

DEFERENCE AND PROPORTIONALITY

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1. Background.

- From *Wednesbury* unreasonableness (*Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223), to strict scrutiny (*R. v. Minister of Defence ex p. Smith* [1996] QB 517, at 554) and the explicit recognition of constitutional rights (*R. v. Secretary of State for the Home Department ex p. Simms* [2000] 2 AC 115).
- Proportionality defined in *R (Daly) v. Secretary of State for the Home Department* [2001] 3 WLR 1622, 1634-6 (per Lord Steyn) as not equivalent to merits review:
- “Discretionary area of judgment” A.Lester and D.Pannick ed. *Human Rights Law and Practice* (1999), 74, para. 3.21; recognised by Lord Hope in *R v. DPP, ex p. Kebilene* [2000] 2 AC 326, and by Lord Bingham in *Brown v. Stott* [2001] 2 WLR 817, 834-5.

2. Lord Woolf in *R v Lambert* [2002] Q.B.1112 at 1114 (emphasis added):

“... legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, **as a matter of constitutional principle** pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention.”

3. Laws L.J. in *International Transport Roth GMBH v. Secretary of State for the Home Department* [2003] Q.B. 728:

- (1) “greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure”
- (2) “there is more scope for deference where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified”
- (3) “greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts” and

- (4) “greater or less deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts”.
4. Lord Hoffmann in *R. (on the application of Pro-Life Alliance v. BBC* [2003] UKHL 23; 2 WLR 1403, at paras 75-77:
- “ My Lords, although the word “deference” is now very popular in describing the relationship between the judicial and other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.”
5. See also Lord Hoffmann in:
- *R. v Secretary of State for the Environment Transport and the Regions, ex p. Holding and Barnes plc* [2001] 2 WLR 1389, [68-72] (“what the public interest requires [re Article 1 of Protocol 1]. . . should be determined in accordance with the democratic principle – by elected local or central bodies or by ministers accountable to them”);
 - *Secretary of State for the Home Department v. Rehman* [2003] 1 AC 153, [62] (court should defer to executive on national security because of (a) lack of expertise and (b) “... [These decisions] must be made by persons whom the people have elected and whom they can remove”);
 - COMBAR lecture 2001 “Separation of Powers” [2002] JR 137 (“No individual right to have the law changed to accord with the court’s perception of the public interest. Once this happens we have government by judges rather than government by the people”).

6. The constitutional status of the HRA

Lord Bingham in *Brown v Stott* (above, at 835); Lord Steyn at 839; Lord Woolf in *R v Offen* [2001] 1 WLR 254 at 275; Laws in *Roth*, above at [69] – [75] and in *Thoburn v Sunderland CC* [2003] QB 151 at [62].

7. The eclipse of populism

8. Parliamentary sovereignty

The courts to define and Parliament’s to defy.

9. Proportionality

- Legitimate ends (and rational connection between ends and means)
- Least restrictive alternative

- Necessary and not merely desirable (pressing social need) – “sufficiently important” (See *Daly* above and *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69).
- But compare **process** (justification) and **substance** (the necessary qualities of democracy).

Compare the approach of *Smith* (above) with *Smith and Grady v. United Kingdom* (1999) 29 ECHR 493. And note the approach of Lord Scott in *Pro-Life Alliance* (above).

10. **Authority and capacity (constitutional competence and institutional competence).**