Latham LJ, took a similar view, holding that because the notification requirements prevented an offender from establishing that he no longer presents a risk of re-offending they were disproportionate. Again, the reasoning is based on the availability of a less rights-restrictive alternative

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<sup>109</sup> [2008] EWHC 3170; [2009] 2 Cr App R (s) 325.

<sup>110</sup> *ibid*, at 333.

and so can be classified as factual optimisation. Latham LJ made a declaration of incompatibility under section 4 of the HRA. He took the view that the provisions could not be read down under section 3 ‘without doing unacceptable violence to the statutory words.’<sup>111</sup> In neither instance was deference considered. This approach can be contrasted with the much more deferential approaches in the other sex offenders register cases, in which the courts applied a large degree of structural deference (*A v Scottish Ministers*) and epistemic deference (*Gallagher*).

The Home Secretary unsuccessfully appealed the decision in *R (F)* to the Court of Appeal. The Court explicitly couched its reasoning in terms of factual optimisation and addressed itself to the question of whether a sex offenders register without a right of review went no further than was necessary to achieve the legitimate objective.<sup>112</sup> The Court concluded that a right of review would not diminish the level of achievement of the legitimate objective, but would be less restrictive of the offender’s Article 8 rights.<sup>113</sup> The Court of Appeal upheld the declaration of incompatibility made by the Divisional Court.

In both *R (F)* and the earlier burden of proof cases, a measure was found to fail the factual optimisation stage of the proportionality analysis. However, *R (F)* gave rise to a section 4 declaration, whereas the burden of proof cases gave rise to section 3 ‘reading-down’. The tensions between sections 3 and 4 have been well rehearsed elsewhere<sup>114</sup> and I am not seeking to resolve those tensions here. However, it is worth noting that section 4 makes deference a separate issue, parallel to the proportionality test, whereas

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<sup>111</sup> [2008] EWHC 3170; [2009] 2 Cr App R (s) 325, at 336.

<sup>112</sup> [2009] EWCA Civ 792, at paragraph 34.

<sup>113</sup> *ibid.*, at paragraphs 36-50.

<sup>114</sup> See for example Klug, F. ‘Judicial Deference under the Human Rights Act 1998’ [2002] EHRLR 125; and Kavanagh, A. ‘Choosing Between Sections 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after *Ghaidan v Mendoza*’ in Fenwick, H., Phillipson, G. & Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007). See also Chapter 3.4.3 above.

section 3 removes it from within the test.<sup>115</sup> Section 4 is deference after the fact of proportionality analysis because there is no direct consequence from the declaration of incompatibility. Section 3 functions to remove structural deference from the factual optimisation stage of proportionality, by preventing the rule-maker from choosing a different, rights-compatible measure instead of the challenged incompatible measure. Instead, the replacement measure is chosen by the court. As I noted in Chapter 3.4.3, this issue of parallel deference in section 4 and the denial of structural deference entailed in section 3 can only arise in relation to Acts of Parliament. This again emphasises the need for institutional sensitivity when addressing proportionality and deference.

Given that there is an in-built deference in the application of section 4, it is arguable that the Divisional Court was correct not to afford Parliament any structural deference in *R (F)*, since the deference flowed automatically from the manner in which section 4 operates. This point is implicit in the decision of the Court of Appeal in that case. The Court held that in remedying the incompatibility, it would be up to Parliament to set the standard for any right of review incorporated into the sex offenders register system.<sup>116</sup> This indicates an acceptance that it is up to Parliament to determine the precise details of a less rights-restrictive measure.

### **5.3: OVERALL BALANCE: LEGAL OPTIMISATION**

The legal optimisation stage of proportionality requires a reviewing court to assess whether the challenged measure strikes an overall balance between the public interest principle and the human rights principle at stake in the case. This is often described in

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<sup>115</sup> See further Chapter 3.4.3.

<sup>116</sup> [2009] EWCA Civ 792, at paragraphs 47-49.

terms of a ‘means-ends fit’.<sup>117</sup> The proportionality test set out by Lord Steyn in *R v A (No 2)*<sup>118</sup> and *R (Daly) v Secretary of State for the Home Department*,<sup>119</sup> does not involve an explicit balancing criterion, a point which has been criticised by Rivers.<sup>120</sup> However, there are quite a few instances where legal optimisation has been applied as part of the proportionality analysis in criminal justice cases dealing with rule-making. The criterion of overall balance has been less accentuated in these cases than in immigration cases. One obvious reason for this is that, as was shown in Chapter 4, factual optimisation rarely functions in immigration cases, and so legal optimisation has to do all of the work.

Furthermore, if a measure is found to fail the factual optimisation stage, then there is little reason to move on to the legal optimisation analysis. The criminal justice cases in which legal optimisation has been applied have predominantly been ones in which the measure was deemed to be factually optimised. To some extent, section 3 accentuates this. Where a court takes the view that a measure is not factually optimised and so reads it down under section 3, the legal optimisation stage is dispensed with. However, this is not necessarily a product of section 3 itself. For example in the *Gallagher* case the High Court made a declaration of incompatibility under section 4 and yet the legal optimisation element of the test was still surplus to requirements, since it had already been established that the measure was disproportionate.

Despite the heavy emphasis on factual optimisation in criminal justice cases, there are nonetheless indications of the use of legal optimisation too. For example, in *R v A (No 2)* Lord Hope expressed proportionality in terms that are very much in line with legal optimisation stating that: ‘[t]he principle of proportionality directs attention to the

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<sup>117</sup> See Fordham, M., and de la Mare, T. ‘Identifying the Principles of Proportionality’ in Jowell, J. and Cooper, J. (eds.) *Understanding Human Rights Principles* (Oxford: Hart Publishing, 2001), at 28.

<sup>118</sup> [2001] UKHL 25; [2002] 1 AC 45.

<sup>119</sup> [2001] UKHL 26; [2001] 2 AC 532.

<sup>120</sup> See Rivers, J. ‘Proportionality and Variable Intensity of Review’ (2006) 65 CLJ 174.

question whether a fair balance has been struck between the general interest of the community and the protection of the individual.’<sup>121</sup>

There is also much discussion of balancing in *R v Director of Public Prosecutions ex parte Kebilene*.<sup>122</sup> Lord Hope expressly used the language of overall balancing stating that: ‘[a]s a matter of general principle therefore a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual’.<sup>123</sup> His reasoning drew on the ECHR case of *Salabiaku v France*.<sup>124</sup>

Lord Hope also used the language of legal optimisation in the *Lambert* case, although he seemed to conflate factual and legal optimisation, stating:

‘It is now well settled that the principle which is to be applied requires a balance to be struck between the general interest of the community and the protection of the fundamental rights of the individual. This will not be achieved if the reverse onus provision goes beyond what is necessary to accomplish the objective of the statute.’<sup>125</sup>

This quote suggests that Lord Hope was of the view that factual optimisation was the means of achieving the end of legal optimisation, rather than a separate element of the test. However, subsequent cases already discussed in Chapter 4 have shown that factual optimisation is a stand-alone element of proportionality.

As was noted above, in *Brown v Stott*<sup>126</sup> Lord Steyn applied a factual optimisation test with structural deference. Lord Bingham’s findings in the same case are phrased very much in the language of legal optimisation. Having set out a detailed account of the

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<sup>121</sup> [2001] UKHL 25; [2002] 1 AC 45, at 81.

<sup>122</sup> [2000] 2 AC 326.

<sup>123</sup> *ibid*, at 384.

<sup>124</sup> (1988) 13 EHRR 379.

<sup>125</sup> [2001] UKHL 37; [2002] 2 AC 545, at 588 *per* Lord Hope.

<sup>126</sup> [2003] 1 AC 681.

ECHR case law on the privilege against self incrimination, he considered whether the requirement in section 172 of the Road Traffic Act 1988 was incompatible with Article 6. Section 172 requires a person keeping a vehicle to identify the driver if there is an allegation that whoever was driving was guilty of one of a list of offences under the 1988 Act. As the appellant had identified herself as the driver of the car and she was over the legal alcohol limit, her answer was being used as evidence against her. Lord Bingham recognised the potential of cars to cause great injury and noted that all those who drive them know that they are subjecting themselves to a particular regulatory regime. Within that context he was satisfied that the balance between the respective interests of the community and the individual had been struck in a manner that was not unduly prejudicial and so he was satisfied that the section was Convention-compatible.<sup>127</sup> This is a clear instance of the use of the overall balancing element of proportionality.

*International Transport Roth GmbH v Secretary of State for the Home Department*<sup>128</sup> concerned the proportionality of property seizure legislation. The public interest being pursued was the control of immigration. Simon Brown LJ cited the *de Freitas* test, which as has been noted lacks an express overall balancing requirement. However, he went on to hold that:

‘It is further implicit in the concept of proportionality, however, that not merely must the impairment of the individual's rights be no more than necessary for the attainment of the public policy objective sought, but also that it must not impose an excessive burden on the individual concerned.’<sup>129</sup>

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<sup>127</sup> [2003] 1 AC 681, at 705-706.

<sup>128</sup> [2002] EWCA Civ 158; [2003] QB 728.

<sup>129</sup> *ibid*, at 753.



He bolstered this position by citing ECHR cases such as *James v United Kingdom*<sup>130</sup> and his ultimate finding on the proportionality point centred on the legal optimisation rather than factual optimisation. He found the challenged measure to breach Article 1 of the First Protocol on the basis that the penalty in question placed an excessive burden on carriers whose vehicles might be used for illegal immigration. He noted that a heavier burden would probably achieve the legitimate aim all the more, but that was not the point, in his view, the ‘price in Convention terms becomes just too high’.<sup>131</sup> This is very clearly an overall balancing or legal optimisation assessment. In the view of Simon Brown LJ, the overall proportionality was not appropriately struck between the competing principles and that is reflected in his reasoning. It is worth noting that his proportionality analysis involves very little consideration of whether the means used only infringed the right insofar as it was necessary. It is possible that an acceptance of this is implicit in his reasoning but it is not expressed fully as a minimal impairment analysis. If the factual optimisation is assumed, then it could be said that the measure passed the factual optimisation hurdle but failed the legal optimisation hurdle.

As a side issue it is also important to be aware that Simon Brown LJ drew a distinction between analysing a rule and an individual case stating that: ‘What is presently in issue, however, is the intrinsic legality of the scheme itself rather than the liability of carriers in individual cases.’<sup>132</sup> This shows that he was clearly of the view that it was the rule itself he was assessing for Convention compatibility and not the individual decision made under that rule. This highlights the important difference between a proportionality review of a rule and of an administrative decision.

Counsel for the defendant suggested that if the challenged statutory scheme was incompatible with the Convention, it should be ‘read down’ under section 3 of the

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<sup>130</sup> (1986) 8 EHRR 123.

<sup>131</sup> [2002] EWCA Civ 158; [2003] QB 728, at 754.

<sup>132</sup> *ibid*, at 742.

HRA. Simon Brown LJ roundly rejected this idea. He expressed the view that Convention compatibility could only be achieved through a radically different scheme and held that when applying section 3 the ‘court’s task is to distinguish between legislation and interpretation, and confine itself to the latter’.<sup>133</sup> He concluded by noting that to rework the scheme using section 3 would be ‘failing to show the judicial deference owed to Parliament as legislators.’<sup>134</sup> This is connected to the point I raised above in relation to the burden of proof cases. Section 4 declarations of incompatibility are a deference mechanism which exists outside of the proportionality test, whereas section 3 removes the element of structural deference from the test. In this instance, Simon Brown LJ paid more deference to Parliament than if he had read the legislation down under section 3.

### *5.3.1: Legal optimisation, empirical epistemic deference and the general scope of rules*

In *Gallagher, Re an Application for Judicial Review*<sup>135</sup> Kerr J assessed the factual optimisation of the sex offenders register, as was discussed above. He also used the language of legal optimisation, although he did not explicitly separate it from factual optimisation in his proportionality analysis. He drew the conclusion that:

‘the fact that the notification requirements persist indefinitely does not render the scheme disproportionate.’ While this is unquestionably an inconvenience for those who must make the report, that inconvenience must be set against the substantial benefit that it will achieve of keeping the police informed of where offenders are living and of their travel

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<sup>133</sup> [2002] EWCA Civ 158; [2003] QB 728, at 758.

<sup>134</sup> *ibid*, at 758. This view is supported by the finding of Jonathan Parker LJ at 789.

<sup>135</sup> [2003] NIQB 26.

plans so that further offending may be forestalled both by rendering detection more easily and deterring those who might be tempted to repeat their offences.’<sup>136</sup>

Kerr J placed a heavy emphasis on deference, noting that ‘Parliament has determined what is required for the protection of the public from sex offenders’.<sup>137</sup> This suggests that the Court was deferring to the assessment of Parliament as to what was required to achieve the realisation of the public interest principle in this case. This is empirical epistemic deference.

As was noted above, in reaching his conclusion, Kerr J was explicit about the need for proportionality to be measured in general, rather than just in relation to the specific individual claimant:

‘It is inevitable that a scheme which applies to sex offenders generally will bear more heavily on some individuals than others. But to be viable the scheme must contain general provisions that will be universally applied to all who come within its purview. The proportionality of the reporting requirements must be examined principally in relation to its general effect. The particular impact that it has on individuals must be of secondary importance.’<sup>138</sup>

This highlights the issue I raised in Chapter 3.2.3, concerning the effect which the scope of the challenged measure has on the proportionality analysis. If the High Court in *Gallagher* had only been concerned with the applicant’s situation and not those of others affected, then it may have reached a different conclusion. As it turned out, the fact that the rule was of general application affected the measurement of the overall

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<sup>136</sup> [2003] NIQB 26, at paragraph 26.

<sup>137</sup> *ibid.*, at paragraph 21.

<sup>138</sup> *ibid.*, at paragraph 23.

balance. It also seems to have given rise to a wider degree of empirical epistemic deference.

The reasoning of Kerr J was expressly adopted by the Court of Appeal in *Forbes v Secretary of State for the Home Department*.<sup>139</sup> Forbes had been convicted of importing child pornography. In his defence, he had contended that although he knew he was importing prohibited videos but he was unaware that they contained child pornography. He sought to challenge the Convention compatibility of the automatic imposition of notification requirements on him, without any discretion for the trial judge. Sir Igor Judge P, giving the judgment of the Court and following Kerr J in *Gallagher* held that '[t]he consequent, automatic, notification requirements contribute to the protection of children everywhere, as well as the detection of offenders minded to exploit them, or to involve themselves in the exploitation of children by others.'<sup>140</sup> The Court held that this was not a disproportionate interference with the rights of a person who has been convicted of importing such material. Again this shows legal optimisation being affected by the generalised scope of the measure being challenged. This reasoning was re-affirmed in the later Court of Appeal case of *R v H*<sup>141</sup> although no detailed consideration of proportionality was involved in that case.

### 5.3.2: *Legal optimisation and normative epistemic deference*

As was noted above, *A v Scottish Ministers*<sup>142</sup> involved a challenge to the notification requirements of the Sexual Offences Act 2003. The Court of Session was satisfied that the measure did not impair the petitioner's Article 8 right to respect for family any more than was necessary (factual optimisation). While the main thrust of the decision focused

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<sup>139</sup> [2006] EWCA Civ 962; [2006] 1 WLR 3075.

<sup>140</sup> *ibid.*, at 3082.

<sup>141</sup> [2007] EWCA Crim 2622.

<sup>142</sup> [2007] CSOH 189; [2008] SLT 412.

on this minimal impairment element of proportionality, the court also gave consideration to the overall balance struck and ultimately concluded that the measure ‘does not result in this petitioner having to bear an individual and excessive burden’<sup>143</sup> which is evidently the language of overall balancing.

Lord Turnbull also alluded to the deference to be afforded to Parliament within balancing, stating that ‘when it comes to the Court examining the way in which Parliament chose to strike this balance it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgement accorded to those bodies’.<sup>144</sup> This is normative epistemic deference in legal optimisation, based on democratic legitimacy. As we have seen, normative epistemic deference arises where both the public interest principle and the human rights principle have received a certain basic level of protection. In such situations, a court may wish to defer to the normative assessment of the decision-maker as to where the precise balance between the two principles lies.

#### **5.4: THE REASONS FOR DEFERENCE**

In the preceding analysis I have shown that both factual and legal optimisation have been applied in the proportionality case law dealing with criminal justice rules. I have also showed how both structural and epistemic deference have operated within those stages of the proportionality test. However, much of this analysis only goes to show *how* deference is afforded within proportionality. Some of the criminal justice cases have also addressed the question of *why* deference is afforded.

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<sup>143</sup> [2007] CSOH 189; [2008] SLT 412, at 425.

<sup>144</sup> *ibid*, at 424.

The tightrope act involved in setting the right degree of deference is well summed up in the following dictum of Simon Brown LJ in the case of *International Transport Roth GmbH v Secretary of State for the Home Department*:<sup>145</sup>

‘Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.’<sup>146</sup>

In *R v Director of Public Prosecutions, Ex p Kebilene*,<sup>147</sup> Lord Hope held that there was a ‘discretionary area of judgment that the courts would afford to the other arms of government. He stated that:

‘[i]t will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.’<sup>148</sup>

This early consideration of deference suggests that there are certain fields of decision-making which are more appropriate for the courts and others which are best left to the other arms of government. In Chapter 3.4 I highlighted the importance of making the reasons for deference explicit. The courts can use proportionality to review the actions of a wide range of government bodies. The reasons for deferring to them are not uniform. As was noted in Chapter 1.3.3, this issue was given detailed consideration by Laws LJ in *International Transport Roth GmbH v Secretary of State for the Home Department*.<sup>149</sup> Although Laws LJ was in dissent with the majority of the Court on the outcome of the case, he set out four central principles for setting the level of deference, which have been repeatedly cited with approval since:

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<sup>145</sup> [2002] EWCA Civ 158; [2003] QB 728.

<sup>146</sup> *ibid*, at 754.

<sup>147</sup> [2000] 2 AC 326.

<sup>148</sup> *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, at 381 *per* Lord Hope.

<sup>149</sup> [2002] EWCA Civ 158; [2003] QB 728.

1) *More deference is due to an Act of Parliament than to an executive decision.*<sup>150</sup> This shows that a primary basis for structural deference is democratic accountability. It also recognises that a distinction must be drawn between different forms of governmental action. Not all forms of government action involve the same level of democratic legitimacy, so the *actual* level is the basis for the deference.

2) *There is more scope for deference where the convention itself requires a balance to be struck.*<sup>151</sup> This indicates that limitation analysis is particularly well suited to certain rights, but Laws LJ was quick to note that while the right to fair trial could not be abrogated, what was or was not fair might involve a balancing exercise between competing principles.

3) *Greater deference is due where the subject matter is within the particular responsibility of the 'democratic powers'.*<sup>152</sup> This is an indication of structural deference or normative epistemic deference based on the recognition that the courts are not well placed to address the required balance in certain areas. It is important to read this in conjunction with Laws LJ's first point regarding the distinctions between executive and legislature. What is in the constitutional responsibility of Parliament is not necessarily in the constitutional responsibility of the executive. As was discussed in Chapter 4.3.2, normative epistemic deference has been rejected by the courts when it comes to the decisions of appointed officials, who lack democratic legitimacy.

4) *More or less deference is due depending on whether the subject matter lies within the particular expertise of the courts or the democratic powers.*<sup>153</sup> It is of significance that this point was separated out from the third point (although Laws LJ sees it as emanating from it). Constitutional responsibility is related to structural deference and normative epistemic deference insofar as a particular institution of government is well placed to

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<sup>150</sup> [2002] EWCA Civ 158; [2003] QB 728, at 765.

<sup>151</sup> *ibid.*, at 766.

<sup>152</sup> *ibid.*, at 766-767.

<sup>153</sup> *ibid.*, at 767.

choose a particular balance. Expertise is related to empirical epistemic deference insofar as a particular institution of government is well placed to find a particular fact. This is an important distinction to draw.

The first, third and fourth of these principles affirm the analysis I set out in Chapter 3.4, i.e. democratic legitimacy and epistemic deference are both reasons for deference. What is explicit in the first of Laws LJ's principles, and implicit in the third and fourth, is that the levels of expertise and democratic legitimacy are not uniform across all governmental bodies which a court might be called upon to review on proportionality grounds. This confirms the need for institutional sensitivity when dealing with questions of deference.

The judgment of Lord Bingham in *A&X v Secretary of State for the Home Department*<sup>154</sup> involves a thoughtful consideration of the reasons for affording epistemic deference based on institutional competence. At issue was the question of whether or not there was a public emergency threatening the life of the nation. Lord Bingham held that this question involved a 'factual prediction of what various people around the world might or might not do'.<sup>155</sup> He stated that this was a pre-eminently political decision. In granting the Home Secretary empirical epistemic deference, Lord Bingham was recognising that the judiciary are not well placed to make predictions about possible future incidents and that the Home Secretary is better qualified to do so. This deference was expressly based on the Government's greater level of expertise in the area relative to that of the courts.

However, notwithstanding this finding, their Lordships were loath to accept that it was not for the courts to decide on matters relating to security of the person. Following on from his comments about institutional competence, Lord Bingham pointed out the level

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<sup>154</sup> [2004] UKHL 56; [2005] 2 AC 68.

<sup>155</sup> *ibid.*, at 102.



of expertise the courts had in this area. He drew on the reasoning on Lord Hope in *Kebilene*, as well as these dicta of La Forest J, in the Canadian Supreme Court:

‘Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be.’<sup>156</sup>

Lord Bingham considered the argument made by the Attorney General that it was anti-democratic for the courts to reject the decisions of Parliament in this area. He pointed out that the HRA itself had given the courts a duty to address such issues and that even a finding of incompatibility did not undermine the sovereignty of Parliament. He went so far as to hold that an independent judiciary is a ‘cornerstone of the rule of law itself.’<sup>157</sup>

Like Lord Bingham, Lord Hope is very quick to recognise that a wide margin of discretion should be afforded to the executive on matters of national security but with the caveat that matters relating to liberty of the person should attract the most anxious scrutiny.<sup>158</sup>

This analysis shows that institutional competence is *relative*. The House was prepared to defer to the expertise of the Home Secretary in relation to national security, where the judiciary has little expertise. However, in the field of security of the person, the courts have a great deal of expertise, and so the level of empirical epistemic deference should be reduced accordingly. The courts will only afford deference based on institutional competence when the decision-maker’s expertise in a particular field is greater than that

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<sup>156</sup> *RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199, at paragraph 68. La Forest J was dissenting in the *RJR-MacDonald* Case, but this aspect of his judgment was subsequently cited with approval in *Libman v Quebec (Attorney General)* [1997] 3 S.C.R. 569 at paragraph 59.

<sup>157</sup> [2004] UKHL 56; [2005] 2 AC 68, at 110.

<sup>158</sup> *ibid*, at 134-135.

of the courts.<sup>159</sup> The rejection of the Attorney General's argument on democratic legitimacy also shows that democratic legitimacy and institutional competence are two separate reasons for deference, which will apply differently in different situations.

## 5.5: CONCLUSION

In this chapter I have set out the leading cases on proportionality in the field of criminal justice in the UK. I have examined them thematically, showing how each of the elements of the structural theory of proportionality and deference is at work. Human rights and public interest principles are identified and then subject to factual optimisation and in some instances legal optimisation.

Certain observations can be made at this stage of the analysis. The role of the minimal impairment arm of proportionality has been far more significant in these cases than in the immigration cases in the preceding chapter. Almost all of the cases involved some examination of whether there was a less rights-restrictive alternative available. Central to the analysis of minimal impairment have been the features of the rule being challenged and their impact on the rights principles at stake. In many cases, alternative measures have been given detailed consideration. Alternatives have even been substituted for the challenged measure using section 3 of the HRA as was particularly evident in the burden of proof cases. This shows that the availability of alternative measures is a prerequisite for factual optimisation. Rule-making is a governmental activity which usually involves choosing from a range of measures and so it is particularly amenable to this stage of the proportionality test, unlike administrative decision-making.

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<sup>159</sup> See further Chapter 3.4.2.

Another important observation that can be made at this point is that overall balancing has played a limited role in the proportionality cases on criminal justice. Unlike administrative decision-making, there is nothing inherent in the activity of rule-making which suggests that certain parts of the proportionality test do not readily apply to it. The first, and most obvious reason for this sidelining of overall balancing is that where a measure is deemed to have failed the factual optimisation stage of the test, there is little reason for the court to then move on to discuss legal optimisation. A measure that is not factually optimised is not proportionate. In cases where the measure has been deemed to be factually optimised, such as *Brown v Stott* and *A v Scottish Ministers* the courts have gone on to consider legal optimisation, although as was made clear in *Gallagher, Re an Application for Judicial Review* the analysis of overall balance requires the general nature of the rule to be considered, which as I indicated in Chapter 3.2.3, is a more difficult measurement than is the case with individualised administrative decisions. As such, there is more scope for epistemic deference.

A second reason for the absence of overall balancing arises in the cases dealing with Acts of Parliament. In many of these cases the reviewing court has used its interpretive role under section 3 of the HRA to ‘read down’ a measure in legislation such that a court is effectively substituting its own less rights-intrusive measure for the challenged measure. This substitution concludes the proportionality analysis and so precludes the possibility of overall balancing. Admittedly, since the measure is deemed to have failed the factual optimisation stage, there is perhaps no reason to have a legal optimisation analysis anyway. However, it must be noted that this ‘reading down’ involves a denial of structural deference. By substituting a particular measure in place of the challenged measure, the reviewing court denies Parliament the opportunity to choose its own replacement for the disproportionate measure. After the individual case has concluded, Parliament does have the power to replace the court’s substituted measure with new

legislation. However as regards the structure of the proportionality analysis undertaken by the court, section 3 must be recognised as affording no structural deference in factual optimisation.

Epistemic deference has been evident throughout this case study. Many of the issues involved with the criminal justice system entail uncertainties which the courts are not well placed to navigate. As such, empirical epistemic deference has been applied at both the factual and legal optimisation stages. Similarly, in *A v Scottish Ministers* the precise balance to be struck was uncertain from the court's point of view and so normative epistemic deference has been afforded to Parliament. Some of the cases in this chapter have also given consideration to the reasons for affording deference. These have been very much in line with the institutional bases for deference set out in Chapter 3.4: democratic legitimacy and relative institutional competence.

Some of the cases in this chapter, most notably *Hirst* have dealt with challenges to a measure that was the outcome of multiple levels of government decision-making. As with the immigration cases in Chapter 4, the proportionality challenges to multi-level criminal justice decisions have been directed to a single level of the decision. This can be contrasted with housing cases, in which there have been a number of significant decisions in which the courts addressed the proportionality of more than one level in multi-level cases. It is to these cases that I turn in the next chapter.

## *Chapter 6: Case Study Three: Proportionality across the Range of Government Action - Housing*

In this third and final case study I apply the structural, institutionally sensitive model to proportionality cases dealing with housing rights under the Human Rights Act 1998 ('the HRA'). Housing cases have given rise to proportionality decisions that relate to multiple institutions of government. Much of the legislation in this field sets up statutory systems for the regulation of social housing and the courts have considered proportionality challenges to these systems. The courts have also considered challenges to the exercise of administrative powers under these systems. In addition, there have been a number of cases which have dealt with the exercise of administrative power within a statutory scheme in which the proportionality of both the administrative action and the legislation was at issue.

As I explained in Chapter 2, and then illustrated in subsequent chapters, Alexy's model of proportionality and deference describes proportionality in terms of the factual and legal optimisation of principles. Deference is classified as normative or epistemic and these two forms of deference are integrated into the structure of the proportionality test itself. In Chapter 3.2, I identified three types of difference in the institutional features of government bodies: choice of objectives, range of measures and scope of the decision.

These three scales of difference can impact on the operation of the structural model of proportionality and deference. In Chapters 4 and 5, I showed how these distinctions would affect the model in two institutional settings at opposite ends of each of these scales: immigration decisions and criminal justice.

In this chapter I will consider the operation of the structural model in cases which deal with numerous institutions of government. In some of the cases I will consider, only one institution was challenged. In others, the activities of multiple institutions were examined by the courts to determine the compatibility of each with the European Convention on Human Rights ('the Convention').

This chapter is set out in three sections. In the first section I will show that the courts have engaged in the identification of human rights principles and public interest principles in their application of proportionality. In the second section I will show that factual and legal optimisation have been used in cases dealing with only one level of government. I will confine section two to cases that concern *either* administrative decisions *or* rule-making but I will take note of institutional factors and their effect on the proportionality analysis. In the third section, I will look at the case law dealing with multiple layers of government and show how the proportionality analysis has become stratified over different institutions in the hierarchy of governmental decision-making. In the second and third sections I will address issues of structural and epistemic deference where they arise.

In Chapter 4 it became clear that factual optimisation played a limited role in relation to one-off administrative decision-making. In Chapter 5, it was evident that factual optimisation played a very substantial role in relation to rule-making and that legal optimisation was minimised. Housing cases throw up an interesting merging of these two formats. While some of the cases have been concerned solely with a rule or an administrative decision, certain cases have dealt with administrative decisions which

were made pursuant to a rule and the courts have had to consider the Convention compatibility of both the administrative decision and the rule. These multi-layer proportionality situations have been at their most prevalent in the housing case law. In this chapter I will explore the institutional patterns that have emerged in such cases.

## 6.1: THE IDENTIFICATION OF PRINCIPLES

Proportionality is essentially a sophisticated balancing exercise. In order to undertake that exercise, it is important to be clear about what is being balanced. As was discussed previously, the choice and definition of principles can have a profound impact on the outcome of the analysis. This section explores the human rights principles and public interest principles which have been identified by the UK courts in housing cases under the HRA.

### *6.1.1: Human rights principles*

The nature of Convention rights is such that it is extremely difficult for them to function as rules. They must be treated as principles insofar as they lack the instructions for their own realisation.<sup>1</sup> This was implicitly recognised by the High Court in *R (Baker) v First Secretary of State*<sup>2</sup> in which Nicholas Blake QC (as he then was), sitting as a deputy judge of the High Court, noted that guidance given to local authorities in relation to compulsory purchase orders must be ‘sufficient to give effect to human rights principles.’<sup>3</sup> The use of such language is noteworthy since it belies the notion of human rights as rules and reflects their actual nature. The number of human rights principles at

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<sup>1</sup> See Chapter 2.2 above.

<sup>2</sup> [2003] EWHC 2511 (Admin).

<sup>3</sup> *ibid*, at paragraph 21 (emphasis added).

issue in housing cases has been somewhat less than in the preceding two case studies, arguably because fewer rights apply directly to the area. The Article 8 right to respect for home life is the most common. The UK Courts have been guided by the jurisprudence of the European Court of Human Rights ('the ECHR') in identifying principles under the Convention. What follows is a brief consideration of the principles which have been recognised by the courts in housing cases.

### *Respect for home life*

The most obvious right at issue in housing cases is the right to respect for the home, which is expressly guaranteed in Article 8(1) of the Convention. The House of Lords stressed in *Harrow London Borough Council v Qazi*<sup>4</sup> that while Article 8 requires that a person's home life needs to be respected, this is not a right to be given a home. Lord Bingham cited ECHR jurisprudence to the effect that the 'European Court of Human Rights has made clear that Article 8 does not in terms give a right to be provided with a home and does not guarantee the right to have one's housing problem solved by the authorities'.<sup>5</sup> As such, the right is based on the core principle that whatever home you have should not be interfered with, rather than that you have a right to claim a home from the state.

The exercise of Article 8 rights is not limited to individuals who have an enforceable legal right to their property. In situations where a person's tenancy has ended, they may still rely on the right to respect for home life, if the court accepts that the dwelling in question is, in fact, their home. This can be seen in the early case of *Poplar Housing and Regeneration Community Association Ltd v Donoghue*<sup>6</sup> in which the claimant had been granted a non-secure week-to-week tenancy, which nonetheless gave rise to an Article 8 issue and engaged the principle that her home life should be respected. It is

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<sup>4</sup> [2004] 1 AC 983.

<sup>5</sup> *ibid*, at 989.

<sup>6</sup> [2002] QB 48.



worth noting that she had been living in the property under those circumstances for over a year at the time the social landlord sought to evict her. This is further bolstered by the judgment of Laws LJ in *Sheffield City Council v Smart*:<sup>7</sup> ““Home” is an autonomous concept for the purpose of ECHR, and does not depend on any legal status as owner.”<sup>8</sup> It is clear therefore that the right to respect for home life is dependent primarily on where a person is living day-to-day, rather than whether they have any concrete legal claim to that residence.

In *Harrow London Borough Council v Qazi*<sup>9</sup> the House of Lords gave detailed consideration to what is entailed in the Article 8 right. They cited ECHR jurisprudence to the effect that home has an autonomous meaning that is separate from any contractual or legal entitlement to a particular piece of property and that the property will be considered the person’s home where it is shown that they have a sufficient and continuous link with it.<sup>10</sup> The House unanimously agreed that the fact that the claimant’s tenancy had come to an end did not extinguish his right to respect for home life in respect of the property; the issue was solely whether the interference with that right could be justified.

#### *Caravan as home*

In *South Buckinghamshire District Council v Porter (No 1)*<sup>11</sup> the House of Lords recognised that the human rights principle of respect for home life can include situations where a person is living in a caravan. Lord Hutton cited the ECHR decision in the case of *Buckley v United Kingdom*<sup>12</sup> as authority that the right to a home could include a caravan, even where the caravan has been erected in breach of planning

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<sup>7</sup> [2002] EWCA Civ 04.

<sup>8</sup> *ibid*, at paragraph 26.

<sup>9</sup> [2004] 1 AC 983.

<sup>10</sup> *ibid*, at 1008-1010 *per* Lord Hope.

<sup>11</sup> [2003] UKHL 26; [2003] 2 AC 558.

<sup>12</sup> (1997) 23 EHRR 101.

control.<sup>13</sup> Again, this underlines the point that it is the plain fact of living in a place that gives rise to the Article 8 principle, and this is not dependent on whether the individual lives there lawfully.

### *Non-eviction*

Once it is established that a particular property is a person's home, there is a human rights principle that they should not be evicted, which must be balanced against any countervailing public interest. This can be seen in the decision of Sedley LJ in *Lambeth London Borough Council v Howard* where his lordship expressed the following opinion:

‘It seems to me that any attempt to evict a person, whether directly or by process of law, from his or her home would on the face of it be a derogation from the respect, that is the integrity, to which the home is prima facie entitled.’<sup>14</sup>

The Court of Appeal held that once there was an attempt at eviction, Article 8 would be engaged and as such, the measure would have to be proportionate in accordance with Article 8(2). This principle was tempered to a large extent in *Harrow London Borough Council v Qazi*<sup>15</sup> in which Lord Hope held that where the eviction was pursuant to the law the eviction would almost always be justified under Article 8(2). Nonetheless, the human rights principle still stands as a basis for a proportionality challenge, despite the fact that such challenges may not always be successful.

### *Right to property*

The other main source of a Convention argument in housing cases is the right to property contained in Article 1 of the First Protocol to the Convention. Like the right to

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<sup>13</sup> [2003] UKHL 26; [2003] 2 AC 558, at 596-597.

<sup>14</sup> [2001] EWCA Civ 468.

<sup>15</sup> [2004] 1 AC 983.

respect for the home, this right is qualified by its own terms and allows for the limitation of the right, where necessary, to control the use of property in the general interest and to secure the payment of taxes or penalties. The breadth of these provisions is indicative of the operation of this right as a principle rather than a rule. In *Clays Lane Housing Co-operative Ltd v The Housing Corporation*<sup>16</sup> the Court of Appeal considered the Convention compatibility of a decision by the Housing Corporation, which regulated social landlords, to order the transfer of housing stock from the claimant to another social landlord on the grounds of mismanagement. It was accepted that Article 1 of the First Protocol applied in the case, and the only Convention issue was whether the deprivation of property was justifiable.

### *6.1.2: Public interest principles*

When a court is considering the proportionality of a government intrusion on Convention rights, it must be satisfied that the intrusion is in pursuit of a legitimate objective.<sup>17</sup> In terms of Alexy's structural model, the objective must be sufficiently important to be a norm, and so have the character of a principle, to be optimised relative to the competing human rights principle. As was noted in previous chapters,<sup>18</sup> the structural model does not seek to provide a means of determining which public interests have the necessary normative force. Rather, the model provides a framework within which normative arguments about this issue can be made.

The UK courts do not have a comprehensive mechanism for deciding whether a public interest meets the standard of a principle. They are guided in the first instance by the first stage of the proportionality test (the 'legitimate objective' stage) and in the second

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<sup>16</sup> [2005] 1 WLR 2229.

<sup>17</sup> See *de Freitas v Minister for Agriculture and Fisheries* [1999] 1 AC 69; and *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167.

<sup>18</sup> See Chapter 2.2, 4.1.2 & 5.1.2.

instance, by the text of the Convention and ECHR case law. The text of the Convention has been used repeatedly in housing cases. Article 8(1) guarantees the right to respect for home life. Article 8(2) gives a specific list of government aims that are sufficiently important to be a basis for limiting a Convention right. As the cases in this chapter are primarily concerned with Article 8 rights, the public interest principles have tended to be derived from Article 8(2).

### *Housing needs of the community*

In *Poplar Housing and Regeneration Community Association Ltd v Donoghue*<sup>19</sup> the Court of Appeal recognised that the rights of the claimant should be balanced against ‘the needs of those dependent on social housing *as a whole*’.<sup>20</sup> The case concerned the repossession of local authority housing. The Court of Appeal expressly endorsed the reasoning of the district judge at first instance, who had held that any limitation on the applicant’s Article 8 rights was justified by the Article 8(2) proviso relating to the rights and freedoms of others. This is a reference to the Article 8 rights of others who are waiting for local authority housing.

A similar public interest principle was recognised by Laws LJ in the Court of Appeal decision in *Sheffield City Council v Smart*.<sup>21</sup> He identified the purpose of the challenged measure as the ‘fair and orderly management of the council’s housing stock.’<sup>22</sup> In doing so, Laws LJ made explicit reference to Article 8(2), although he did not discuss which specific aspect of Article 8(2) gave rise to this legitimate aim. However, it would not be difficult to justify this objective on the basis of the need to protect the rights and freedoms of others or the economic well-being of the country.

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<sup>19</sup> [2002] QB 48.

<sup>20</sup> *ibid*, at 70-71 (emphasis in original).

<sup>21</sup> [2002] EWCA Civ 04.

<sup>22</sup> *ibid*, at paragraph 14.

A similar public interest principle was recognised in *Clays Lane Housing Co-operative Ltd v The Housing Corporation*.<sup>23</sup> The case concerned the compulsory transfer of housing stock from the claimant, a social landlord, to another social landlord, over the objection of the claimant that it should be transferred to a third social landlord. In choosing between the two potential transferees, the regulatory body highlighted the greater degree of financial strength, certainty and security that would be afforded to tenants if the housing stock was transferred to its preferred of the two, on the basis that it would provide greater security for the tenants. This public interest was accepted by the Court of Appeal as the basis for an intrusion onto the property rights of the claimant. The Court did not give any detailed consideration to the derivation of the public interest, although it did cite the text of Article 1 of the First Protocol in full, which includes a provision allowing the ‘state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest’. It is difficult to see how the protection of the security of tenants in social housing would not have been accepted under this provision if the legitimacy of the objective had been examined in detail.

*Public Health and preservation of the environment*

In *South Buckinghamshire District Council v Porter (No 1)*<sup>24</sup> the House of Lords accepted that there was a public interest principle that the environment should be preserved. This particular goal had been identified by the Court of Appeal decision in the same case and was expressly endorsed by Lord Steyn, who made direct reference to Article 8(2); although he did not specify which precise aspect of Article 8(2) this goal was derived from.<sup>25</sup> The case concerned three separate cases involving gypsies who were camped on land they owned, but did not have planning permission for them to

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<sup>23</sup> [2005] 1 WLR 2229.

<sup>24</sup> [2003] UKHL 26; [2003] 2 AC 558.

<sup>25</sup> *ibid*, at 588.

reside there. The pieces of land being used by two of the respondents were in green belt areas. Lord Bingham recognised that control of planning, one of the purposes of which was to protect the environment, was an ‘important process, since control, appropriately and firmly exercised, enures to the benefit of the whole community.’<sup>26</sup> Lord Bingham went on to refer to ECHR jurisprudence on Article 8(2) dealing with the eviction of gypsies<sup>27</sup> and noted that in those cases it was ‘effectively common ground’ that the measures ‘pursued aims entitled to recognition under the Convention as legitimate.’<sup>28</sup> Since the claimants had accepted that the objective was legitimate, there was little detailed discussion of precisely how that objective could be derived from Article 8(2). It could feasibly be linked to the protection of the rights of others, economic well-being or public health.

A related point was recognised in *R (Baker) v First Secretary of State*<sup>29</sup> which concerned the compulsory purchase of a property that was no longer fit for human habitation. Again, the parties had agreed that the measure was taken in the public interest and so the court did not need to give detailed consideration to the legitimacy of the objective.<sup>30</sup> However the Court described the public results sought by the measure as ‘preventing it from continuing to pose a serious threat to the health of both the occupant and the immediate environment’.<sup>31</sup> There is no clear discussion of the derivation of the principle in the judgment. However, Article 8(2) does include provision for limitation for the protection of health and public safety and Article 1 of the First Protocol includes provision for limitation in ‘the general interest’. It seems likely that this was the derivation, although it is not possible to be certain.

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<sup>26</sup> [2003] UKHL 26; [2003] 2 AC 558, at 568.

<sup>27</sup> *Buckley v United Kingdom* (1996) 23 EHRR 101; and *Chapman v United Kingdom* (2001) 33 EHRR 399.

<sup>28</sup> [2003] UKHL 26; [2003] 2 AC 558, at 581.

<sup>29</sup> [2003] EWHC 2511 (Admin).

<sup>30</sup> *ibid*, at paragraph 16.

<sup>31</sup> *ibid*, at paragraph 16.

A more direct derivation can be seen in *R (Wilson) v Wychavon District Council*.<sup>32</sup> The Court of Appeal accepted that the public interest principle being pursued was the protection of the environment, which it held to be derived from the Article 8(2) recognition of the protection of the rights and freedoms of others.<sup>33</sup>

#### *Urban regeneration*

In *Pascoe v First Secretary of State*<sup>34</sup> the High Court recognised that urban regeneration was an environmental benefit which could constitute a legitimate public aim for the purposes of proportionality analysis. The High Court made reference to *Chapman v United Kingdom*<sup>35</sup> in which the ECHR recognised that Article 8(2) can be used as a basis to pursue the legitimate aim of protecting the rights of others through preservation of the environment.<sup>36</sup> Forbes J also accepted that the urban regeneration would be in pursuit of the economic well-being of the country, which is one of the public interest principles expressly set out in Article 8(2). This analysis of urban regeneration shows how a sub-principle can be derived from two separate principles in Article 8(2) simultaneously.

In *Smith v Secretary of State for Trade and Industry*<sup>37</sup> Wyn Williams J in the High Court heard a challenge to a decision to confirm a compulsory purchase order of lands being used as gypsy halting sites. The order was confirmed notwithstanding the fact that alternative accommodation had not yet been found. The lands were to be developed to provide facilities for the London Olympic Games in 2012. The basis of this limitation of their Article 8 rights was the economic well-being of the country, which is recognised in Article 8(2). The High Court subsequently defined the public interest down even

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<sup>32</sup> [2007] EWCA Civ 52; [2007] QB 801.

<sup>33</sup> *ibid*, at 819-820.

<sup>34</sup> [2006] EWHC 2356 (Admin); [2007] 1 WLR 885.

<sup>35</sup> (2001) 33 EHRR 399.

<sup>36</sup> *ibid*, at 422; Cited with approval: [2006] EWHC 2356 (Admin); [2007] 1 WLR 885, at 907 *per* Forbes J.

<sup>37</sup> [2007] EWHC 1013 (Admin); [2008] 1 WLR 394.

further to the objective of needing to have the land in place by mid-2007. Defining the principle in such a narrow way affected the operation of the proportionality analysis; it drastically reduced the range of measures which could feasibly have achieved the public interest. The definition of the public interest by the High Court has been criticised on the basis that it relieved proportionality of any effective role.<sup>38</sup>

The use of such a narrow definition of the public interest by the High Court could also be criticised on normative grounds. It could be argued that the High Court failed properly to apply the legitimate objective element of the proportionality test. Such criticism can be made within the framework of the structural model: it could be described as an excessive level of deference at the legitimate objective stage.

*Prevention of anti-social behaviour and non-payment of rent*

*R (McLellan) v Bracknell Forest Borough Council*<sup>39</sup> involved a challenge to a statutory scheme established by the Housing Act 1996, which empowered local authorities to grant ‘introductory tenancies’ to tenants. This meant that for the first year of their tenancy they were essentially on probation. The aim of the scheme was to prevent anti-social behaviour and the non-payment of rent, both of which had a significant detrimental impact on other local authority housing tenants. Waller LJ held that in order to be Convention-compatible, the measure would need to be justified under Article 8(2) as protecting the rights and freedoms of others.<sup>40</sup> *McLellan* also involved Article 6 issues, but these did not give rise to a proportionality analysis.

*Discrimination: an illegitimate aim*

Article 14 establishes that the rights enjoyed under the Convention shall be secured without discrimination on any ground. This was at issue in *Ghaidan v Godin-*

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<sup>38</sup> See further Hickman, T. ‘The Substance and Structure of Proportionality’ [2008] PL 694, at 704-705.

<sup>39</sup> [2001] EWCA Civ 1510; [2002] QB 1129.

<sup>40</sup> *ibid*, at 1147.



*Mendoza*.<sup>41</sup> The House of Lords examined the Convention compatibility of a provision in the Rent Act 1977 (as amended) which granted a surviving spouse a secured tenancy in a property on the death of the tenant spouse. This had been extended to include couples living together *as* husband and wife. The respondent in the case was the homosexual partner of a deceased tenant of the claimant's and the claimant sought to evict him from the property subsequent to the death of his partner. The House of Lords accepted that this involved discrimination against the respondent in his enjoyment of Article 8 rights on the basis of his sexual orientation. Lord Nicholls held that such discrimination would have to pursue a legitimate aim and bear a reasonable relationship of proportionality between the means and ends. He abruptly dismissed the legitimacy of the discrimination, stating: '[h]ere, the difference in treatment falls at the first hurdle: the absence of a legitimate aim.'<sup>42</sup> Since no public interest principle could be provided to balance against the principle of non-discrimination, the human rights principle won outright.

## **6.2: FACTUAL AND LEGAL OPTIMISATION AT INDIVIDUAL LEVELS OF GOVERNMENT**

According to Alexy's model, once the human rights and public interest principles have been identified, the court then moves on to optimise both principles factually and legally. Factual optimisation (also known as 'minimal impairment') involves an examination of what is factually possible, i.e. the court looks to see if there is another way of achieving the public interest aim which is less rights-intrusive. The next stage of proportionality, which Alexy terms 'legal optimisation', requires that there be an overall

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<sup>41</sup> [2004] 2 AC 557.

<sup>42</sup> *ibid*, at 568.

balance between the aim pursued and the means used to achieve it. As we have seen Alexy accommodates deference within his model. Structural deference permits the decision-maker to choose between two equally rights-intrusive measures at the factual optimisation stage. Epistemic deference arises where there is uncertainty as to specific issues within proportionality and gives leeway to the decision-makers findings of fact (empirical epistemic deference) or findings as to the precise balance required between the public interest and the human right (normative epistemic deference). As I discussed in detail in Chapter 3, various aspects of this model are institutionally contingent, and so will be more or less applicable in relation to HRA-based judicial review of certain institutions of government.

In this section I will show how housing rights cases under the HRA can be explained using this structural, institutionally sensitive model. As indicated above, this section will be limited to cases where courts looked at either a one-off administrative decision or a rule of general application. These decisions are more straightforward than the cases involving multiple levels of government. My primary aim in this section is to show that the optimisation elements of the test and the related forms of deference are at work in the cases. In the subsequent section I will go on to develop the difficulties inherent in proportionality cases which involve an interplay between different levels of government.

*Poplar Housing and Regeneration Community Association Ltd v Donoghue*<sup>43</sup> was an early HRA case on housing and the language of proportionality is not as explicit in the judgment as it is in later decisions.<sup>44</sup> Nonetheless, the reasoning does indicate that the Court of Appeal gave some consideration to factual optimisation. The challenged measure was a provision of primary legislation: section 24(1) of the Housing Act 1988,

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<sup>43</sup> [2002] QB 48.

<sup>44</sup> It is worth noting that this case pre-dates the celebrated *Daly* decision by about a month.

which required the courts to make an order for possession where a social landlord sought to evict an occupant at the end of a tenancy. Once it was shown that the tenancy had ended, the legislation made it mandatory for the court to grant the order, and no discretion was available. The claimant had been deemed to have become intentionally homeless by the local authority and on this basis the tenancy was ended and so the court was required to make an order for possession. The principles at stake were the tenant's Article 8 right to respect for family life and home on the one hand, and the public interest in protecting the Article 8 rights and freedoms of others who were in need of local authority housing.

It was the compulsory nature of the provision that the claimant argued was a disproportionate infringement of her Article 8 right. Lord Woolf CJ, giving the judgment of the Court, looked at the alternative remedies that were available to an occupant in the claimant's circumstances. He noted that there were a number of ways of challenging the decision to evict, such as an appeal to the County Court, the ombudsman or to the authority itself.<sup>45</sup> While Lord Woolf CJ did not expressly discuss this in the terms of minimal impairment, by looking at the surrounding arrangements, his reasoning included the level of impairment of this particular measure in the broader context of the statutory and institutional framework in which local authority housing operates. As such, it is an early indication of the courts engaging in factual optimisation analysis in housing cases. The focus on factual optimisation was appropriate, since this was a piece of legislation and various options were available to government in setting it out. The choices made and duly reflected in the statute were at the core of the Court of Appeal's reasoning. This is particularly appropriate for proportionality analysis of rule-making powers where the decision-maker has a range of measures available. In such a

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<sup>45</sup> [2002] QB 48, at 71.

situation, since other, less rights-intrusive options could be chosen in a way that is not always possible for administrative decisions.

The Court took the view that the field of housing policy was an area in which ‘the courts must treat the decisions of Parliament as to what is in the public interest with particular deference.’<sup>46</sup> This suggests epistemic deference in the factual optimisation stage. Parliament’s view on what is required is being deferred to. It is not entirely clear whether this is empirical or normative epistemic deference. Lord Woolf CJ was not explicit about whether the deference was being paid to the Parliament’s measurement of the public interest or to the balance it struck between the competing principles. The judgment also made a very brief allusion to legal optimisation. Having accepted that the measure was ‘necessary in a democratic society’ Lord Woolf CJ held that the question remaining was whether the measure was ‘legitimate and proportionate.’ He took the view that ‘this is the area of policy where the court should defer to the decision of Parliament.’<sup>47</sup> Again, this seems to be epistemic deference, probably normative. While the Article 8(2) analysis is very sparse in this case, it is nonetheless possible to see the patterns of the structural model within the reasoning.

The decision in *R (Baker) v First Secretary of State*<sup>48</sup> involved a detailed factual optimisation analysis of an administrative decision by Nicholas Blake QC (sitting as a Deputy Judge of the High Court). The case concerned a decision by a local authority to compulsorily purchase the home of a woman who had let it fall into an extreme degree of disrepair, as a result of which the property was causing problems for the surrounding environment. The rights at issue were the claimant’s Article 8 right to respect for home and her right to property under Article 1 of the First Protocol. As was discussed above, the parties agreed that the measure was in the public interest, so the Deputy Judge did

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<sup>46</sup> [2002] QB 48, at 71.

<sup>47</sup> *ibid*, at 71.

<sup>48</sup> [2003] EWHC 2511 (Admin).

not specify them in great detail, but his reasoning specifically mentions the protection of health.

The Court made reference to the two stage analysis recognised by Dyson LJ in *Samaroo v Secretary of State for the Home Department*.<sup>49</sup> the first stage was to examine whether the objective could have been achieved by less rights-intrusive means and the second was to examine the overall balance. This is a clear recognition of factual and legal optimisation.<sup>50</sup> The Court considered the report of the inspector who had approved the compulsory purchase order on the Secretary of State's behalf and concluded that all other options had been considered but none were thought to be effective. The Court was satisfied that the least rights-intrusive measure had been chosen.

The Court also recognised that if there had only been one means of achieving the aim available to the Secretary of State, then the measure would have been justified. This is an important recognition of the limitations of the application of this arm of the test in certain institutional settings. As I discussed in detail in Chapter 3.3.2 and Chapter 4.2: where there is a very limited range of measures open to a decision-maker, the minimal impairment arm of proportionality becomes far less relevant. The range of measures available to the decision-maker to achieve the public interest aim will be determinative of how much use factual optimisation will be in assessing proportionality. The more measures available, the more meaningful can be the factual optimisation analysis.

It is also interesting to note the divergence between the *Baker* and *Samaroo* decisions. In the *Samaroo* case, Dyson LJ held that there was no need to consider whether the least intrusive means had been used in an administrative decision where it was made pursuant to a rule or policy made at a different level of government. The *Samaroo* decision therefore turned completely on the overall balancing point. By contrast, the

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<sup>49</sup> [2001] EWCA Civ 1139. This case is discussed in detail in Chapter 4 above.

<sup>50</sup> [2003] EWHC 2511 (Admin), at paragraphs 40-42. See above, Chapter 4.2 and 4.3.

*Baker* case turned almost entirely on minimal impairment. This inconsistency can be reconciled by the fact that there were alternative measures available to the decision-maker in *Baker*, which were worth considering. This can be contrasted with the *Samaroo* decision, which, being an immigration decision, involved a choice between deportation and leave to remain. *Baker* is therefore a good example of an administrative decision-making case in which factual optimisation played an important role. The key distinction is the different institutional setting as between the two.

In *Baker* the Court was at pains to set out the need for *both* a minimal impairment *and* an overall balancing stage in proportionality analysis. The Court concluded that given that the least rights-intrusive means of achieving the public interest aim had been used, there could be ‘very little debate about the justification overall, as a fair balance, given the benefits that the public would achieve by the compulsory purchase of these premises.’<sup>51</sup> While there was scant analysis on the legal optimisation point, a finding was made that there was overall balance. As such the *Baker* decision not only shows how the two arms of the test can be used together but also that it is possible for one arm of the test either to be more important or to do more of the heavy lifting in any particular application. To that extent, it compares well with some of the cases discussed below in which only one arm of the test was applied. Whether it is factual or legal optimisation that does most of the work will be substantially affected by the institutional setting.<sup>52</sup>

*Clays Lane Housing Co-operative Ltd v The Housing Corporation*<sup>53</sup> involved an administrative decision by the respondent, which was a regulatory body for social landlords. The respondent had ordered the compulsory transfer of housing stock from the claimant, a social landlord to another social landlord, the ‘Peabody Trust’. The

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<sup>51</sup>[2003] EWHC 2511 (Admin), at paragraph 57.

<sup>52</sup> See Chapter 3.2.

<sup>53</sup> [2005] 1 WLR 2229.

claimant had wanted the housing stock to be transferred to a different social landlord, ‘Tenants First’. At issue were the claimant’s property rights under Article 1 of the First Protocol and the public interest in securing the welfare of tenants in social housing.

The claimants argued that both the respondent and the High Court had failed adequately to address the proportionality of the transfer on the basis that they had used a proportionality test from the ECHR case of *James v United Kingdom*<sup>54</sup> which relied solely on overall balancing and did not involve a minimal impairment analysis. The claimant contended that the *Daly* test superseded the *James* test as a matter of domestic law and it required that the least intrusive means of achieving the public interest be applied. Maurice Kay LJ accepted that the *Daly* test was authoritative but disagreed with the claimant on how it operated in the instant case. There was no dispute in the case about the fact that a transfer was going to occur, the issue was which of the two other social landlords the housing stock would be transferred to. He held that this signified ‘that what is “necessary” is driven by the balancing exercise rather than by a “least intrusive” requirement’.<sup>55</sup> On this basis, his reasoning was much more heavily focused on legal optimisation rather than factual optimisation. However, some recognition of factual optimisation was made. Maurice Kay LJ denied that the least restrictive means had to be found on the basis that such a means would be ‘strictly necessary’. Instead he preferred to describe factual optimisation as requiring the means to be ‘reasonably necessary’. Having done this, he recognised the two elements of the test: ‘I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest *and* as being reasonably necessary but not obligatorily the least intrusive of Convention rights.’<sup>56</sup> Maurice Kay LJ then went on to note that a ‘strict necessity’ test rather than a

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<sup>54</sup> (1986) 8 EHRR 123.

<sup>55</sup> [2004] EWCA Civ 1658; [2005] 1 WLR 2229, at 2241.

<sup>56</sup> *ibid*, at 2241.

‘reasonable necessity’ test might force a decision-maker to take a decision which was ‘fraught with adverse consequences’ on the basis that it was ‘perhaps quite marginally, the least intrusive.’<sup>57</sup> He then examined the decision made by the respondent, which has included doubts whether Tenants First would be able to discharge its regulatory responsibilities in the public interest if the property was transferred to it. The respondent was satisfied that a transfer to Peabody would provide that certainty. While Maurice Kay LJ accepted that the respondent had not applied the correct proportionality test, he was satisfied that if they had done so, they would have reached the same outcome.<sup>58</sup>

The reasoning of Maurice Kay LJ is somewhat unsophisticated in relation to factual optimisation. If his reasoning is unpacked, it is possible to show the structural model at work. The decision-maker had made a finding that a transfer to Peabody Trust would provide greater security for the tenants than would a transfer to Tenants First. As such, a transfer to Tenants First would not be a factually optimised outcome because it did not provide the requisite level of realisation of the public interest principle. On that basis, transfer to Peabody Trust was in fact the least intrusive measure which would achieve the required level of realisation of the public interest. Furthermore, empirical epistemic deference could be afforded to the decision-makers findings in relation to the level of public interest realisation which would be provided by each measure. This reasoning is completely in line with the findings of Maurice Kay LJ, but it makes the process of proportionality reasoning more explicit than his ‘strictly/reasonably necessary’ concept, notwithstanding the fact that he derived it from ECHR Jurisprudence.<sup>59</sup>

Aside from this, the heavy emphasis on legal optimisation was nonetheless justified on institutional sensitivity grounds, given the limited range of measures available to the

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<sup>57</sup> [2004] EWCA Civ 1658; [2005] 1 WLR 2229, at 2242.

<sup>58</sup> This is a recognition of the importance of proportionate outcomes as opposed to the use of proportionality language in decision-making. This question was considered in detail in a series of immigration cases and ultimately the proportionality of outcomes approach was preferred there also. See above, Chapter 4. 3. 2.

<sup>59</sup> *James v United Kingdom* (1986) 8 EHRR 123, at 145-146.



decision-maker. In this case, the decision-maker was faced with only two options as to the transfer of the housing stock, one of which achieved the public interest to a greater degree. This limits the extent to which a wide ranging factual optimisation analysis would have been possible and so the focus on legal optimisation was understandable. Maurice Kay LJ cited *Lough v First Secretary of State*<sup>60</sup> as authority for the proposition that the ‘balancing’ test (legal optimisation) was more appropriate than the ‘least intrusive’ test (factual optimisation) where a case involved a conflict between two or more groups of private interests, rather than a direct interference with a Convention right by a public body. However, once an institutionally sensitive analysis is conducted, it becomes clear that it is the limited range of measures available in such cases that is determinative of the usefulness of factual optimisation, rather than the subject matter.

*Clays Lane* was followed by *Pascoe v First Secretary of State*.<sup>61</sup> The case concerned a compulsory purchase order pursuant to a statutory power to designate certain areas for urban regeneration and subsequently to redevelop them. The principles at stake were the claimant’s right to respect for the home under Article 8 and her right to property under Article 1 of the First Protocol. The public interest aim was urban regeneration. Counsel for the claimant argued that because the decision-maker had not expressly applied a minimal impairment proportionality test when deciding the issue, the decision was not Convention-compatible.

Forbes J then proceeded to consider whether or not there were any alternative less rights-restrictive measures available for achieving the public interest. Before doing so, he noted that ‘the intensity of review depends upon the particular context in question in a given case.’<sup>62</sup> Forbes J concluded that the decision-maker had examined all of the

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<sup>60</sup> [2004] EWCA Civ 905; [2004] 1 WLR 2557.

<sup>61</sup> [2006] EWHC 2356 (Admin); [2007] 1 WLR 885.

<sup>62</sup> *ibid*, at 910. Forbes J had already accepted that there was a wide margin of appreciation in this area, suggesting he was prepared to afford a large degree of deference, see [2006] EWHC 2356 (Admin); [2007] 1 WLR 885, at 909.

proposed alternatives and that he was satisfied ‘that the inspector’s assessment (accepted in due course by the Secretary of State) that there were, in fact, no less intrusive alternatives available to the proposed scheme was properly made.’<sup>63</sup> This is a clear example of factual optimisation tempered by empirical epistemic deference. The court deferred to the decision-maker’s findings of fact concerning the viability of alternative less rights-restrictive measures (empirical epistemic deference). Having accepted those findings of fact, the court was satisfied that there was no less rights-restrictive alternative which would achieve the public interest (factual optimisation).

Forbes J in the High Court contended that *Clays Lane* was authority for the proposition that the two stage *Samaroo* approach was not of universal application.<sup>64</sup> It is worth noting that the first of the two stages, factual optimisation, was not actually applied in *Samaroo*. Furthermore, as has been shown, Forbes J did engage in a factual optimisation analysis to the extent that it was possible, but the limited range of alternative measures meant that the analysis was necessarily scant. While it is not explicit in the judgment of Forbes J, I contend that the limited role for factual optimisation in this case was caused by the institutional features of the decision-maker.

Forbes J concluded his analysis of proportionality by accepting that the overall balance struck by the decision-maker was ‘sufficient to meet the requirement of proportionality’.<sup>65</sup> This is a clear indication of the Court’s acceptance that the challenged measure was legally optimised (although the challenge was ultimately successful on an alternative non-HRA ground). The Court also noted that there was no need for the decision-maker to adopt a formulaic approach to the human rights balancing exercise. The Court’s focus appears to be on the proportionality of the outcome, rather than whether some form of proportionality reasoning was used by the

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<sup>63</sup> [2006] EWHC 2356 (Admin); [2007] 1 WLR 885, at 913.

<sup>64</sup> *ibid*, at 911.

<sup>65</sup> *ibid*, at 914.

decision-maker. This is in line with the reasoning of the Court of Appeal in *Huang v Secretary of State for the Home Department*.<sup>66</sup>

*R (Wilson) v Wychavon District Council*<sup>67</sup> concerned a challenge to a provision which Parliament had inserted into the Town and Country Planning Act 1990. The original legislation had afforded an exemption from local authority stop notices to both dwelling houses and residential caravans. The new provision removed the exemption for residential caravans. The appellants were gypsies and claimed that the measure discriminated against them on the basis of ethnic origin. The human rights principle at stake was the Article 14 prevention of discriminatory treatment concerning the enjoyment of Article 8. Richards LJ gave detailed consideration to the decisions of the ECHR and the UK Courts concerning Article 14 and held that where there was indirect discrimination, the level of scrutiny should be ‘intense or severe’ but not ‘very strict’ as is required in cases of direct discrimination. The Court accepted that the protection of the environment was a legitimate objective derived from the Article 8(2) recognition of the protection of the rights and freedoms of others.<sup>68</sup>

Richards LJ rejected the contention that Parliament was bound to choose the least restrictive alternative when pursuing the public interest. This suggests that he was working on the basis that he must choose between factual and legal optimisation. However, he went on to hold that:

‘It does not follow that the existence of a less restrictive alternative is altogether irrelevant in the context of Article 14 ... the narrower the margin of appreciation or discretionary area of judgment, or the more intense the

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<sup>66</sup> [2005] EWCA Civ 105; [2005] 3 WLR 488 and [2007] UKHL 11; [2007] 2 AC 167. See above, Chapter 4.3.2.

<sup>67</sup> [2007] EWCA Civ 52; [2007] QB 801.

<sup>68</sup> *ibid*, at 819-820. See further above at 6.1.2.

degree of scrutiny required, the more significant it may be that a less restrictive alternative could have been adopted.<sup>69</sup>

He then proceeded to give detailed consideration to both the balance struck between the impact of the measure on the Article 8 rights of the claimants and the public interest in protecting the environment. He also considered the effect that such a measure would have had on those living in fixed dwelling houses and concluded that there were material differences between the two situations which permitted the differential balance.<sup>70</sup> This was clearly legal optimisation at work.

He subsequently examined whether or not a qualified exemption could have been adopted instead of removing the exemption entirely. He ultimately concluded that the application of such an exemption ‘would bring the position very close to the exercise that has to be carried out anyway in individual cases even in the absence of a qualified exemption.’<sup>71</sup> In examining the alternative and concluding that its effects were substantially similar to the challenged measure, Richards LJ was engaged in a factual optimisation analysis, notwithstanding his contention that it was not part of the proportionality test under Article 14. The range of measures available to parliament is extremely wide, so there is no institutional reason why factual optimisation should be minimised in this case. However, the focus on overall balancing in this case shows that factual optimisation is *part* of the proportionality test, not necessarily *all* of the test. By deferring to Parliament’s choice between the two equally rights-intrusive measures, Richards LJ was affording Parliament structural deference.

In *Smith v Secretary of State for Trade and Industry*<sup>72</sup> the human rights principle was the claimant gypsies’ right to respect for the home under Article 8(1) and the public

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<sup>69</sup> [2007] EWCA Civ 52; [2007] QB 801, at 826.

<sup>70</sup> *ibid*, at 826-828.

<sup>71</sup> *ibid*, at 832.

<sup>72</sup> [2007] EWHC 1013 (Admin); [2008] 1 WLR 394.

interest principle was derived from the economic well-being of the country under Article 8(2). The specific aim of the measure, accepted by the court as meeting the 'legitimate objective' test, was that the lands all be in the ownership of the State by a particular date. As was noted above, this was an extremely narrow public interest principle which has been heavily criticised. The case involved a compulsory purchase order of land owned by the claimants made by the London Development Agency. Facilities for the London 2012 Olympic games were due to be built on the land. The respondent had confirmed the compulsory purchase order, even though no alternative sites were available for the claimants.

In defining the public interest principle, Wyn Williams J gave the Secretary of State a very wide degree of empirical epistemic deference. The Secretary of State argued that the Olympic development would be put at risk if the lands were not in the possession of the London Development agency by mid-2007. This was not challenged by the claimant and the Court found that it was 'unchallengeable'.<sup>73</sup> While the question of deferring to the Secretary of State's expertise was not addressed, the lack of any examination of whether the public interest did require the lands to be transferred by mid-2007 shows that there was a *de facto* acceptance of this finding of fact. This was a dramatic level of deference to afford and it arguably skewed the analysis towards a particular outcome.

Wyn Williams J went on to examine whether minimal impairment had to be strictly applied in every case. Having looked also at *Samaroo*, *Pascoe* and *Clays Lane* he came to the conclusion that in this case a 'compulsory purchase order may be proportionate even though it does not amount to the least intrusive interference of the land owner's rights under article 8.'<sup>74</sup> Notwithstanding this finding, the Court elected to examine whether the challenged measure was in fact the least restrictive available. Wyn

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<sup>73</sup> [2007] EWHC 1013 (Admin); [2008] 1 WLR 394, at 409.

<sup>74</sup> *ibid*, at 406.

Williams ultimately found that the confirmation of the compulsory purchase was proportionate stating that ‘[n]o other measure, in my judgment would have achieved that objective.’<sup>75</sup> This is clearly factual optimisation. Furthermore, this quote undermined the Court’s assertion that the least restrictive intrusive alternative need not be followed in all cases. If nothing else would have achieved the public interest, then there *was* no less restrictive alternative.

The Court also noted that in reaching his conclusion that the measure was proportionate, he had had regard to the whole of the claimants’ rights under Article 8 and the fact that the respondent was taking all reasonable steps to resolve the provision of alternative sites expeditiously. This consideration of the factors weighing on either side of the balance is a brief application of legal optimisation.

In this section I have shown that both factual and legal optimisation are deployed by the courts when addressing the proportionality of housing decisions made at a single level of government. While the courts have not always used both arms of the test to their fullest extent, each has been repeatedly applied, giving a clear indication that the structural model can be applied to the UK case law. As I have shown, the emphasis or minimisation of aspects of the proportionality test can be explained by looking at the institutional setting. These institutional patterns have been along much the same lines as was seen in Chapters 4 and 5. The role of deference has not been made explicit in every case, but as I have shown, if an institutionally sensitive approach is taken, these cases can be interpreted in line with the structural model of deference outlined in Chapter 2.4.

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<sup>75</sup> [2007] EWHC 1013 (Admin); [2008] 1 WLR 394, at 409.

### 6.3: FACTUAL AND LEGAL OPTIMISATION IN MULTI-LEVEL CASES

In the previous section I showed how factual and legal optimisation have been addressed by the courts when dealing with HRA based challenges to decisions made at a single level of government. While certain institutional issues presented themselves, they were largely explicable, as were the issues which arose in Chapters 4 and 5. In this section I will move on to examine housing cases addressing the Convention compatibility of decisions which are rooted in multiple levels of government. Most of these concern administrative decision-making under statutory schemes. The proportionality analysis in some of these cases has struggled with the stratification inherent in this sort of decision-making. My aim in this section is to show that the structural, institutionally sensitive model of proportionality and deference can be applied to HRA case law involving review of multi-level decision-making. However, as I will show, a misunderstanding of the institutional factors which affect proportionality has severely undermined the quality of the reasoning in some recent judgments.

This thesis has argued that certain aspects of the proportionality test can be either played down or emphasised in different institutional settings. As was shown in Chapter 4, where an administrative decision-maker has a limited range of options available, then factual optimisation will be minimised and legal optimisation will be emphasised. Conversely, as was established in Chapter 5, where a rule-making authority has a wide range of measures available to it, factual optimisation will be emphasised in certain circumstances, and legal optimisation may be less rigorous, particularly if the rule is of very wide application.<sup>76</sup>

A multi-level decision is likely to involve a rule-maker with a wide choice of measures whose rules affect a large number of people. This can be described as the ‘macro level’.

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<sup>76</sup> See Chapter 5.3.1.

At the lower level, it is likely to involve an administrative decision-maker with a very limited choice of measures whose decisions will affect one person or group. This can be described as the ‘micro level’.<sup>77</sup> These macro and micro levels are two distinct measures, each of which is open to proportionality challenge on HRA grounds.<sup>78</sup>

For proportionality to be effectively applied a court must take one of two courses. The first option is for both limbs of proportionality, along with the attendant issues of epistemic and structural deference – to be applied in full to each of the two levels of the decision. The second option is to stratify the test in an institutionally appropriate manner. This would involve the application of factual optimisation to the rule-maker and legal optimisation to the administrative decision-maker. The rule-maker would be afforded structural and epistemic deference where appropriate and the administrative decision-maker would be afforded epistemic deference. While this second option is less rigorous than the first option, it is conceivable that it could be done in such a way that maintains the internal logic of the structure of proportionality and deference.

There is some case law which indicates that proportionality will be applied in a substantial way to both levels of a decision being followed. However there are also examples of cases where the test is fragmented in a way which fails adequately to take account of institutional factors: the rule-maker is reviewed according to legal optimisation and the administrative decision-maker is reviewed according to factual optimisation. It is hoped that the analysis of proportionality in preceding chapters of this thesis has shown that such an approach is logically flawed and undermines the institutional premises upon which the proportionality test is based.

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<sup>77</sup> I have taken the terms ‘macro level’ and ‘micro level’ from the judgment of Waller LJ in *R (McLellan) v Bracknell Forest Borough Council* [2001] EWCA Civ 1510; [2002] QB 1129.

<sup>78</sup> Where the rule is an Act of Parliament, the challenge would be on the basis of section 3 or 4 of the HRA. If the rule is set at a lower level, then the challenge would be on the basis of section 6. In either case, the proportionality test can be applied, as was shown in Chapter 5.



An example of an approach which suggests that both limbs of proportionality analysis should be applied to each level of a multi-level decision can be seen in *R (McLellan) v Bracknell Forest Borough Council*.<sup>79</sup> The Court of Appeal considered the Convention compatibility of a statutory scheme that put council tenants on an unsecured tenancy for the first twelve months to ensure that they would not engage in anti-social behaviour or non-payment of rent. The human rights principle was the Article 8 right to respect for the home and the public interest principle was the protection of the rights and freedoms of others under Article 8(2). In looking at the Article 8 issue, Waller LJ, with whom the rest of the Court agreed, addressed the issue at the macro and micro level. The macro level concerned the Convention compatibility of the legislative scheme itself and the micro level concerned the Convention compatibility of individual decisions made under the scheme. Waller LJ affirmed the judgment of the first instance judge, Longmore J, who held that the statutory scheme was Convention-compatible. This was based on the *Handyside*<sup>80</sup> version of the proportionality test, which includes requirements that the measure be justified by reasons that are relevant and sufficient; address a pressing social need and be proportionate to the aim pursued. This is very clearly the language of overall balancing (legal optimisation) and it was this point that was the main thrust of the decision.

While the Court did not expressly conduct a minimal impairment analysis, the features of the scheme were considered in a way that suggested that the Court was satisfied that the scheme went only as far as was necessary. This is a rudimentary form of factual optimisation similar to that seen in *Poplar Housing*. Waller LJ cited the case of *Mellacher v Austria*<sup>81</sup> in which the ECHR gave the Austrian legislature a wide margin of appreciation in relation to housing matters. He then went on to hold that Parliament

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<sup>79</sup> [2001] EWCA Civ 1510; [2002] QB 1129.

<sup>80</sup> See *Handyside v United Kingdom* (1976) 1 EHRR 737.

<sup>81</sup> (1989) 12 EHRR 391.

had decided that the scheme was ‘necessary in the interest of tenants generally and the local authorities’.<sup>82</sup> He then went on to note that the scheme involved ‘important safeguards’ and listed six procedural protections that were available to a tenant whom the council sought to evict. He further noted the availability of judicial review in such cases. By looking at the features of the measure and their impact on the protected right, the Court of Appeal was assessing the level of impairment involved. This shows that a degree of factual optimisation was applied, although a detailed analysis of alternative measures was not undertaken. The reference to a wide margin of appreciation suggests that deference was being paid to Parliament; although it is not entirely clear what form this deference took. It was arguably a combination of empirical epistemic deference concerning the assessment of what measures would achieve the public interest and structural deference regarding the choice of measure. This would explain why the factual optimisation analysis (such as it was) involved such light scrutiny of alternative measures.

While the analysis of the macro issue involved some degree of both factual and legal optimisation, the analysis of the micro level was far less exhaustive. To some extent this may be explained by the fact that the court of first instance did not address the micro level issue and for various factual reasons it did not need to be addressed in detail by the time the case reached the Court of Appeal. The important thing to note is that the Court of Appeal held that the mere fact that the statutory scheme was Convention-compatible did not exclude the possibility of a court reviewing the Article 8 compatibility of a decision made *under* that scheme. Waller LJ was satisfied that a tenant had the right to raise the issue of whether their eviction was justified under Article 8(2). While the precise proportionality test to be applied in such a challenge was not discussed by the Court of Appeal, there is no reason to think that factual or legal optimisation would be

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<sup>82</sup> [2001] EWCA Civ 1510; [2002] QB 1129, at 1154.

excluded from a HRA challenge to a decision made under the statutory scheme. The *McLellan* case can therefore be characterised as a proportionality analysis of the primary legislation using both factual and legal optimisation. The micro level issue of challenges to decisions made under the legislation was left open to further proportionality review. While this is by no means a perfect example of full proportionality analysis at both stages of a multi-level decision, it does support the proposition that factual and legal optimisation can each operate at both levels of government which are challenged in multi-level cases.

The relationship between legislation and administrative decisions was also examined in *South Buckinghamshire District Council v Porter (No 1)*.<sup>83</sup> At issue was section 187B of the Town and Country Planning Act 1990, which permitted local authorities to seek injunctions when an enforcement order had been issued. Three local authorities were seeking injunctions on foot of enforcement orders requiring a number of gypsies to cease living on land which had not been zoned for residential use. The local authorities argued that section 187B should be read as requiring the courts to automatically grant the injunctions once the enforcement order had been made. The respondents rejected this argument.

This case required an assessment of two levels of government: the section 187B itself and decisions made under it. The two issues were so closely related that the analysis of each is somewhat intertwined, however, it is possible to discern the approach taken by the House to each level.

On the issue of section 187B itself, The House of Lords held that the provision should be read as retaining the courts' full original jurisdiction in relation to the injunction. The exact language of factual optimisation is absent, but the analysis does pay some attention to the alternative means of achieving the public interest. For example Lord

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<sup>83</sup> [2003] UKHL 26; [2003] 2 AC 558.

Steyn considered whether it would be sufficient to let the local authorities themselves make a determination on the Article 8 issues involved in these cases. He took the view that this would not be an effective protection. This shows the House analysing the alternative means and concluding that the least rights-intrusive means would be to retain full original jurisdiction with regard to the granting of injunctions. This indicates that the court was applying factual optimisation in interpreting the Act. Since the alternative interpretations proposed by the local authority were not factually optimised, they were disproportionate. This could be the reason why no legal optimisation analysis was undertaken in relation to them. It could also have been the view of the court that only factual optimisation was appropriate at the rule-making level. It is not possible to discern which approach was being followed.

Lord Bingham cited with approval the judgment given by Simon Brown LJ in the Court of Appeal decision in this case. Simon Brown LJ had held that injunctive relief should only be granted where the court deemed it to be proportionate, making the point that regardless of the merits of the enforcement order, the court should only grant an injunction where it was prepared to commit a person for failure to obey it and so all of the circumstances of those subject to the injunction must be considered by the court.<sup>84</sup> This indicates a very low level of epistemic deference being afforded to the local authorities. This is noteworthy for two reasons. First, it is the *local authority* which is receiving very limited deference even though it is the *Act of Parliament* that is being interpreted at this stage. This highlights the complex interplay of levels of governance that is involved in these cases. The second point to note about this low level of deference is that the granting of injunctions is something that is within the institutional competence of the courts. As such, relative to other arms of government, the courts have much greater expertise in this area. As has been noted previously, institutional

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<sup>84</sup> See [2002] 1 WLR 1359, at 1377-1378 *per* Simon Brown LJ.

competence is *relative*. Where a court is well equipped to make a decision itself, it will not defer to a decision-maker on institutional competence grounds.

At the level of the individual decisions on enforcement notices, Lord Bingham held that where Convention rights were at issue, the activities of the local authorities would not merely be supervised but would be required to serve a legitimate aim, be in accordance with law and be proportionate. It was common ground that the enforcement orders would be in accordance with law since they were made under the Town and Country Planning Act 1990. As such, the overall proportionality would be the central issue in deciding injunctions. This finding is similar to earlier decisions in relation to administrative decision-making, particularly immigration decisions, in which the factual optimisation issue was deemed to have been dealt with by the legislation setting out the powers of the public body. Here again, Lord Bingham seems to be focusing on overall balancing on the understanding that factual optimisation is not relevant to the exercise of a statutory power by an administrative decision-maker.

Lord Steyn cited with approval the following dicta of Simon Brown LJ from the Court of Appeal decision in the same case:

‘Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought— here the safeguarding of the environment— but also that it does not impose an excessive burden on the individual whose private interests— here the gypsy’s private life and home and the retention of his ethnic identity— are at stake.’<sup>85</sup>

This is very clearly the language of overall balancing and it puts legal optimisation to the fore in the decision to grant an injunction.

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<sup>85</sup> [2002] 1 WLR 1359, at 1378.

The House of Lords repeatedly pointed out that it was not up to the courts to decide the merits of the planning decision itself.<sup>86</sup> However, they were not prepared to limit the powers of the courts to address all of the circumstances, including the human rights issues, when deciding whether to grant an injunction. Lord Steyn noted that as an injunction was an equitable remedy, there was inherently a wide measure of discretion for the court in deciding whether to grant one.<sup>87</sup> Lord Bingham considered the level of deference that a court should afford to the local authority when determining whether or not an enforcement notice passes the overall balance test. Having found that it was up to the court to determine proportionality, he went on to hold that:

‘This did not mean that the court would pay no heed to the decisions of local planning authorities: issues as to whether or not planning permission should be granted are exclusively a matter for them, and the planning history of the site, including any recent decisions, will be highly relevant. Respect should be accorded to the decisions of a democratically accountable body. But it is still for the court to reach its own independent conclusion on the proportionality of the relief sought to the object to be attained.’<sup>88</sup>

These comments indicate that epistemic deference is a significant issue at the level of the individual decision to grant an injunction. Lord Bingham is clearly accepting that empirical epistemic deference should be afforded with regard to factual matters. He is also accepting that some element of normative epistemic deference on the basis of democratic legitimacy may be appropriate. However, the relative institutional competence of the courts in such matters is a factor working in the opposite direction to reduce the level of deference at this overall balancing stage of the analysis. Not only

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<sup>86</sup> This can be seen in the judgment of Lord Clyde: [2003] UKHL 26; [2003] 2 AC 558, at 590-592.

<sup>87</sup> [2003] UKHL 26; [2003] 2 AC 558, at 587.

<sup>88</sup> *ibid*, at 574.

does this show that epistemic deference can be integrated into overall balance, but it is also illustrative of the need to be sensitive to the particular institutional features of the government body being reviewed relative to the courts.

The *Porter* case shows the application of factual optimisation to the framework of rules and legal optimisation to individual decisions made within those rules. As such, the proportionality test has been effectively split across two levels of government. It is not entirely clear whether this was an intentional fragmentation of the test or if it just happened that those were the aspects of the test which did the hard work at each level. In either event, the analysis is consistent with the underlying premises of the structure of proportionality and deference.

A somewhat less satisfactory analysis was undertaken by the Court of Appeal in *Sheffield City Council v Smart*.<sup>89</sup> Laws LJ considered the balance to be struck between the human rights principle of respect for home life and the public interest principle of ensuring fair and reasonable management of local authority housing. The applicants had been deemed unintentionally homeless by the housing authorities and had been granted non-secure tenancies, which the local authorities subsequently sought to terminate on the basis of complaints made by the applicants' neighbours. Throughout the judgment, Laws LJ refers to the requirement of balancing, both in his own findings and with regard to the arguments of counsel. It is clear from the language used that legal optimisation is at the crux of the decision.

As with the *McLellan* case, the judgment includes important observations about which precise level of government the Court of Appeal was reviewing. The appellants argued that the Court should restrict itself to looking at the balance struck by the local authority in deciding to seek possession from the appellant. However, Laws LJ rejected this. He took the view that what was at issue was not the specific administrative decision, but the

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<sup>89</sup> [2002] EWCA Civ 04.

legislation upon which it was based. He held that: ‘the balance of interests arising under Article 8(2) has in all its essentials been struck by the legislature.’<sup>90</sup> The analysis is solely in terms of legal optimisation and the court did not undertake a factual optimisation analysis of the challenged legislation.

Laws LJ held that the UK Courts ‘will give a margin of discretion to elected decision-makers, all the more so if primary legislation is under scrutiny.’<sup>91</sup> While he accepted that conflict between primary legislation and the Convention was possible, he held that ‘one would expect such clashes between the policy of main legislation and the Convention rights to be exceptional, not least for the good reason that distribution of the Convention rights has to go hand-in-hand with deference to the democratic legislature.’<sup>92</sup> These comments and the heavy focus on the balance struck by Parliament indicate that the Court was affording a large degree of normative epistemic deference to Parliament in legal optimisation. This was based on the democratic legitimacy of the Parliament.

As regards the micro level of the individual decisions made under the legislation, Laws LJ did accept that the courts could scrutinise the decision of the local authority to seek possession on a *Daly* basis, rather than limiting themselves to *Wednesbury* review. The Court did not expressly set out the elements of the proportionality test that should be applied in such a case. The *Daly* test is stated in terms of factual optimisation without any recognition of legal optimisation, which would suggest that legal optimisation would not be applicable to individual decisions made under the scheme. However, this was not explicit in the judgment and there is now a wealth of case law on overall balancing and so the full proportionality test might be applied in these cases.

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<sup>90</sup> [2002] EWCA Civ 04, at paragraph 40.

<sup>91</sup> *ibid*, at paragraph 42.

<sup>92</sup> *ibid*, at paragraph 41.



Laws LJ's acceptance of the possibility of proportionality review at the micro level was deeply qualified and he suggested that such instances might involve 'something wholly exceptional' having occurred in relation to the case. In the instant case he found that no Article 8 point arose in the possession proceedings. This suggests that a significant level of deference is also to be afforded to any local authority whose decisions under the scheme were challenged on proportionality grounds.

Overall, therefore, it would appear that the approach to multi-level decision-making and proportionality in *Smart* is somewhat flawed. The analysis of the macro level was based on legal optimisation with a large degree of epistemic deference. The standard suggested for the micro level may have been the full proportionality test, but by explicitly citing *Daly* it is possible that Laws LJ had in mind only a factual optimisation standard. If this was the case, it would invert the logic of the proportionality test. As was shown in Chapter 5, rule-making is especially amenable to factual optimisation, whereas administrative decisions tend to be more amenable to legal optimisation, as was discussed in Chapter 4. To apply only legal optimisation to the rule-making aspect of a decision would be to ignore the possibility that a less rights-intrusive rule might be possible. Furthermore, at the level of the individual decision made under the rule, factual optimisation is of little use. Local authorities in eviction cases are unlikely to have a meaningful range of measures from which to choose. To apply only factual optimisation to the micro would be to remove the important safeguards of legal optimisation. Even if Laws LJ was not seeking to exclude legal optimisation from the micro level, the introduction of a 'something wholly exceptional' test will skew the analysis very heavily in favour of the local authority. As was seen in Chapter 4.3.1 the requirement of exceptional circumstances impacts dramatically on legal optimisation.

The implicit reasoning of *Smart* concerning the fragmentation of the proportionality test was subsequently made explicit by the House of Lords in *Harrow London Borough*

*Council v Qazi*.<sup>93</sup> The case concerned the eviction of a local authority tenant whose wife had left the property where they both lived. At the time of taking up the tenancy, the respondent was aware that if his wife left the house his own tenancy would come to an end. Lord Hope took the view that the existing laws relating to the termination of tenancies were proportionate in this instance. Lord Hope's analysis is developed in terms of overall balance, although that language is not expressly used. His reasoning is based to some degree on the fact that the claimant was aware of this at the outset and further on the fact that 'the premises, once recovered, will be available for letting to others who are in need of housing in their area.'<sup>94</sup> The language of minimal impairment was absent from his reasoning, notwithstanding the fact that this was a rule, and alternative measures would arguably have been available for consideration.

Lord Millett accepted that Article 8 would require a balance to be struck between respect for the home and one of the public interest principles listed in Article 8(2) but distinguished the listed public interest principles from the rights of others. He held that '[c]onsideration of the question whether interference with the right is "necessary for the protection of the rights and freedoms of others" may also call for a balance to be struck, but it need not do so.'<sup>95</sup> He went on to hold that since the tenancy had been lawfully terminated and as such, the outcome of the possession order was a forgone conclusion, there was no need for a balancing analysis to take place in the instant case.

The House of Lords was split over the issue of whether the case should be remitted to the county court for consideration of whether the eviction of the claimant could be justified under Article 8(2), with the majority ruling that it should not. This again highlights the distinction between the macro and micro issue. The majority of the House of Lords in *Qazi* were satisfied that the general domestic property law of England and

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<sup>93</sup> [2004] 1 AC 983.

<sup>94</sup> [2004] 1 AC 983, at 1013.

<sup>95</sup> *ibid*, at 1019.

Wales was enough to satisfy 8(2) save in exceptional circumstances. This meant that the mere fact that the determination of the tenancy was lawful at the macro level was deemed to be a sufficient basis for justification under Article 8(2) of anything done at the micro level. The minority of the House was open to the possibility of the County Court looking at each individual application for possession to ensure that the administrative decision on which it was based was Convention-compatible. This split between the rules at the macro level and the rulings at the micro level again highlights the effect that institutional roles can have in proportionality cases. For the majority, the macro level of domestic property law rule-making had done the balancing act already. For the minority, this would need also to be done at a micro level of administrative decision-making. The majority did not see fit to engage in a minimal impairment analysis of the macro level and it precluded the possibility of any proportionality analysis of decisions made under the legislation. As such, legal optimisation operated at the macro level, but not factual optimisation, and neither form of optimisation was permitted at the micro level.

As has already been discussed, rules, including legislation, are particularly amenable to factual optimisation but can be difficult to assess according to legal optimisation. What the House of Lords did in this case was to break the proportionality test in half, apply an inappropriate half to one level of the decision (the legislation) and refuse to apply either half to the other level (the local authority decision to evict). This is a significant weakening of the proportionality test, which could have been avoided if a structural, institutionally sensitive approach had been taken. If the House had indicated that proportionality analysis of the micro level was acceptable, but been clear that a wide degree of epistemic deference would be afforded, then the integrity of the proportionality test could have been maintained. As it stands, the decision denies the possibility of any proportionality analysis at the micro level, which is tantamount to

relieving local authorities of any responsibility to exercise their eviction powers in a Convention-compatible way.

Mr Qazi sought to appeal his decision to the ECHR but his appeal was deemed inadmissible. Subsequent to the *Qazi* case, the ECHR delivered judgment in two cases dealing with similar issues: *Connors v United Kingdom*<sup>96</sup> and *Blecic v Croatia*.<sup>97</sup> In each of these two cases the appellants had no domestic law rights to their homes and in each case, the ECHR held that the lack of a domestic law entitlement was not, on its own, sufficient to justify the infringement of the right to respect for home life.

While Mr Qazi's situation was unchanged by these cases, the minority of the House of Lords in his case did get a second bite of the cherry. In *Kay v Lambeth London Borough Council*,<sup>98</sup> The House was called upon to revisit this precise issue in light of the intervening Strasbourg jurisprudence. Lord Bingham had been in the minority in the *Qazi* decision and maintained the same position in *Kay*, bolstered somewhat by the ECHR judgments. He held that Article 8(2) required an interference with the Article 8(1) right to meet certain conditions. With regard to micro level decisions, he accepted that compliance with domestic property law was one such condition, but held that it was not a sufficient condition. He stated that 'other conditions must also be met, notably that the interference must answer a pressing social need and be proportionate to the legitimate aim which it is sought to achieve. This must now be recognised as the correct principle.'<sup>99</sup> He did not suggest that all attempts at eviction must be justified by the public authority from the outset in Article 8 terms, but held that an Article 8 issue should be permitted as a defence in proceedings for possession. He was also satisfied

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<sup>96</sup> (2004) 40 EHRR 189.

<sup>97</sup> (2004) 41 EHRR 185.

<sup>98</sup> [2006] UKHL 10; [2006] 2 AC 465.

<sup>99</sup> *ibid*, at 491.

that the Article 8 points could be considered by the County Court and would not require a separate judicial review.<sup>100</sup>

Despite his efforts to open the door for proportionality to operate in micro level housing decisions, Lord Bingham was however in the minority again on this occasion. The majority again reiterated that where a decision was made pursuant to the domestic law it was deemed to be justified under Article 8(2). The majority accepted that it would be permissible to challenge the Convention compatibility of the law upon which the possession was sought but not the decision to seek possession. Lord Hope held that ‘a defence which does not challenge the law under which the possession order is sought as being incompatible with article 8 but is based only on the occupier's personal circumstances should be struck out.’<sup>101</sup> The only challenge at the micro level that Lord Hope and the rest of the majority were prepared to contemplate was one based on traditional *Wednesbury* grounds.<sup>102</sup> This indicates that the House was willing to hear proportionality based challenges to housing legislation generally, but expressly precludes the possibility of proportionality challenges to decisions made under these legislative schemes. As with *Qazi* this shows a massive focus on a single institutional setting and totally ignores the proportionality issues that might arise at the micro level.

This is regrettable. Lord Hope expressed concerns regarding the burden that would be imposed on the courts if every order for possession required a lengthy discussion of proportionality.<sup>103</sup> While this is a legitimate concern, it could have been answered in a fashion which did not remove proportionality entirely from the micro level of the decision. If the micro issue had been addressed in a manner which gave strong support

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<sup>100</sup> It is worth noting that Lord Bingham did not accept that the Strasbourg decisions overruled the *Qazi* decision via section 6 of the HRA. In his view, application of Strasbourg decisions to domestic situations was best governed by the existing system of precedent. See [2006] UKHL 10; [2006] 2 AC 465, at 497-498.

<sup>101</sup> [2006] UKHL 10; [2006] 2 AC 465, at 516-517.

<sup>102</sup> *ibid.*, at 516-517.

<sup>103</sup> *ibid.*, at 504-507.

for a wide degree of deference for administrative decision-makers, the proportionality of decisions made under the scheme could still have been examined without unduly burdening the State. This deference could have been empirical epistemic (based on the local authority's expertise in planning matters) and normative epistemic (based on the local authority's democratic legitimacy). Such a position would have reduced the likelihood of the use of proportionality challenges in most cases of eviction by a local authority, but it would have retained the protection of Article 8 for more severe cases. By failing adequately to take account of the structure of the proportionality test, the House of Lords gave local authorities carte blanche to act in a manner that is highly restrictive of Convention rights.

The issue of the relationship between the micro and macro levels was addressed by the House of Lords for a third time in *Doherty v Birmingham City Council*.<sup>104</sup> In the period between *Kay* and *Doherty*, the ECHR had decided the case of *McCann v United Kingdom*<sup>105</sup> in which the Strasbourg Court had refused to accept that local authority decisions made under statutory schemes should be excluded from proportionality review.

The *Doherty* case involved a challenge to a decision to evict the claimant gypsies from a halting site. The respondent local authority had been exercising its powers under the Caravan Sites Act 1968. The Court of Appeal in *Doherty*<sup>106</sup> interpreted *Kay* as providing two options available to a tenant who sought to challenge their eviction. The first option ('gateway (a)') would be to challenge the Convention compatibility of the legislation under which the decision to evict was made. The second option ('gateway (b)') would be to challenge the decision to evict on conventional public law grounds, most obviously *Wednesbury* unreasonableness. *Kay* had made it clear that challenging

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<sup>104</sup> [2008] UKHL 57; [2008] 3 WLR 636.

<sup>105</sup> (2008) 47 EHRR 40.

<sup>106</sup> *Birmingham City Council v Doherty* [2006] EWCA Civ 1739; [2007] HLR 32.

the local authority's decision to evict on Convention grounds was not an option, so there was no 'gateway (c)'. The Court of Appeal held that there was no basis for such a challenge, as the decision to evict had been made in accordance with the statutory scheme, which compatible or not, had to be followed. The majority of the House of Lords followed this reasoning and again reiterated that proportionality review was excluded from the micro-level.<sup>107</sup> Notwithstanding the findings of the ECHR in *McCann*, Lord Hope expressly stated that *Kay* would not be overruled without good reason and even then only by a panel of nine Law Lords.<sup>108</sup>

At the macro level ('gateway (a)'), the House held that the legislative provision was incompatible with Article 8, however, their Lordships declined to make a finding of incompatibility, since the offending provision had been repealed by the Housing and Regeneration Act 2008, although this new legislation had not yet come into force. At the micro level, the majority of the House again endorsed the 'gateway (b)' approach and was only prepared to countenance common law judicial review. The House remitted the case to the County Court for consideration on that basis.

However, Lord Hope did accept that the standard of judicial review could include slightly more than a strict application of the irrationality test. He held that: 'it would be unduly formalistic to confine the review strictly to traditional *Wednesbury* grounds. The considerations that can be brought into account in this case are wider.'<sup>109</sup> He went on to affirm that the test should be 'whether the decision to recover possession was one which no reasonable person would consider justifiable'.<sup>110</sup> He accepted that certain facts of an individual case could be relevant to this matter, such as the length of time a person had been living in their home.

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<sup>107</sup> [2008] UKHL 57; [2008] 3 WLR 636, at 646 *per* Lord Hope.

<sup>108</sup> *ibid*, at 645.

<sup>109</sup> [2008] UKHL 57; [2008] 3 WLR 636, at 657.

<sup>110</sup> *ibid*, at 657.

The nature of this widened form of reasonableness review has been examined by the Court of Appeal in a number of recent cases.<sup>111</sup> The Court has suggested that the reasonableness review will be influenced by Article 8. However, the Court of Appeal has not sought to introduce full-blown proportionality review at the micro level, which is appropriate, since the Court is bound by the decisions in *Kay* and *Doherty*. If proportionality is ever introduced at the micro level, it will be done by the incoming Supreme Court.

In *Doherty* Lord Hope gave two other reasons (apart from the *Kay* precedent) for excluding the possibility of a Convention challenge to the local authority decision made under the statutory scheme. First, he was concerned that opening the door to such challenges would result in a huge amount of costly litigation on Article 8 points in the County Court. The second reason was that 6(2)(b) exempts a public authority from the requirement to act in a Convention-compatible manner if it is acting to give effect to provisions of primary legislation which are themselves Convention-incompatible and cannot be read down to remove the incompatibility. This has been interpreted to mean that where a public authority is acting to give effect to a Convention-incompatible statute and it has both compatible and incompatible courses of action open to it, section 6(2)(b) will *not* require the public authority to choose the compatible course.<sup>112</sup> Lord Walker accepted that in light of *Kay* this reasoning must also be applied to housing decisions of local authorities. This was also the position taken by Lord Hope.

There is however a chink in the armour of section 6(2)(b). The finding in both *Kay* and *Doherty* is that in these multi-level cases, proportionality analysis can only be applied to the legislation and not to the local authority decision. If the legislation fails the

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<sup>111</sup> *Doran v Liverpool City Council* [2009] EWCA Civ 146; *Central Bedfordshire Council v Taylor* [2009] EWCA Civ 613; *Manchester City Council v Pinnock* [2009] EWCA Civ 852.

<sup>112</sup> See further *R (Hooper) v Secretary of state for Work and Pensions* [2005] UKHL 29; [2005] 1 WLR 1681; and *R (Wilkinson) v Inland Revenue Commission* [2005] UKHL 30; [2005] 1 WLR 1718. Discussed at Chapter 3.3 above.



proportionality analysis, then section 6(2)(b) would indeed protect the decision of the local authority. However, if the legislation is deemed to be proportionate, then section 6(2)(b) does not arise, since it *only* applies in cases where a public authority is acting pursuant to Convention-incompatible legislation. An incompatible decision made under *compatible* legislation would be subject to section 6(1), and so would be unlawful. The legislation in *Doherty* was deemed incompatible with the Convention, so section 6(2)(b) was applicable. However, no such finding was made in *Kay* and the logic of the section 6(2)(b) point in *Doherty* would seem to suggest that it would not apply in such cases. Arden has noted that ‘*Doherty* is itself unlikely to be the last word on the subject’.<sup>113</sup> It is certainly conceivable that the House of Lords might take a fourth run at this multi-level issue if it were faced with a Convention-incompatible decision of a local authority acting pursuant to Convention-compatible statute.

The line of reasoning in the *Qazi*, *Kay* and *Doherty* decisions can be contrasted with that taken in the earlier decision of *Runa Begum v Tower Hamlets London Borough Council*.<sup>114</sup> *Runa Begum* concerned a challenge to a statutory scheme which provided that where the decision of an accommodation officer was challenged, the local authority could conduct its own internal review. The appellant argued that this was incompatible with Article 6, as it did not provide for an independent review. The House of Lords disagreed, and accepted that an internal review would be satisfactory, since it would be amenable to judicial review, which could then provide for proportionality based review. As with the *Shayler* decision discussed in Chapter 1.3.2, this decision holds that legislation at the macro-level passes muster on the basis that decisions made under it, at the micro-level are judicially reviewable. Indeed, in *Runa Begum*, the House held that the statute itself did not even engage the Convention right. Just as *Qazi* and *Kay* supported the individual decisions on the basis that the statute was acceptable, the *Runa*

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<sup>113</sup> Arden, A. ‘Doherty: The Facts of the Matter’ (2008) 11 HLR 96, at 102.

<sup>114</sup> [2003] UKHL 5; [2003] 2 AC 430.

*Begum* case supports the statute on the basis that the individual decisions will be susceptible to proportionality based review.

Looking at all these cases in the round reveals a deeply conflicted approach. Admittedly, in *Runa Begum* the House did find that the Act itself did not engage the Article 6 right, so a proportionality review of the legislation was excluded. However, the logical extension of the tension between these two lines of reasoning is that where a piece of legislation does not engage a Convention right, a challenge to a decision made under that legislation will be amenable to judicial review on human rights grounds. However, where a piece of legislation does engage a right, but the intrusion by the Act is deemed proportionate, then decisions made under the legislation are immune from a HRA based challenge. This is extremely difficult to sustain. A piece of legislation which engages a right would seem to pose a much higher risk of creating the possibility of Convention incompatible decisions, and yet decisions made under that legislation are deemed immune from challenge.

In this section I have shown the development of an inconsistent body of case law dealing with multi-layer housing decisions. The *McLellan* case shows that it is possible for factual and legal optimisation to be applied both to a framework of rules and to administrative decisions made under those rules. This approach is supported by *Porter*. Although *Porter* seems to fragment the test, it does so in a way which is consistent with the structure of the test. While not as thorough as the *McLellan* approach, the *Porter* reasoning is sustainable. As has been shown throughout this thesis, rule-making is a prime target for factual optimisation and administrative decisions are particularly amenable to legal optimisation. The approach taken in the other multi-level housing cases is very difficult to support, in that it excludes large swathes of government decision-making from any sort of Convention challenge at all. If a structural, institutionally sensitive approach had been taken to these cases, then these outcomes

could have been avoided. It is clear that the courts wished to be very deferential in many of these cases, but that end would have been far better served by addressing the issue of deference at the micro level head on, instead of eliminating the proportionality analysis entirely.

#### 6.4: CONCLUSION

In this chapter I have set out the leading proportionality cases in the area of housing. I have shown how both human rights principles and public interest principles have been defined and derived in order to set up the balancing operation inherent in proportionality. I have shown that both factual and legal optimisation are utilised by the courts in housing decisions and that in most instances where deference arises, it can be integrated into the proportionality test by classifying it as structural or epistemic.

I have examined the housing cases involving a proportionality challenge to a single level of government. Certain patterns that were observed in earlier chapters have been replicated in these cases. Administrative decisions are somewhat more amenable to legal optimisation, as was evident in *Clays Lane*, and rule-making is somewhat more amenable to factual optimisation, as was evident in cases such as *Poplar Housing*. However, in *Baker* it was possible to apply factual optimisation to an administrative decision because the decision-maker had a range of measures available.

Some of the reasoning in the single-level housing cases has obfuscated the process of proportionality by failing to make the operation of deference explicit. The courts have been at pains to point out in a series of cases that the least rights-intrusive means does not necessarily need to be used in order for a measure to be Convention-compatible. In some decisions, such as *Clays Lane* and *Smith* the suggestion was made that factual

optimisation should not apply because it requires that a less rights-restrictive alternative might be chosen even if that measure does not achieve the public interest to the required extent. This is not the case. Factual optimisation requires that the least restrictive measure be chosen from among those which actually achieve the public interest. These cases have purported to limit the factual optimisation arm of proportionality substantially, but this issue could have been addressed differently. For example in *Clays Lane*, in which the court sought to set out a strictly necessary/reasonably necessary test rather than recognising that some sort of deference was owed to the decision-maker. By working either structural or empirical epistemic deference into the optimisation analysis, the courts could have permitted decision-makers to choose an appropriate measure while still keeping the proportionality analysis intact.

I have also shown the problems encountered in decisions dealing with multiple layers of governmental activity. The institutional split poses tricky questions for the courts, but in cases such as *McLellan* the proportionality test has been set out in a manner that allows it to apply comprehensively to both levels of government. Later decisions such as *Qazi*, *Kay*, and *Doherty* have been unduly focused on the institution of Parliament to the expense of the possibility of analysing the administrative decisions made under primary legislation. If a greater level of institutional sensitivity had been applied, these issues could have been resolved through the use of deference. The issue of housing is very firmly embedded in social and economic policy, which is at the core of the institutional competence of Parliament and local government, both of which have significant democratic legitimacy. As such, it seems inevitable that the courts would afford a substantial deference in such cases. If this is accepted, then there is no need to preclude proportionality analysis from the micro level entirely. There is no reason to think that structural or epistemic deference would be ineffective in affording local authorities leeway where it is due.

The core argument of this thesis is that proportionality and deference have a structure through which deference is integrated into proportionality. This structural model can be made explicit in the UK case law if sufficient attention is paid to the distinctions between various institutions of government. I have shown that certain institutional factors affect the manner in which this operates. In this case study, I have also shown the difficulties the courts have got into in their attempts to address proportionality across multiple layers of government simultaneously. While decisions such as *Porter* and *McLellan* manage to navigate these tempestuous waters, the bulk of the multi-level decisions have shown a marked lack of judicial understanding of the relationship between proportionality on the one hand and institutional factors on the other. It is hoped that a functioning structural theory of proportionality will go some way to addressing this confusion.

## *Chapter 7: Conclusion*

The HRA incorporates the European Convention into domestic UK law. Many of the rights guaranteed in the Convention can be limited in the public interest. Where an individual wishes to challenge a government measure which infringes upon their Convention rights, he or she will ask the court to make a determination on the issue. When the UK courts are adjudicating such cases, they often use the proportionality test in order to determine whether or not the measure before them is Convention-compatible. In this sense, judges are the primary ‘doers’ of proportionality. The level of scrutiny of the proportionality analysis will often be tempered by the principle of deference to the primary decision-maker.

The proportionality test has become one of the dominant features of HRA-based judicial review. It seems highly likely that even if the HRA were to be repealed, it would be replaced by or supplemented by a ‘British Bill of Rights’. The proposals of the two main political parties indicate that the rights in any such document will be subject to limitation in the public interest.<sup>1</sup> Therefore, there is no reason to believe that proportionality would not survive the transition to a new Bill of Rights; such a

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<sup>1</sup> See speech by David Cameron MP to the Centre for Policy Studies, 26 June 2006. Full text available at [www.guardian.co.uk](http://www.guardian.co.uk) (last checked 21 May 2009); and See speech by Prime Minister Gordon Brown MP to Liberty, 27 October 2007. Full text available at [www.number10.gov.uk](http://www.number10.gov.uk) (last checked 30 May 2009). There are also moves being made to introduce a Bill of Rights for Northern Ireland (see [www.borini.info](http://www.borini.info)), although it seems likely that this would supplement the HRA, rather than replacing it within that jurisdiction.

document would almost certainly require a test along the lines of proportionality. Furthermore, even if the HRA were to be repealed without replacement, proportionality has entered into the tapestry of public law in the UK to such an extent that it is highly likely to continue as a basis for assessing the limitation of common law rights.<sup>2</sup>

Proportionality, it seems, is here to stay, and so a detailed and comprehensive account of its operation is needed. In this thesis, I have set out a structural, institutionally sensitive model of proportionality and deference. This model overcomes the limitations of the spatial metaphor, which has dominated discussion of proportionality and deference in the UK. The model also takes explicit account of institutional factors which have, until now, not been fully explored. This model is a basis for a more complete investigation of proportionality under the HRA. It provides both a bulwark against institutionally perverse uses of proportionality and a framework for a more deeply focused discussion of the normative issues at stake in proportionality-based judicial review.

## **7.1: A STRUCTURAL, INSTITUTIONALLY SENSITIVE MODEL OF PROPORTIONALITY AND DEFERENCE**

In this thesis, I have used the work of Robert Alexy to show that it is possible to integrate deference *within* the proportionality test. This model is focused on the *structure* of proportionality and deference. Existing UK theories of proportionality are based on the spatial metaphor, which describes proportionality and deference as being in opposition to each other, rather than making space for their synthesis. The structural

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<sup>2</sup> See for example the reasoning of Lord Bingham in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532, in which he used common law rights as a basis for a proportionality-type review.

model is only effective in the UK if an institutionally sensitive approach is taken to the governmental activity which is the subject of HRA-based judicial review. This is because the HRA covers a wide range of governmental bodies whose specific features can affect the operation of proportionality and deference. I will briefly summarise the model.

### *7.1.1: The structure of proportionality and deference*

I have shown that proportionality entails the optimisation of competing principles: ordinarily a public interest principle and a human rights principle (although it can also be used for two competing human rights principles). These can both be characterised as principles because they are norms which require realisation, but they do not contain the terms of that realisation in the way that rules do. Not all public interest goals are of sufficient importance to achieve the status of principles. Whether a public interest goal meets that standard is an important preliminary issue which must be determined by a reviewing court. This issue involves issues of political morality and is open to normative disagreement. To date, the UK courts have used the first stage of the proportionality test ('legitimate objective') and the text of the Convention (as interpreted by the European Court of Human Rights ('the ECHR')) as a guide in determining this issue. It is arguable that a better legal mechanism for deciding this point would be desirable. However, any such mechanism could easily be accommodated within the structural model, since it seeks to provide a framework for such normative debates. It is not the purpose of this thesis to conclusively resolve the question of which public interests are sufficiently weighty to be classed as principles.

The optimisation of the competing principles occurs at two levels. First, factual optimisation seeks to establish whether the challenged measure was the least rights-



intrusive means of achieving the public interest principle. Secondly legal optimisation seeks to establish whether there is an overall balance between the two competing principles.

Deference can be structural or epistemic. Structural deference relates to the structure of the proportionality test itself. Epistemic deference arises where there is uncertainty as to the measurement of some element within proportionality. This can be either empirical: where the uncertainty relates to facts; or normative: where the uncertainty relates to the precise balance to be struck between the two competing principles. These forms of deference can arise in different ways at different points in the proportionality test. It is important to note that there must be a reason for deference. It will not automatically be afforded the various stages of the proportionality analysis without some evidence that deference is appropriate. This evidence will be based on either institutional competence or democratic legitimacy.

When a court is undertaking a proportionality analysis of a government measure, it works through the various steps of the proportionality test. First, the court must identify precisely which public interest principle and which human rights principle are being optimised. These two principles are effectively the inputs of the proportionality process.

Structural deference may arise at this stage. The body being reviewed may have a choice as to the objectives it pursues. If there are multiple objectives available, each of which can be described as 'legitimate' for the purposes of the proportionality test, then structural deference may be afforded to the decision-maker's choice between these legitimate objectives. This deference can be afforded to both the choice of a particular public interest objective and to the setting of the desired level of achievement of that objective. Once the level of achievement being sought is established, the rest of the proportionality test can be used to determine what level of limitation of human rights is justified by that level of public interest.

After the principles have been identified, the court will look to see whether or not the challenged measure is rationally connected to the public interest. This requires that the challenged measure actually be capable of realising the public interest principle to some extent. If it does not, then the human rights principle will have been limited for no reason. The legitimate objective and rational connection stages of proportionality are essentially threshold issues.

Once the principles have been identified, and a rational connection has been established, the first of the two forms of optimisation will be applied. Factual optimisation (referred to as ‘minimal impairment’ or ‘least restrictive means’ in the UK) requires the court to examine whether or not there were any less rights-intrusive measures available to the decision-maker which would have achieved the public interest principle to the same extent. If there is such a measure available, then the challenged measure will fail the proportionality hurdle at this point.

Both structural and epistemic deference can arise at the factual optimisation stage. Where there are multiple measures available each of which are equally rights-intrusive, then the decision maker may be afforded structural deference and so the court will defer to the decision-maker’s choice of measure. Where there is uncertainty as to the level of intrusion on the human rights principle or the level of importance or achievement of the public interest, then empirical epistemic deference may be afforded. Where there is uncertainty as to the precise normative balance to be struck between the two principles, then normative epistemic deference may be afforded.

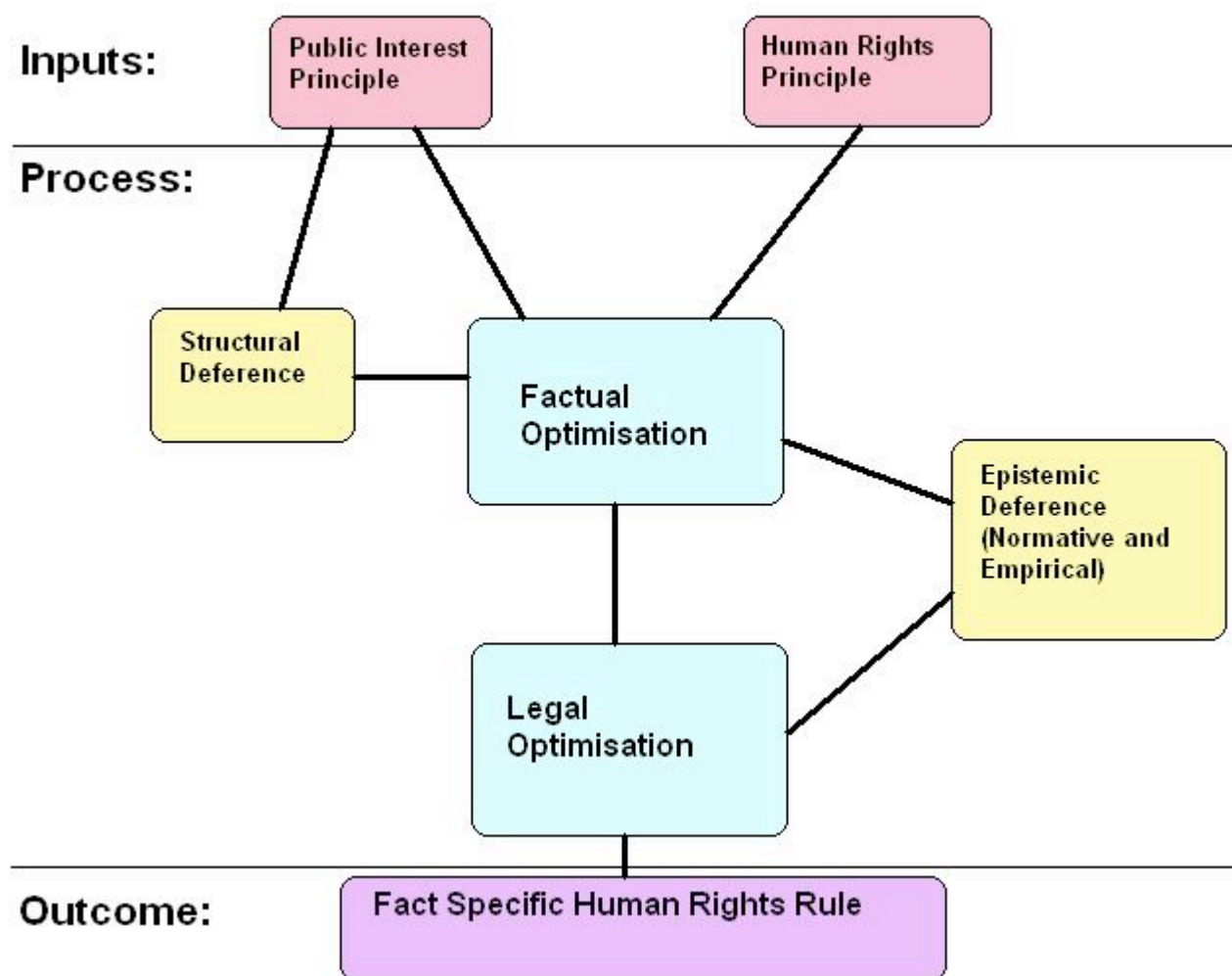
After the factual optimisation stage, the court then moves on to consider legal optimisation (referred to as ‘overall balancing’ in the UK). This requires an overall balance between the level of achievement or importance of the public interest and the level of intrusion on the Convention right. In assessing this, the court may afford the decision maker empirical or normative epistemic deference. If it is difficult for the court

to measure the level of intrusion on the right or the level of realisation of the public interest, then the decision-maker's view may be deferred to. If there is normative uncertainty about the precise balance to be struck, then deference may be afforded on that basis also.

The outcome of the proportionality analysis is a fact-specific human rights rule. This rule dictates the relationship between the two competing principles in that specific situation. This rule will guide courts dealing with future proportionality cases in a way that is very familiar to common lawyers.

I have attempted to show the structure of the model in the form of a diagram (see Figure 1, on next page) For the purposes of clarity, I have intentionally omitted rational connection and legitimacy of aim from the diagram, as they are effectively threshold issues.

Figure 1: Diagram of the structural model of proportionality and deference



### 7.1.2: Institutional sensitivity

As I have shown in this thesis, the structural model of proportionality and deference can only function if it is applied in an institutionally sensitive manner. Proportionality is used by the courts when reviewing the Convention compatibility of a range of government bodies. There are specific institutional factors which can affect both the operation of proportionality and the reasons for deferring to the decision-maker. While there is a standard structure to proportionality and deference, certain aspects of that structure may be minimised or emphasised, depending on the institutional setting.

There are three specific institutional factors which can affect the structural model of proportionality and deference. Variations in these three factors can arise at different points on the scale: the three factors are scales rather than binary either/or distinctions and different institutions can be placed at different points on each of the three scales.

The first factor is the choice of objectives. Some institutions, such as Parliament, will have a wide-ranging choice of which objectives to pursue. Others, such as appointed officials exercising statutory powers, will have a very limited choice. Many other institutions of government will fall at mid-points on this scale. This factor has implications for the definition of principles at the start of the proportionality analysis as well as for structural deference at this stage. If a decision-maker has had their objective set for them by a separate institution of government (e.g. where an official works according to a statutory authority) then the definition of the public interest principle will be more straightforward for the court than if the decision-maker has a wide choice.

The second factor is the range of measures available to the decision maker. Some institutions of government will have a wide choice of measures available to pursue the public interest. For others this will be much more limited. This will inevitably affect *factual* optimisation and *structural* deference. It is meaningless to ask whether a less rights-intrusive measure is available to a decision-maker who has no significant choice as to which measure is used to pursue the public interest principle. There is also no scope for affording structural deference in such situations, since a range of equally rights-intrusive measures is not available.

The third factor which will affect the operation of proportionality and deference is the scope of the challenged measure. This impacts on *legal* optimisation and *epistemic* deference. A one-off administrative decision will have a narrow scope and affect very few people. This will generally mean that it will be quite straightforward for a reviewing court to measure both the level of intrusion on the Convention right and the

level of realisation of the public interest. This makes legal optimisation easier and reduces uncertainty and by extension the need for epistemic deference. Where the measure is of general application and affects a wide range of people, then there is much greater scope for uncertainty, which will give rise to a more difficult legal optimisation stage and a greater need for epistemic deference, be it empirical or normative.

In addition to these three scales of difference, institutional sensitivity can be required where a challenged decision emanates from multiple levels of government. For example, where an official is exercising a statutory power, both the exercise of the power and the legislative provision which established that power could feasibly be challenged on HRA grounds. In these cases, it is important for the reviewing court to consider the institutional factors involved at each level of the decision separately when applying the proportionality test.

It is commonly accepted that the level of intrusion on the Convention right is one specific ground against which the level of deference should be measured. I would certainly endorse this as an important consideration in deciding the correct level of deference (although I am not seeking to make a normative argument about where that level of deference should be set). However, institutional factors can also affect the level of deference to be afforded. Different forms of deference are based on different institutional presumptions. Structural deference involves a choice between two equally Convention-compatible measures. Such decisions are more appropriately the domain of elected bodies than of the courts. Similarly, normative epistemic deference entails a choice about which principle to prioritise in situations where the precise balance is uncertain. Both of these forms of deference are grounded in concepts of legitimacy of decision-making, and so they can be linked to the criterion of democratic legitimacy. Not all institutions have the same degree of democratic legitimacy. The greater the

democratic legitimacy of the decision-maker, the stronger the reason for affording structural deference or normative epistemic deference.

Conversely, empirical epistemic deference relates to uncertainty in measurement of facts. In such situations, expertise, rather than legitimacy is the core institutional criterion for affording deference. The expertise of decision-makers will vary substantially across the range of government activity. Where the decision-maker has a high degree of institutional competence in relation to the measurement of a particular factor, then the courts will have a reason for affording deference. This institutional competence must, however, be measured relative to that of the courts. Where the reviewing court has a substantial expertise in a field, then there will be less reason to defer to the decision-maker, regardless of their level of institutional competence.

## **7.2: THE MODEL AT WORK IN THE HRA CASE LAW**

I have shown through three case studies that the structural model of proportionality and deference can be found in the existing case law on the HRA. I have shown that in order for the structural model to work, it must be applied in an institutionally sensitive manner. I have used existing HRA case law to establish this. The first two case studies, immigration and criminal justice, arise at opposing ends of the three institutional factor scales I identified in my analysis of institutional sensitivity. By using diametrically opposed examples, I have shown the full extent of the need for institutional sensitivity. The third case study, housing, has shown the complications which arise in multi-level decisions.

The case studies have gone some way to imposing order on the existing HRA case law. By tracing the structural model through a large number of cases, I have shown

connections and patterns in the proportionality jurisprudence that were not previously evident.

### *7.2.1: The model in pure administration cases*

I have used the example of immigration cases to elaborate the operation of the structural model in cases where the governmental activity being judicially reviewed is a solely administrative decision, with no rule-making element. By examining the leading case law in the area, I have shown that such cases generally involve the decisions of appointed officials exercising statutory powers and the decision is usually a binary choice between permitting an applicant to remain in the UK or refusing to let them stay. In these cases, the decision-maker will have no choice as to which objective to pursue, there will be no range of measures available and the decision will be of individual application, meaning it has a very narrow scope. I have shown how in such cases factual optimisation has been minimised to a near total extent, as has structural deference. I have shown how the legal optimisation stage of proportionality has done most of the work in these cases. I have explained how empirical epistemic deference has been applied repeatedly within legal optimisation. I have also shown that while normative epistemic deference was afforded for a time, it has since been rejected. The decision-makers in these cases have institutional competence, but no democratic legitimacy, so this splitting of epistemic deference fits well into the structural, institutionally sensitive model.

### *7.2.2: The model in pure rule-making cases*

I have used the example of criminal justice rules (broadly defined) to elaborate the operation of the structural model in cases where the governmental activity being



judicially reviewed is a solely rule-making decision, with no administrative element. Most of these HRA cases have involved primary legislation, but I have also examined some cases involving rules promulgated at lower levels of government. The choice of objectives is usually wide, as is the range of measures available and the decision will be of general application and affect numerous individuals. I have shown how factual optimisation is greatly emphasised in these cases and legal optimisation is often (although not always) sidelined. I have also shown the operation of structural and empirical epistemic deference within factual optimisation as well as the operation of both forms of epistemic deference within legal optimisation. Where deference has been afforded, I have established the institutional basis for that deference, be it democratic legitimacy or institutional competence.

I have also addressed the operation of section 3 of the HRA which requires legislation to be read in a convention-compatible manner whenever possible. I have shown how this can lead to a total denial of structural deference in factual optimisation and contrasted it with the operation of section 4, which includes an in-built deference to Parliament which operates in parallel with proportionality.

### *7.2.3: The model in multi-level decision cases*

I have used the example of housing cases to elaborate the operation of the structural model in cases where multiple levels of government interact. I have shown how, in cases where only one level was challenged, the structural model has held up well. The application of factual or legal optimisation has been dependent on the institutional factors I have identified. Where deference has arisen, I have shown how its application can be integrated into proportionality using the structural model.

I have also shown how, in cases where there have been multiple levels of government challenged simultaneously, the courts have not always applied the test in a manner which is institutionally sensitive. The reasoning has at times been perverse, when viewed from an institutionally sensitive perspective. In certain instances, the structure of the proportionality test has been fragmented across the institutional levels in a way which is internally inconsistent. Factual optimisation is of limited use in low-level administrative decision making and legal optimisation can be difficult to apply to a rule of general application. Despite this, there are examples of an inverted fragmentation of proportionality: in some cases the courts have applied legal optimisation to the statutory framework within which the administrative decision is made, and applied factual optimisation to the administrative decision itself. In some instances, the courts have gone so far as to deny the possibility of any proportionality analysis of the administrative decision. This is inconsistent with the premises upon which the proportionality test is based and, once an institutionally sensitive approach is taken, these sorts of decisions can be avoided.

### **7.3: OUTCOMES OF THIS THESIS**

The primary goal of this thesis is to elaborate the relationship between proportionality and deference in a deep analytical manner in order to transcend the spatial metaphor and flesh out the institutional dimensions of proportionality-based judicial review. In addition to achieving this, there are three other future prospects for this research.

### *7.3.1: Scope for further study*

The examples I have used in this thesis, particularly in Chapters 4 and 5, have been case studies where the institutional differences were at extreme ends of the three institutional factors affecting the operation of the proportionality test. In order to establish the need for institutional sensitivity, I have focused on these examples because they are the best way to highlight the effect that these distinctions will have on proportionality and deference. However, there will be cases where institutional factors are at play, but are far less pronounced. For example, a Secretary of State making a decision in accordance with a statutory instrument which she herself promulgated will be at a mid-range point on the three scales of institutional difference. In such a case, there will be scope for both factual and legal optimisation to be applied to either or both of the two levels of decision-making involved. Now that I have established the structural, institutionally sensitive model, cases such as these will provide fertile ground for exploration of the nuances of the structural model.

The model can also be extended to cover other fields of human rights adjudication. The three case studies helped establish the model, but its application is not limited to those three areas.

Another area of potential further study is the interplay between sections 3 and 4 of the HRA, which have been the scope of elaborate and sustained academic scrutiny. Now that I have set out the structural, institutionally sensitive model, the relationship of deference to proportionality in review of primary legislation is more explicit. This has the potential to revitalise the discussion of sections 3 and 4 in a way which permits a deeper analysis of the interaction between them.

### *7.3.2: Avoidance of the risk of institutionally perverse reasoning*

A recurring theme of this thesis has been the explanation of the premises upon which proportionality and deference are based. Now that these are explicit and have been used to integrate deference into the proportionality test, there is less risk of decisions being made on the basis of reasoning which is contradictory to the institutional premises underlying the proportionality test ('institutionally perverse reasoning').

If the courts develop a better understanding of factual optimisation, legal optimisation and the various forms of deference in their different institutional settings, there is less likelihood that institutionally perverse reasoning will be used. If a court wishes to afford significant deference on some valid ground, then it may do so, without straining the premises upon which the test is founded.

In some of the multi-level cases, the courts have held that if legislation is proportionate then every decision made under that legislation is also proportionate. Such an approach is very difficult to reconcile with Article 6 of the Convention and section 6 of the HRA and it removes an important layer of human rights protection. A court may take the view that a decision-maker should be afforded a large degree of epistemic or structural deference within proportionality when exercising a statutory power. In the case of some institutions, such as local authorities, there are strong reasons of democratic legitimacy and institutional competence for affording a significant level of deference. However this is not the same thing as dispensing with the proportionality analysis of the decision entirely. It is only after the spatial metaphor has been overcome and an institutionally sensitive approach to multi-level decisions has been developed that institutionally perverse decisions of this kind can be avoided.

### *7.3.3: Framework for normative debate*

In Chapter 1, I explained how previous debates about the interaction of proportionality and deference were trapped in the spatial metaphor, whereby discussion was dominated by arguments about the proper scope of judicial power relative to the power of other arms of government. Because these arguments were made in general terms about institutional roles, rather than in the context of the structure of the proportionality test, they were ultimately unproductive. Once a structural, institutionally sensitive model is established, then there is scope to make these arguments in a more focused way. There are a number of normative questions within the proportionality test. The identification of public interest principles, legal optimisation and the level of deference are all deeply normative issues. However, the value of the structural model is that it makes space for a normative debate about these specific issues in a way that takes full account of how they relate to the rest of proportionality. The structural model does not purport to resolve these debates. Its contribution is that it makes clear which stages of the proportionality test are connected to which specific normative questions. As such, normative debates can be integrated into proportionality, rather than being viewed as somehow prior to it. This is a substantial improvement on the existing spatial explanations.

## **7.4: FINAL REMARKS**

Since its introduction, HRA proportionality review has become a substantial feature of the British public law landscape. Deference has consistently loomed just behind proportionality: sometimes as a shadow, sometimes as a Siamese twin. Proportionality and deference have been applied in many judgments of the UK Courts and been the

subject of a great deal of academic commentary. However, widespread application and discussion are not synonymous with widespread understanding. The judiciary and academic commentators have struggled to devise a productive theory of proportionality. A great deal of the discussion has been either piecemeal or, more commonly, dominated by a desire to link proportionality to other public law reference points, instead of understanding it on its own terms. This has prevented the sort of comprehensive analysis of proportionality that is required if its full potential as a sophisticated mechanism for rights-based judicial review is to be realised.

In this thesis, I have sought to establish just such a comprehensive analysis. I have examined proportionality and deference in terms of the underlying premises, their relationship to each other and their institutionally specific features. This multi-faceted investigation of proportionality under the HRA has enabled me to set out a model which can be applied across the spectrum of proportionality adjudication in a way which is sensitive to the features of individual cases but maintains the integrity of the test's structure. In doing this, I hope I have made a contribution towards clarifying what has at times been a confusing and confused debate.

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