

# **TWO DOGMAS OF PROPORTIONALITY (WITH APOLOGIES TO W.V. QUINE)**

**RICHARD GORDON Q.C.**

## **INTRODUCTION**<sup>1</sup>

W.V. Quine's celebrated Paper *Two Dogmas of Empiricism* (1951) was a devastating critique of logical positivism. It has justly been regarded as '*the most important [paper] in all of twentieth century philosophy*'.

Alas, I can make no parallel claims for my modest (and mercifully short) canter across the much gentler slopes of the proportionality doctrine. But I have borrowed and adapted Quine's title because it provides a helpful structure for the few things that I want to say about proportionality and substantive challenges in the field of fundamental rights law.

Dogmas are assertions. They are there to be questioned. The constituent elements of proportionality have now been stated so often that they have in themselves become a kind of dogma. The over-familiar litany of legitimate aim, rational connection between aim and measure, and measure-must-go-no-further-than-necessary-to-achieve-the-aim is so easy to recite that, in repeating it without analysis, we run the risk of any soporific. Our senses are numbed and our thought atrophies.

Two related dogmas (or underlying assumptions) seem to attach to the modern doctrine of human rights proportionality not only in Hong Kong and the United Kingdom but throughout the common law world. These are that: (i) it possesses a clear analytic structure that differentiates it sharply from the more fluid and open-ended *Wednesbury* doctrine, (ii) whether a measure is or is not proportionate necessarily engages the concept of 'deference.'

I suspect that there may be an element of truth (if that is a logical possibility) in each of these assertions. However, it is precisely because they are often accepted as reflecting the truth, the whole truth and nothing but the truth that I will try to pour a little cold (or at least tepid) water over them and to suggest, in particular, that there are important questions that they simply fail to address. My ostensibly prosaic conclusion will be that proportionality, like *Wednesbury*, is not a monolithic legal doctrine and that, like *Wednesbury*, application of proportionality is (currently at least) solely reducible to a question of context unregulated by any clear legal

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<sup>1</sup> This talk was delivered to the Bar European Group Conference in Athens on 3 May 2011. A slightly different version was also delivered to the Hong Kong Bar Association in June 2011.

principles. At the end of this Paper I will suggest why those bringing substantive challenges on proportionality grounds in human rights cases (and possibly even more widely) might, if it were possible, be assisted by a new formulation of principles (albeit principles that could, if adopted, stand in harmony with the existing proportionality criteria that we have).

### DOES PROPORTIONALITY HAVE A CLEAR ANALYTIC STRUCTURE?

In his authoritative speech in *R (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26 (*Daly*) Lord Steyn undoubtedly took the view that proportionality had a clear analytic structure. This was, indeed, one of his reasons for reaching the conclusion that, applied to the facts of a particular case, a different result might sometimes be reached by implementing proportionality rather than *Wednesbury*. As he put it, in *Daly* (after citing the well-known formulation of the proportionality criteria articulated by the Privy Council in *De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69) ‘these criteria are more precise and more sophisticated than the traditional grounds of review’.<sup>2</sup>

It is obviously true that the syntax of proportionality is more complicated and, for that very reason, seems to promise more than *Wednesbury*. It is, however, questionable whether one may ultimately derive any more from its increasingly sophisticated incantations than the truism that (as Lord Steyn famously observed in, as it happens, the same case) ‘*in law context is everything*’.

We may attempt to clear up one possible misconception straightaway. Whatever else it is, proportionality appears not to involve a merits review. I say ‘*appears*’ because in *Daly* Lord Steyn observed in a short statement the accuracy of which has never been questioned (see paragraph 28) that his analysis ‘*does not mean that there has been a shift to merits review.*’<sup>3</sup> Thus, although Lord Steyn had, as a generalisation one paragraph earlier, suggested that a proportionality exercise might sometimes produce a different outcome to *Wednesbury* because it could involve scrutinising the balance struck by the decision-maker or looking at the relative weight accorded by the decision-maker to identified rights or interests, such

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<sup>2</sup> See *Daly* at paragraph 27.

<sup>3</sup> It is tantalisingly unclear whether Lord Steyn meant that in the average case there would not be a merits review (hence his use of the word ‘*shift*’) but that a merits review might otherwise well occur. However, the fact that he refers in his earlier analysis to reviewing the overall balance or looking at weight accorded to interests as well as his other references suggests that he was, in substance, referring to the intensity of review.

exercise would not obviously accord any merits review; it would, essentially and (one infers) uniquely be a review process.

If Lord Steyn's premise of no merits review is right, it follows that there must, in applying the doctrine, be solely a relationship of review (as Lord Steyn seems, indeed, to envisage) between the Court's evaluation or assessment of the substance of a particular decision and the evaluation of the original decision-maker. If that were not the position it would unravel the premise because the only way in which the legal validity of a decision could, in the absence of such a relationship, be examined on the footing of a breach of proportionality would be by the Court conducting a merits review.

The immediate question that arises is what the nature of that review relationship is.

As I will seek to explain later, the nature of the underlying relationship between the role of the public law decision-maker and that of the review Court cannot satisfactorily be explained on the basis of 'deference' as we have come to know and love it. Amongst other things, we now know as the result of the House of Lords' respective rulings in *R (Begum) v. Governors of Denbigh High School* [2006] UKHL 15 and *Belfast City Council v. Miss Behavin' Ltd* [2007] UKHL 19 that (to put it at its simplest) whether a decision is or is not proportionate is a matter for the Court and not for the decision-maker. The creation of this deceptively simple principle makes it, I will suggest, difficult to find space for a principled and coherent doctrine of 'deference.'

I will come, in a moment, to where the removal of a merits review and issues over deference takes us in terms of an appreciation of what, properly understood, holds proportionality together. But, before arriving at that point, it may be instructive to look, briefly - and somewhat impressionistically - at the elements that make up a legally proportionate decision.

The first requirement is, by common consensus, that the State measure in question must have a legitimate aim. Properly understood, this mandates consideration of whether the aim of the measure is sufficiently important to justify interference with some highly-regarded interest (such as a fundamental right under the Basic law or HKBORO or (in the UK at least) an EU Treaty right). At first sight this element has an impressive sounding precision about it. But have you ever conducted a case in which it made, or could have made, a practical difference to the outcome in terms of the 'space' between proportionality and *Wednesbury*?

To say this is not to dispute the need for a State measure to have a legitimate aim where it encroaches on Convention or EU rights. However, as soon as one engages in the proportionality exercise it soon becomes apparent that the idea of a legitimate aim in this sense is inseparable from consideration of both the rational connection between the aim and the measure (the second proportionality requirement) and the fact that the adoption of the measure must be necessary to secure the aim (the third requirement). In other words, each of the seemingly differentiated aspects of the proportionality template relates to the others and the whole construct involves no more than a very general scrutiny of means and ends. The formulation gives no clues as to how the process is to be undertaken. There is a danger that each of the three requirements will simply collapse into each other when they have to be applied.

A perhaps instructive example of this (albeit an unusual one) is the challenge to the hunting ban in *R (Countryside Alliance) v. Attorney-General* [2007] UKHL 52. There, it was common ground between all the parties to the litigation that the aim of the Hunting Act 2004 was to reduce suffering and cruelty to animals. Had this been accepted by the Court, the claimants might, on the evidence, have succeeded in their submissions to the effect that either there was no rational connection between the aim and the measure or that such measure went further than was necessary to achieve the aim because the evidence on cruelty and suffering was so inconclusive.

However, from the Divisional Court onwards (and despite the clearly expressed rationale for the 2004 Act that had been articulated in the Government's witness statements) the objective of the Hunting Act was held to be a 'composite' aim of preventing or reducing unnecessary suffering to animals 'overlaid by a moral viewpoint that causing suffering to animals for sport is unethical and should, so far as is practical and proportionate, be stopped.' On the basis of this moral overlay, injected it may be thought as a forensic prophylactic into the legislative objective that had already been conceded, it was not difficult for the Government to satisfy the other requirements of proportionality. They were both linked, inexorably, to the legitimate aim framed by the Court.

It may be suggested that the Hunting Act challenge was atypical because the introduction of the legislation was the product of a free vote in Parliament. On that footing, the executive was no better placed than the Court to pluck from the volumes of debate in both Houses any rationale for the legislation.

But that is not really the point. Let us suppose that instead of the Court framing the relevant litigation agenda, the Government's identification of the legislative aim had won the day. The Claimants' submissions would then have been founded on the rationality of the ban by reference to that objective. Yet, whatever the threshold of relevant rationality may be, this is in type the same enquiry as would be conducted by a classic *Wednesbury* analysis. Similarly, the process of evaluating whether or not a measure goes further than is necessary by reference to the legislative objective is, shorn of the possibility of being classified as a merits review, no more in type than a process of evaluating the legality of a measure taking into account (and giving that consideration due weight) the specific expertise of the decision-maker.

What is, I suggest, different about proportionality is the intensity of review rather than any intrinsically different formal structure. In its own way, of course, *Wednesbury* itself possesses a formal structure. One starts with the four corners of the Act in question and determines whether: (i) a relevant consideration has been omitted, or (ii) an irrelevant consideration has been taken into account. Only then by reference to that analysis does one move to stage (iii) (whether there is an irrational decision) and then only if nothing adverse to the analytic integrity of the decision in question has emerged from the Court's assessment at stages (i) and (ii).

It is not, perhaps, difficult to accept that there are cases in which application of a proportionality method of review will result in a different outcome to a conventional *Wednesbury* approach. Yet it seems also to be the position that this reflects merely a higher intensity of review doctrinally accepted as part of the Basic Law (and in the UK HRA and EU) catechism and is not a conclusion that flows from any formalistic structural differences between the two doctrines.

If, as I argue, nothing follows from the fact that proportionality has more intellectual baggage than *Wednesbury* but only from the fact (in the case of proportionality) of a higher intensity of review, how is that different threshold of review intensity to be measured? It may be thought to lie somewhere in the idea of 'deference.' Indeed, it can only lie there or in some other component of judicial restraint.

But I will suggest that 'deference' could only help if one could accord to it a meaning that gives it an independent existence from contextual intensity of review. For if, as I suggest, 'deference' means no more than traditional judicial restraint in certain areas bounded by neon

warning signs such as ‘macro-economic policy’ or ‘expertise of the decision-maker’ it is not easy to see how it injects anything distinctive into proportionality as a concept.

Take away merits review, take away ‘deference’, add a measure of fundamental rights or EU rights (either will do), add a dash of nomenclature (‘proportionality’) and some garnishing (the three proportionality requirements) and what have you cooked? The answer is, I will suggest, not a new dish; merely a bit of extra icing on the intensity of review cake.

### DEFERENCE AND PROPORTIONALITY

Before *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ 158 (‘*Roth*’) little had been written on the subject of deference at least in relation to human rights.<sup>4</sup> But, in his important dissenting judgment in that Court of Appeal ruling, Laws L.J. placed considerable emphasis on it as a relevant concept.

As articulated by him, deference was a legal construct the operation of which was regulated by four principles. First, greater deference would be paid to an Act of Parliament than to a decision of the executive or a subordinate measure. Secondly, there was more scope for deference where the European Convention on Human Rights required a balance to be struck and much less so where the right in question was unqualified. Thirdly, greater deference would be due to the democratic powers where a matter was within their constitutional responsibility; less so where it was a matter within the constitutional responsibility of the courts. Fourthly, greater or lesser deference would be due according to whether or not the subject matter lay more readily within the actual or potential expertise of the democratic powers or the courts.

A few points may be derived from this judicial salvo of principles. *Roth* was a case where ECHR and EU arguments were run *in tandem* but where the exposition of the relevant principles attaching to the then newly-minted idea of deference appears solely to have been directed at fundamental rights cases (see principle 2).

Yet if ‘deference’ (in its *Roth* sense) is uniquely ECHR-based (or, perhaps, by analogy, also EU-based subject to a qualification to which I shall shortly come) it would, nonetheless, be naive to imagine that *Wednesbury* itself lacks a deference component in the wider sense. The whole idea of *Wednesbury* is underpinned by a supposed (but possibly erroneous)

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<sup>4</sup> But deference as a wider juridical notion is not novel: see K.M. Hayne *Deference – An Australian Perspective* Public Law (2011) 75, 77

constitutional separation of powers between the judges and Parliament. To engage in high intensity review would be to usurp this separation of power and assume the functions of the statutory remit of a public law decision-maker. So, in the ordinary meaning of the word (as opposed to a sliding-scale meaning), the Court on a *Wednesbury* analysis defers to the decision-maker.

In that context it is, perhaps, difficult to achieve a meaningful synthesis of the following two statements: (a) proportionality triggers high intensity review but (b) proportionality contains a large measure of judicial deference. If we take merits review out of the equation (it has already been taken out by Lord Steyn in *Daly*) the higher the intensity of review, the lower the scope there would seem to be for deference.

It ought to follow that the more one progresses downwards from an Act of Parliament to (say) an executive decision the less scope there is for deference. Yet, at least as far as *Wednesbury* is concerned (which, by definition, will never be concerned with looking to the legality of a statute) considerable deference (if that is the right word) continues to be shown by the Courts.

On a *Roth*-type sliding scale it may be possible to agree that the judicial restraint reflected in a *Wednesbury* review analysis is rather greater than that shown in fundamental rights or EU cases. What is less easy is to say why this should be so.

One answer might be that the so-called deference exhibited in a fundamental rights scenario is mitigated (or in tension with) the more hands-on review that proportionality necessitates. But this implies that we can say something that is analytically sensible about either the true content of deference in EU and fundamental rights cases or about the principles regulating the higher intensity review other than context. I do not believe that we can.

Deference to an Act of Parliament because Parliament is sovereign seems to me to risk some tough questions. Whatever else is involved in fashioning an idea of EU proportionality deference it is oxymoronic, I suggest, to contend that ‘deference’ in an EU case at least could, in any way, be related to the sovereignty of Parliament given the twin consequences of: the supremacy of EU law and the fact that primary legislation must be dis-applied where it is incompatible with the requirements of EU law.

In any case, the EU institutional framework is, surely, indifferent to the classification of our domestic institutions. We can play with words like ‘sovereign’ to our hearts’ content but it matters not a jot, I have always understood, to the EU legal lexicon. Of course, it may simply

be that ‘deference’ in an EU case is founded on wholly separate and different principles to deference in an HRA case but that they sometimes happen to coincide. But this is not, I think, how our courts have approached it. It would be surprising, for example, if an overlap between a fundamental right covered simultaneously by the ECHR and by the Treaty should be treated differently in ‘deference’ terms where primary legislation is said to offend both against a provision of the ECHR *simpliciter* and exactly the same provision of the ECHR but in its EU incarnation. Would the measure of deference to be expected from the Court not be identical in each case?

Similarly, in Hong Kong there is no longer any equivalent doctrine of Parliamentary sovereignty. Indeed, the power of the judges is both conferred and restricted by the Basic Law. This was made clear by Li CJ in *Na Ka Ling v. Director of Immigration* [1999] 1 HKLRD 315, 337. As the learned Chief Justice observed:

*‘In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. Although this has not been questioned, it is right that we should take this opportunity of stating it unequivocally. In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law.’*

But, of course, this is precisely because the Basic Law is the law as well as forming the constitutional framework of the SAR. The Basic Law is not, and is different in kind from, a sovereign Parliament that is a law-creating vehicle in itself. So, there can be no question in Hong Kong (given the judges’ obligations) of deference to any sovereign Parliament. And, because the Basic Law constrains both the legislature and the executive (rather than, as in the UK, the legislature being unconstrained in its power) deference to either of these organs of state makes no logical sense. In Hong Kong the judges comply with the Basic Law; they do not defer to any organ of State.

This elementary distinction between a constitutional (and law existing) framework such as exists in Hong Kong (or the EU) has both in Hong Kong and in the UK rarely been understood. In Hong Kong it has, in fact, only very recently been accorded specific

recognition by the short judgment of Bokhary P.J. in the CFA in the case of *Charles Peter Mok* FACV 8 of 2010. At paragraph 79 of his judgment, the learned PJ observed as follows:

*'I have no difficulty with the sense in which the expressions "margin of appreciation" and "deference" are each used in the Chief Justice's judgment. But for my own part, they are expressions with I prefer to avoid when the Court is engaged in constitutional review. A margin of appreciation is best known as what the European Court of Human Rights accords to the nations of the European Union. That is a context in which a transnational court has to bear in mind two things : first, the respect due to national sovereignty and autonomy and, secondly, its own limited familiarity with local conditions. As for deference, the Court must not and does not defer to anybody on the question of what is or is not constitutional. What the Court will do is to recognise that, save where absolute and non-derogable rights and freedoms are concerned, there will generally and naturally be a range of legislative choices as to which any preference that the Court may have is irrelevant. Where legislation lies outside that range, the Court will intervene.'*

Although Bokhary P.J. referred to the word 'deference' appearing in the Chief Justice's judgment that word (as far as I can see) did not appear once in that judgment. But the word has surfaced in many other judgments in Hong Kong and – if my thesis is right – it has usually been used incorrectly.

An example of its incorrect use (only I stress if I am right) is that deployed by Andrew Cheung J in *W v. Registrar of Marriages* HCAL 120/2009. The issue in that case was whether a post-operative male-to-female transsexual may marry a man (as opposed to a woman) in Hong Kong, either as a matter of law pursuant to the provisions of the Marriage Ordinance (Cap 181), or as a matter of constitutional entitlement under the Basic Law and the Hong Kong Bill of Rights. At paragraph 195 of his judgment the learned judge said this:

*'Generally speaking, where the relevant societal consensus is in a stage of transition or cannot otherwise be easily ascertained, the court should, in the absence of compelling reasons to the contrary, defer to the judgment of the legislature as reflected in the existing law of marriage, and be most slow to tamper with the status quo by giving the constitutional right to marry an expanded meaning not originally encompassed by the text ... In case[s] where there is no clearly discernible societal consensus, the stance of the elected legislature, as is reflected in the existing law of marriage, should be taken as representative of society's view for the time being, pending the emergence of a clearer societal consensus. All this, as will presently be demonstrated, is consistent with the approach of the European Court.'*

It seems to me that this approach to 'deference' is essentially the same as that of Laws L.J. in *Roth* and that both misunderstand the true function of the Court when exercising in the proportionality exercise. Of course, Hong Kong is not a contracting state to the ECHR but, in any case, the reference by Andrew Cheung J (at the end of the passage I have cited) to European case-law also confuses, I would respectfully suggest, deference with the quite different concept of a margin of appreciation accorded by the Strasbourg Court to national

autonomy as opposed to any supremacy of the legislature itself over domestic courts.<sup>5</sup> The ‘societal consensus’ referred to by the learned judge ought to be reflected in enacted legislation, but the interpretation of that legislation is solely a matter for the Courts who should, in that respect, defer to no other institution.

The principles espoused in (for example) *W v. Registrar of Marriages* and *Roth* expressly contemplated a separate constitutional role as between the courts on the one hand and Legco or Parliament on the other. That supposition, founded on a classic Diceyan construct of sovereignty, is I suggest based on a fallacy. Bokhary P.J’s judgment was, as I have said, very short. But two recent cases in the UK make the same point at greater length.

In both *Begum* and *Misbehavin* the House of Lords held that the question of whether fundamental rights have been violated is one for the Court. Baroness Hale put it at its clearest in *Misbehavin*:

*‘31. The first, and most straightforward, question is who decides whether or not a claimant’s Convention rights have been infringed. The answer is that it is the court before which the issue is raised. The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account. If it were otherwise, every policy decision taken before the Human Rights Act 1998 came into force but which engaged a convention right would be open to challenge, no matter how obviously compliant with the right in question it was. That cannot be right, and this House so decided in R (SB) v Governors of Denbigh High School [2007] AC 100, in relation to the decisions of a public authority. To the same effect were Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816 and R (Williamson) v Secretary of State for Education and Employment [2005] UKHL 15, [2005] 2 AC 246, in relation to legislation passed before the 1998 Act came into force. In each of those cases, the House considered the justification for the policy or legislation in question on its merits, regardless of whether the decision-maker had done so.’*

Nothing in this exposition means that the Court will ignore the decision-making process of a public body if it seeks to justify its policy or ignore the legislative justification for a Hong Kong Ordinance or a UK Act of Parliament. On the contrary, such justification may – depending on the context – be given weight (sometimes great weight) by the Court in deciding whether or not a measure is proportionate.

What Baroness Hale’s reasoning does suggest, though, is that there is no longer a basis for introducing into a framework of deference a sliding scale starting, at its highest, with an

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<sup>5</sup> At paragraph 154 of his judgment in *Chan Kin Sum* HCAL 79/2008 (the prisoners’ voting case) Andrew Cheung J also appears to treat the two doctrines interchangeably: ‘I have no difficulty with the concept of margin of appreciation or deferring to the judgment of the legislature. The point I wish to make here is that by whatever name the courts’ deference is called, one should be very slow, in a domestic context, to evaluate the quality of the legislative debate, particularly with a view to lowering the deference or respect that the courts should have, in a given case, for the choice made by the legislature. That is, generally speaking, no business of the courts. Once the legislature has spoken, the courts should generally take it from there.’

Ordinance or Act of Parliament and descending into that last circle of Dante's hell (a public body decision). As is implicit in *Misbehavin'* the constitutional function of the Court reposed in it by the Basic Law or Parliament is to decide whether or not (where the question is raised) particular legislation or particular decision-making is proportionate. This necessarily means that the Court's constitutional function is to decide a number of questions for itself. This function arises (as Baroness Hale reminds us) 'regardless of whether or not the decision maker<sup>6</sup> [has] done so' (underlining added) (i.e. regardless of whether the decision-maker has addressed fundamental rights considerations adequately or at all).

It must follow from this that the weight to be placed by the Court on any aspect of the evidence before it derives not from any mesmeric force of an Ordinance (reflecting a societal consensus) or Act of Parliament or any other supposed democratic imperative but, rather, through - and only through - the ordinary process of adjudication that is itself part of the Courts' own constitutional function. No hierarchy that derives from proportionality is involved in this.

Once this important consequence is borne in mind it may be thought that although considerable respect may be shown by the Court for the legislative process and for public law decision-making, the quality of that respect is purely contextual. It will depend on: (i) the nature of the right or other relevant interest under scrutiny, (ii) the relevant considerations that the Court considers determine whether or not such right or interest has been unlawfully violated.

The fact that the nature of the right or interest under scrutiny is purely contextual is uncontroversial. It is an axiom of both ECHR and EU law that some rights or interests are more jealously protected than others.

However, it may be argued that in selecting 'relevant considerations' as contextual I am guilty of question-begging. It is this element that I want finally to address.

### IN LAW CONTEXT IS EVERYTHING

It is no accident that Lord Steyn's now famous aphorism was delivered in a case (*Daly*) where the focus was on proportionality. No doctrine is, I believe, more contextual than

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<sup>6</sup> For this purpose the 'decision-maker' includes the legislature as Baroness Hale's interchangeable reference to 'policy decision' and 'legislation' makes clear.

proportionality in the sense of the Court determining that which it considers material before tailoring the amount of judicial restraint needed to decide the case.

We should bear in mind that the agenda for a judicial review challenge (whether under the Basic Law, the ECHR, EU law or other domestic law) will, invariably, have been set by the legislature and/or by the particular public law decision-maker. This is because the facts or information needed to inform the legislation or decision in question will have been self-selected through a non-forensic process; a process to which the courts come, if they come at all, as guests at a party that has long since finished.

To acknowledge that reality is merely to accept that there is a limit to what the courts can do when confronted with public law disputes. That limit arises, however, because of the context (the nature of the party) rather than because of any constitutional restrictions on what the courts may do.

We can test this against the requirements of the proportionality exercise. Although the Court is constitutionally responsible for evaluating the legitimacy of the legislative aim it is usually in no position to decide what may, in the end, come down to a utilitarian calculation, namely how important is it overall to restrict a particular fundamental right given the competing rights and interests that may be engaged? That utilitarian calculation is already likely, in the case of domestic primary legislation, to have gone through a careful Parliamentary process (in the UK this will entail specialist Committee scrutiny especially in the fields of EU and ECHR issues).

A careful process of this kind will, inevitably, 'shape' the matters that the Court will consider on a proportionality examination. The legislative aim may have been identified in clear terms (although this is often not the case). An impact assessment, if conducted, is likely to have selected the matters that will fall for consideration in terms of 'fair balance'. A Court is often not equipped to go behind such matters and widen the scope of the inquiry. But this does not mean that the Court is 'deferring' to Legco or Parliament or that it is, in some fashion, undertaking its respective and separate constitutional responsibility by leaving proportionality decisions for the most part in the hands of our democratic representatives.

As to the second proportionality requirement, attributing rational connection (or its absence) between the legislative objective and the measure under scrutiny is a strand of proportionality that the courts are uniquely well placed to assess.

However, (the third requirement) deciding whether a measure goes further than is necessary to achieve the legislative aim takes one back to the imprecision of context. Assuming as I do for present purposes that this requirement (coupled with the first requirement of legitimate aim) could, in the abstract, involve a careful cost/benefit analysis of the particular legislation or policy to decide (in very crude terms) whether the gains outweigh the losses, this is a task in which context must, surely, be everything. On the level of macro-economic policy or national security there may, in the absence of a hard-edged error of law, be little scope for the Court to go outside the areas considered by the legislature or public law decision-maker in order to decide whether or not the measure is proportionate. It is not that the Court lacks constitutional responsibility for the final evaluation it is, rather, that it is no part of its judicial function simply to repeat the non-forensic exercise that has already been performed. In other more specific contexts the Court may be better equipped to intervene and, if it is, it will (and should) do so and declare legislation or policy to be disproportionate.

These gradations between levels of intrusiveness are no different, in principle, to a *Wednesbury* exercise; the sole difference is that the content and hierarchic significance of the Basic Law, or EU law or ECHR law form in themselves part of the relevant context so that in a case where such issues are raised both the fact of such law being engaged and the specific right or interest under challenge will also form part of the context which regulates the level of scrutiny which the Court will undertake.

## CONCLUSION

What, you may ask, is the point of an exercise that seems to have as its central aim only the assimilation of proportionality to *Wednesbury* which many of us had thought to have died long ago?

Well, challenging dogmas is probably a good thing in itself. But, aside from virtue being its own reward, the abstract resilience of proportionality poses a challenge. How does one calibrate an important principle that has, as its central attraction for public lawyers bringing substantive challenges, the increased judicial protection of ECHR and EU rights?

It may be that we need to devise a set of general principles that could be applied more accurately and more predictively than context. If, as I think, 'deference' in its narrow sense is dead, and if the structure of proportionality by itself does not reach all the parts that we thought proportionality was meant to reach, I wonder whether the following statement of

principles (by reference to the general proportionality criteria that we do have) should at least be considered?:

- Proportionality will not necessarily involve a merits review but it may do so in cases where, on a question that the Court assesses as material to whether a measure is proportionate, the evidence before the Court differs materially from the facts and information before Parliament or the decision-maker.
- Where a merits review of this kind is not undertaken the Court will not second-guess matters on which a thorough analysis of the facts and information before the relevant decision-maker has been carried out in relation to the relevant legislation, policy or decision.
- Where there was sufficient information and/or facts before the relevant decision-maker but there is no analysis or (in the Court's view) inadequate analysis of it the Court will be prepared to review – by its own independent analysis - the facts and information before it with a view to deciding whether the measure in question unlawfully interferes with the Convention or EU right in question.

I am conscious that these principles do not necessarily represent the current law. Indeed, it is all too possible that in our current constitutional arrangements some of them may raise issues in the UK under Article IX of the Bill of Rights and in Hong Kong by reference to the principles laid down in the *Hansard* case-law. I describe them only to show that there are important issues about the courts' constitutional functions and their ability to perform those functions in applying proportionality that need to be grappled with if adequate judicial protection of EU and ECHR rights is to be guaranteed in substance. If we do not address these types of issues proportionality whether in HK or the UK will – like the Emperor's clothes – be revered without being glimpsed.

That would be a pity.

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