JASON VARUHAS

KEEPING THINGS IN PROPORTION: THE JUDICIARY, EXECUTIVE ACTION AND HUMAN RIGHTS

LLB(HONS) RESEARCH PAPER
LAWS 489

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I INTRODUCTION

The principle of proportionality has a long and venerable history. Over 2,500 years ago Confucius encapsulated the concept in his phrase "ge ji yan yong niu dao" (loosely, "let the means be proportionate to the object"). The principle has long been recognised in common law and civil law jurisdictions alike. The principle that a punishment should not be disproportionate to an offence can be traced back to section 10 of the Bill of Rights 1688 (proscribing excessive bail, excessive fines and cruel and unusual punishments). In the criminal law it is a fundamental principle that the punishment should fit the crime. It is settled law that measures taken in self-defence must be proportionate to the danger posed. The proportionality principle is to be found outside the criminal law. It can arise in cases where a benefit is awarded but is not

[1] The author would like to especially thank Antony Shaw for his wise words, guidance, support, expertise, insight, enthusiasm and the many spirited hours spent discussing the finer points of this paper. I have been privileged to have had had such a distinguished lecturer and practitioner to guide me. Without his assistance this paper would not have been possible. The author wishes to thank his mother, Nicola Varuhas, whose unconditional caring, support and encouragement has been invaluable.

[2] "Don't use a knife made for killing an ox to kill a chicken" Confucius (c551-479BC).

[3] Exodus 21:24.

[4] "The outcome justifies the deed" i.e. let the means justify the ends.

[5] This phrase has been adapted from the speech of Lord Diplock in *R v Goldsmith* [1983] 1 WLR 151, 155 (HL) Lord Diplock.

considered sufficient compensation, or where a council grants or refuses to grant a planning permission.[6]

In Germany ("*Verhältnismäßigkeit*")[7], France ("*Le Principe de Proportionalité*")[8] and other civil law jurisdictions the principle has long been recognised.[9] The European Court of Human Rights and the European Court of Justice have both recognised the principle as one of fundamental importance.[10] A case can be made that it is a "general principle of law recognized by civilized nations".[11]

Until recently proportionality has not been seriously contemplated as a governing principle of administrative law in common law countries. Only in the last decade have the common law jurisdictions of the United Kingdom and New Zealand, amongst others, begun to recognise the importance of proportionality in scrutinising executive action.

The first step was to recognise proportionality as a guiding principle in assessing whether an executive decision was irrational. More recently, it is increasingly considered as a separate and discrete head of administrative review. In the United Kingdom today, proportionality now represents a separate ground of review. In New Zealand, proportionality has not yet been affirmed as a separate and discrete head of review, but that recognition is inevitable.

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[6] For more historical background on proportionality in the common law see Jeffrey Jowell and Anthony Lester "Proportionality: Neither Novel Nor Dangerous" in Jeffrey Jowell and Dawn Oliver (eds) *New Directions in Judicial Review* (Stevens and Sons, London, 1988) 51.

[7] In Germany the principle of proportionality is termed "Verhältnismäßigkeit", which literally translated means "relativity".

[8] In France the principle of proportionality is termed "Le Principe de Proportionalité". See Guy Braibant "Le Principe de Proportionalité" (1974) 2 Mélanges Walines 297 where Braibant considers the principle of proportionality to endorse the "rule of common sense".

[9] For more background information on proportionality in the laws of Europe see Nicholas Emiliou *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International, London, 1996).

[10] For more background information on proportionality in the laws of Europe see Emiliou, above.

[11] International Court of Justice Statute, art 38(1)(c).

In this paper I consider the principle of proportionality specifically in the context of the judiciary, executive action and human rights. I make three main contentions.

First, I contend that proportionality is a legitimate separate ground of review, and that it is required by international human rights treaties such as the European Convention on Human Rights ("the European Convention" or "the Convention")[12] and the International Covenant on Civil and Political Rights ("the ICCPR")[13]. Much has been made of the fact that proportionality review is tantamount to merits review, however in my view it represents no more substantive review than the traditional grounds. I consider that it is the courts' constitutional duty to protect and promote fundamental human rights and freedoms. In discharging this duty the judiciary is compelled to adopt proportionality review in order to adequately safeguard those rights and freedoms. Judicial review of administrative action is ultimately a judicial creation designed to protect fundamental rights and freedoms from arbitrary interference by the executive, and as such it is for the judiciary to decide what is required to adequately protect and promote rights.

Secondly, I contend that, in conducting proportionality review in cases where human rights are at stake, the judiciary should show no deference whatsoever to the executive. The doctrine and culture of deference posits that the intensity of review that should be provided by proportionality is to be watered down and weakened. Such approach does not afford human rights the degree of protection required in a free, open and democratic society. In advancing this contention, I do not suggest that the judiciary wage war on the executive; nor am I suggesting that the judiciary replace executive decisions with their own. I am simply contending that it is the courts' inescapable role to

[12] European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221.
[13] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

uphold and advance human rights standards, and in doing so they must ensure that executive actions do not disproportionately infringe upon fundamental rights and freedoms. In this context, the doctrine and culture of "deference" or "due deference", is directly inimical to the judiciary's constitutional duty to promote and protect fundamental rights and freedoms.

Thirdly, I contend that the New Zealand courts must, and inevitably will adopt proportionality review. It is required by New Zealand's international obligations, especially under the ICCPR. A failure to adopt proportionality review would result in the breach of the State's international treaty duties. I also contend that proportionality review is statutorily mandated by the New Zealand Bill of Rights Act 1990, which contains an express proportionality requirement.

Before continuing, it is important to clarify precisely what I mean by proportionality review in the context of executive action and human rights. Proportionality review in that context requires the judiciary to ensure that executive actions do not disproportionately infringe on individual's fundamental rights and freedoms. Drawing on existing principles, I suggest that the proportionality test contains three sub-principles:

(1) Suitability: an administrative or legal power must be exercised in a way which is suitable to achieve the purpose intended and for which the power was conferred. This principle requires that the measures designed to meet the objective are rationally connected to it and appropriate;
(2) Necessity: the exercise of the power must be necessary to achieve the relevant purpose. This principle requires that the least infringement possible be made on human rights. The objective must be sufficiently important to justify the limiting of the right;
(3) Proportionality: the exercise of the power must not impose burdens or cause harm to other legitimate interests which are disproportionate to the object to be achieved. In the context of human rights this will mean the exercise of the

power must not impose infringements on an individual's human rights disproportionate to the object to be achieved (usually a public benefit).

II EUROPEAN CONVENTION ON HUMAN RIGHTS

The doctrine of proportionality review derives from the civil law jurisdictions of Europe, and is now enshrined in the European Convention. The doctrine of proportionality review provides for a more intense and farther reaching scrutiny of executive action than do the other traditional heads of review in the UK.[14] The degree and scope of review are greater under proportionality review. Because the UK had not until recently adopted proportionality review it was continually rebuffed at Strasbourg for not meeting the requirements of the Convention. It was this continual criticism from the European Court of Human Rights ("the ECHR") that led to the adoption of proportionality review in the UK.

In this section I will first consider the ECHR's treatment of English style judicial review. I will then go on to discuss why the UK had to adopt proportionality review in order to fulfil its international obligations.

A Substantive Guarantees

The jurisprudence of the ECHR has proved to be the major driving force behind the adoption of proportionality review in the UK. Without the growing influence of the Convention in domestic law and domestic incorporation of the treaty in the Human Rights Act 1998 ("the HRA") it is questionable whether proportionality review would have evolved at all. The ECHR has continually found the traditional heads of review inadequate to fulfil the Convention

[14] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 115, paras 27-28 (HL) Lord Steyn; See also Takis Tridimas "Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny" in Evelyn Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) 65, 69: "[P]roportionality is often perceived to be the most far-reaching ground of review, the most potent weapon in the arsenal of the public law judge".

requirements. It is these findings that have stirred the UK judiciary into adopting proportionality as a separate head of review.

The adequacy of judicial review has been considered primarily under three provisions of the Convention: Articles 5(4) (the right to habeas corpus), 6(1) (the right of access to the courts) and 13 (the right to an effective remedy).

1 Article 5(4)

Article 5(4) reads:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

This provision guarantees the right to habeas corpus – that every person detained, has the right to challenge the lawfulness of that detention.[15]

The ECHR has recognised that shortcomings in one procedure can be remedied by safeguards available in other procedures.[16] The courts can thus correct the unlawfulness of a detention imposed by the executive by providing an adequate remedy and control against such unlawfulness. It is in this context that the ECHR has considered the adequacy of judicial review as both a remedy and a safeguard against unlawful detention.

The ECHR has not viewed judicial review favourably in this context. In *Weeks v UK* the Court agreed with the Commission's findings that the traditional heads of judicial review were too narrow in scope to provide the proceedings required by Article 5(4) or remedy the inadequacy of executive

[15] For decisions concerning Article 5(4) regarding the UK see generally *Curley v UK* (2001) 31 EHRR 14; *Stafford v UK* (2002) 35 EHRR 32; *Brogan v UK* (1988) 1 EHRR 117.
[16] *Weeks v UK* (1987) 10 EHRR 293, para 69.

procedure.[17] The Court also agreed with the Commission's finding that the scope of control provided by judicial review was not wide enough to bear on the question of 'lawfulness' which required consideration of whether the detention was consistent with and justified by the objectives of the indeterminate sentence imposed on the applicant.[18] In *Hussain v UK* and *Chahal v UK* the Court again found that the scope of judicial review was too narrow to satisfy the requirements of Article 5(4).[19] The Court also criticised judicial review as being too uncertain a remedy.[20]

It is clear from the decisions in *Weeks*, *Hussain* and *Chahal* that the UK courts had to adopt proportionality review in order to comply with the Convention requirements. A stand alone head of proportionality review would fulfil the Article 5(4) criteria by broadening the scope of review and directly questioning the executive's justification for detention. The importance of such safeguards has been highlighted by the recent decision of *Al-Nashif v Bulgaria* where the ECHR found that such judicial controls cannot be dispensed with even where policy issues such as national security or terrorism are at stake.[21]

2 Article 6(1)

Article 6(1) provides:

> In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing … by an independent and impartial tribunal established by law.

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[17] *Weeks v UK*, above, para 69.
[18] *Weeks v UK*, above, para 69; It should be noted that the Court has pointed out that the domestic courts cannot go so far as to substitute their decision for that of the decision-maker's: *Weeks v UK*, above, para 59; *Hussain v UK* (1996) 22 EHRR 1, para 57.
[19] *Hussain v UK*, above, paras 57, 61; *Chahal v UK* (1996) 23 EHRR 413, paras 124-133.
[20] *Hussain v UK*, above, paras 56, 61.
[21] *Al-Nashif v Bulgaria* (2003) 36 EHRR 37, para 94; See also *Chahal v UK*, above, paras 130-133.

This provision guarantees the right of access to the courts[22], as part of the right to a fair trial under Article 6. Where an executive decision impacts on an individual's civil rights and obligations contrary to Article 6(1), the provision requires that that individual have the right to challenge the decision in front of a judicial body that has full jurisdiction and provides the guarantees of Article 6(1).[23]

The ECHR has been called upon several times to determine whether a UK court has satisfied the requirements of Article 6(1) as far as the scope of its jurisdiction is concerned. This is the context within which judicial review has been scrutinised under Article 6(1).

In *Kingsley v UK*[24], which concerned the specialised area of gaming, the Court found that the traditional grounds of review were too narrow in scope to satisfy the requirements of Article 6(1).[25] The ECHR held that the domestic courts possessed inadequate jurisdiction, in the circumstances, when reviewing executive action.[26] In *W v UK* the ECHR found that UK courts' unwillingness to consider the merits of the decision in review proceedings was a violation of Article 6(1).[27] The traditional heads of review were held to be too limited in scope in wardship proceedings.[28] This same conclusion was reached in the cases of *O v UK*[29], *B v UK*[30] and *R v UK*.[31]

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[22] See generally *Golder v UK* (1975) 1 EHRR 525.
[23] *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, para 29.
[24] *Kingsley v UK* (2002) 35 EHRR 10, paras 32-34.
[25] Where specialised areas of expertise are concerned the ECHR has at times found the traditional heads of review to be sufficient in scope to fulfil the requirements of Article 6(1): *Chapman v UK* (2001) 33 EHRR 18, paras 121-125; *Bryan v UK* (1995) 21 EHRR 342, para 47; The Commission has once found judicial review to be of sufficient scope: *Fayed v UK* (1994) 18 EHRR 393, para 75.
[26] *Kingsley v UK*, above, para 32.
[27] *W v UK* (1987) 10 EHRR 29, para 82; See also *GL v Italy* (2002) 34 EHRR 41, para 40; See also *Air Canada v UK* (1995) 20 EHRR 150 where the applicants argued that the proportionality of the measures complained of could not be examined under the traditional heads of review. Because judicial review proceedings had not taken place the Court was unwilling to examine the appropriateness of review, but Judges Martens and Russo both believed that only full jurisdiction to consider the merits of the decision could provide the requisite safeguards.
[28] *W v UK*, above, para 82.
[29] *O v UK* (1987) 10 EHRR 82.
[30] *B v UK* (1987)10 EHRR 87.

The deficiencies of a judicial review system which excluded a proportionality head of review was further highlighted in the case of *Tinnelly v UK*.[32] The ECHR found that the issuance of a security certificate by the Secretary of State disproportionately restricted the applicants' right to access to a court under 6(1).[33] The ECHR further held that judicial review was inadequate to remedy or safeguard against such a violation. This was because the court did not have sight of all the documentation, and, more importantly, because the scope of review was too limited for the purposes of Article 6(1). There was thus a breach of Article 6(1).[34]

Thus the unwillingness of the municipal courts to fully examine the merits of the decision has led to findings against the State. Pertinently, the traditional grounds of review have been unable to correct executive action which disproportionately infringes upon individual rights. A separate head of proportionality review has the aim of correcting such executive action. Proportionality review also subjects the executive decision to a heightened degree of scrutiny, considering the substance of the decision. It is thus likely that a separate head of proportionality review would serve to ensure that the Article 6(1) guarantee is not violated.

3 Article 13

Article 13 states:

> Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

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[31] *R v UK* (1987) 10 EHRR 74.
[32] *Tinnelly & Sons Ltd and McElduff v UK* (1998) 27 EHRR 249.
[33] *Tinnelly & Sons Ltd and McElduff v UK*, above, para 79.
[34] *Tinnelly & Sons Ltd and McElduff v UK*, above, paras 72-79.

The ECHR has on several occasions considered the adequacy of judicial review as an effective remedy where individuals' rights are violated. Early in this line of case law the ECHR held the traditional grounds of review to be an effective remedy where rights had been violated by the executive.[35] However in time judicial review came to be seen as wholly deficient.

In *Chahal v UK* the ECHR considered the adequacy of the traditional grounds of judicial review in providing an effective remedy.[36] The Court found that the narrow and limited nature of judicial review where national security was concerned was a violation of the Article 13 guarantee.[37]

In the landmark decision of *Smith and Grady v UK* the Court found that an executive policy banning homosexuals from the military breached the applicants' right to respect for private life and could not be justified as necessary in a democratic society.[38] The Court also found a breach of Article 13. The UK Court of Appeal had applied heightened scrutiny given the prima facie breach of fundamental rights but had not applied a proportionality standard of review. The Court considered the reasoning of the Court of Appeal and found:[39]

> [T]he threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order claims pursued, principles

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[35] *Soering v UK* (1989) 11 EHRR 439, paras 122-124; *Vilvarajah v UK* (1991) 14 EHRR 248 paras 123-127. However in the case of *Vilvarajah* Judges Walsh and Russo both dissented holding that a national system which excluded the competence to make a decision on the merits could not meet the requirements of Article 13. These dissenting judgments highlighted what would come to be seen as a major deficiency of English style judicial review.

[36] *Chahal v UK* (1996) 23 EHRR 413.

[37] *Chahal v* UK, above, paras 153-154.

[38] *Smith and Grady v UK* (2000) 29 EHRR 493; See also *Lustig-Prean and Beckett v UK* (2000) 29 EHRR 548.

[39] *Smith and Grady v UK*, above, paras 129-139.

that lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.

After *Smith* it was clear that the UK courts *had* to adopt a separate head of proportionality review if the UK were to comply with Article 13. Indeed Lord Cooke of Thorndon believed that *Wednesbury* review had been given its "quietus" in *Smith*.[40] If the UK courts were to be sure of fulfilling their Article 13 obligations they would have to adopt proportionality review. This was highlighted by *Smith* and also the two more recent decisions in *Hatton v UK* and *Al-Nashif v Bulgaria*.[41] In both these cases Article 13 had been violated because the domestic courts had not been able to consider whether an infringement on a Convention right had been proportionate or not.[42] It is hard to see how the ECHR could make it clearer that proportionality had to be adopted as a separate head of review to avoid a major lacuna in municipal law. In short, a corpus of administrative law which did not include proportionality review would be in violation of the Convention.

B Domestic Judiciaries and International Obligations

Proportionality review had to be adopted in the UK in light of its international obligations (specifically the Convention). A lot of stigma has been attached to the adoption of proportionality review in the UK given that it merges on merits review. I would contend that this stigma is unwarranted. The adoption of proportionality review is mandated by the UK's international commitments. It is simply a requirement of the UK's international obligations under the Convention.

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[40] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 115, para 32 (HL) Lord Cooke of Thorndon; See also Lord Steyn's comments in *Daly* who saw *Smith* as crucial in coming to his conclusion that proportionality had to be adopted: *R (Daly) v Secretary of State for the Home Department*, above, paras 26-27 Lord Steyn (Lord Bingham of Cornhill, Lord Cooke of Thorndon, Lord Hutton, Lord Scott of Foscote concurring); See further *Association of British Civilian Internees - Far East Region v Secretary of State for Defence* [2003] 3 WLR 80, paras 32-37 (CA) Dyson LJ for the Court.

[41] *Hatton v UK* (2002) 34 EHRR 1; *Al-Nashif v Bulgaria* (2003) 36 EHRR 37.

It is important to highlight two basic yet important aspects of the international law of treaties. First, when a State enters a treaty, the obligations and duties undertaken by that State are binding upon every organ of the State – the legislature, the executive and the judiciary. [43] It is often forgotten that the judiciary is bound by the State's international undertakings; however this point is crucial when considering judge made law in light of treaty obligations.[44] Secondly, it is well established in international law that the domestic legal system cannot be used as an excuse to justify the breach of international obligations.[45] The International Court of Justice has on a number of occasions submitted advisory opinions concerning the final decisions of domestic courts and reinforcing the primacy of international obligations.[46]

In light of these two tenets of international law it becomes clear that the judiciary is bound by international treaty obligations, and that there exists an obligation to develop the domestic law in conformity with such obligations and duties.[47] A failure to do so on a specific occasion would represent a breach of international law.[48]

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[42] *Hatton v UK*, above, paras 115-116; *Al-Nashif v Bulgaria*, above, paras 137-138.
[43] Malcolm N Shaw *International Law* (4 ed, Cambridge University Press, Cambridge, 1997) 806; See also Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, art 26 which provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".
[44] For example in the *La Grand Case (Germany v US)* the ICJ found that the US domestic courts' application of the 'procedural default rule' in effect took away the right of the individual to question their conviction under the relevant convention: *La Grand Case (Germany v US)* (2001) 40 ILM 1069, paras 79-91 (ICJ).
[45] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, art 27 provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"; David John Harris *Cases and Materials on International Law* (5 ed, Sweet and Maxwell, London, 1998) 662; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1999) 121 ILR 405 (ICJ); *Alabama Claims Arbitration* (1872) Moore 1 Int Arb 495; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (1988) 82 ILR 225 (ICJ); *Greco-Bulgarian Communities Case* (1930) 5 ILR 4 (PCIJ).
[46] *La Grand Case (Germany v US)* (2001) 40 ILM 1069 (ICJ); *Case Concerning the Vienna Convention on Consular Relations (Paraguay v USA)* (1998) 37 ILM 810 (ICJ); *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1999) 121 ILR 405 (ICJ).
[47] Ian Brownlie *Principles of Public International Law* (5 ed, Oxford University Press, Oxford, 1998) 35.
[48] Brownlie, above, 35.

Many of the Convention rights require a consideration of the proportionality of an infringement upon an individual right.[49] The executive is bound to respect the requirements of these provisions and only infringe upon rights where it is proportionate to do so. But where the executive interference represents a disproportionate infringement the judiciary must have the power to remedy that infringement and safeguard against future infringements. The ECHR has on numerous occasions pointed out the need for judicial review to consider the proportionality of an executive infringement upon a right.[50] It is simply a requirement of the UK's international obligations that the municipal courts develop proportionality (even if it is merits review) as a separate head of review.[51] Where the judiciary fails to safeguard against such executive interferences they are not only failing in their constitutional duty to protect fundamental rights, they are also breaching the UK's treaty obligations.

C The "Margin Of Appreciation" and Deference: Two Distinct Concepts

Before continuing it is important to note the difference between the terms "deference" and "margin of appreciation". It could be suggested that because the ECHR grants the domestic government a degree of lee-way (by allowing a margin of appreciation), so too should the domestic courts accord the executive a degree of deference. This *mistake* could easily be made given both doctrines advocate some degree of discretion being left with the original decision-maker, untouched by the judicial body. It is a mistaken belief nonetheless.

The Strasbourg Court has held that in determining whether an interference with a Convention right is proportionate a margin of appreciation would be

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[49] For example European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221, arts 8, 9, 10, 11.

[50] See Part II A *Substantive Guarantees*.

[51] See the 'Bangalore Principles' adopted and developed by eminent jurists from across the globe (in a series of colloquiums) that prescribe that the judiciary should apply international human rights norms in interpreting constitutional rights and guarantees. See the series of publications: INTERRIGHTS and Commonwealth Secretariat *Developing Human Rights Jurisprudence: Domestic Application of International Human Rights Norms* (The Commonwealth Secretariat, London, 1988-1998) Volumes 1-8.

given to the State authority.[52] This is based on the idea that the domestic government would be in a better position than an international body to determine the needs of its country.[53] A supranational authority like the ECHR is removed from the domestic circumstances of its member States and it is thus legitimate for certain questions to be left primarily to domestic authorities. However, it cannot follow from this that a domestic court should show deference to the executive in judicial review. The reason the ECHR has developed the margin of appreciation is because it is supranational court. The margin of appreciation has no relevance or application in the domestic sphere. Thus any argument favouring deference based on the margin of appreciation does not hold weight.

III PROPORTIONALITY REVIEW AND THE UK

Proportionality review was eventually adopted in the UK, given the growing influence of European law which was typified by the domestic incorporation of the Convention into UK municipal law in 1998. In this section I consider the evolution of proportionality review in the UK jurisdiction. This section is aimed at giving a historical insight into the development of proportionality review. More importantly, though, this section is designed to highlight two hugely important trends in the UK judiciary's attitudes in judicial review actions concerning human rights. The first trend that has evolved over time is the steadily growing level of scrutiny of executive action where human rights are concerned. The second trend to note is the judiciary's continuing awareness of not stepping on the executive's toes. Even though the judiciary are

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[52] See for example *Handyside v UK* (1976) 1 EHRR 737; *Buckley v UK* (1996) 23 EHRR 101.
[53] Paul Craig "The Courts, The Human Rights Act and Judicial Review" (2001) 117 LQR 589, 589-590; Rabinder Singh "Is There a Role for the 'Margin of Appreciation' in National Law after the Human Rights Act" (1999) 1 EHRLR 15, 17; Lord Lester of Herne Hill and David Pannick (eds) *Human Rights Law and Practice* (Butterworths, London, 1999) 73-74; David Feldman "Proportionality and the Human Rights Act 1998" in Evelyn Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) 117, 124-126, 136-137; Sir John Laws "The Limitations of Human Rights" [1998] PL 254, 254.

showing more anxious scrutiny where human rights are involved they continue to show deference to the executive.

A Pre-Human Rights Act

Proportionality was first postulated as a separate head of review in the UK in 1985 by Lord Diplock in *CCSU v Minister for the Civil Service*, noting that the principle had been recognised in the administrative law of several European nations.[54] However from this time until the domestic incorporation of the Convention the doctrine of due deference impeded the adoption of proportionality review.

In *Brind v Secretary of State for the Home Department* the concept of a separate head of proportionality review was expressly rejected.[55] Both Lord Bridge of Harwich and Lord Roskill believed that to allow proportionality review would involve the courts substituting their own decision for that of the executive.[56] Their Lordships were unwilling to potentially usurp their power and infringe upon the executive sphere, preferring instead to defer to the executive.[57] Their Lordships were however willing to provide greater scrutiny where human rights were at stake, and require justification for any infringement upon a fundamental right.[58]

This approach of heightened scrutiny under the irrationality head of review has been adopted and developed in several cases.[59] The approach is

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[54] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (HL) Lord Diplock.
[55] *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, 735 (HL) Lord Ackner.
[56] *Brind v Secretary of State for the Home Department*, above, 723 Lord Bridge of Harwich; *Brind v Secretary of State for the Home Department*, above, 725 Lord Roskill.
[57] *Brind v Secretary of State for the Home Department*, above, 723 Lord Bridge of Harwich (Lord Roskill concurring).
[58] *Brind v Secretary of State for the Home Department*, above, 723 Lord Bridge of Harwich (Lord Roskill concurring).
[59] See for example *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531 (HL) Lord Bridge of Harwich; *R v Secretary of State for the Home Department, ex parte Launder* [1997] 3 All ER 961, 989 (HL) Lord Hope of Craighead; *R v Lord Saville of Newdigate, ex parte A* [1999] 4 All ER 860, 872 (CA) Lord Woolf MR.

epitomised by Sir Thomas Bingham MR's judgment in *R v Ministry of Defence, ex parte Smith*.[60] The Master of the Rolls found that the more substantial the interference with human rights, the more justification the court would require in order to hold the decision reasonable, and the greater the policy content of the decision the less likely it will be held unreasonable.[61] However, while this approach purported to show a greater intensity of review where human rights were involved, the courts still preferred to allow a wide area of deference where the decision had some policy element.[62] The courts were failing to give adequate protection to fundamental rights, in practice.

It is clear that before the HRA came into force the courts had been unwilling to adopt proportionality review for fear of usurping their function in the separation of powers. Although the courts were purporting to subject executive action which infringed on human rights to "anxious scrutiny"[63], in reality this was not the case. The courts continued to apportion significant deference to the executive. There is a clear dichotomy here in that where the courts show deference to the executive, this impedes their ability to afford adequate protection to human rights. This dichotomy was being reconciled in favour of the executive.[64] Deference continued to stand in the way of the judiciary affording full protection to fundamental rights. This is further

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[60] *R v Ministry of Defence, ex parte Smith* [1996] 1 All ER 257 (CA).

[61] *R v Ministry of Defence, ex parte Smith*, above, 263-265 Sir Thomas Bingham MR.

[62] See for example *R v Director of Public Prosecutions, ex parte Kebeline* [1999] 4 All ER 801, 844 (HL) Lord Hope of Craighead: where Lord Hope of Craighead holds that more deference should be shown "where the convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified" and "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."; See also *R v Ministry of Defence, ex parte Smith*, above, 263-265 Sir Thomas Bingham MR; *R v Lord Saville of Newdigate, ex parte A*, above, 870-871 Lord Woolf MR; *Bugdaycay v Secretary of State for the Home Department*, above, 522-523 Lord Bridge of Harwich.

[63] This term was coined by Lord Hope of Craighead: *R v Secretary of State for the Home Department, ex parte Launder* [1997] 3 All ER 961, 989 (HL) Lord Hope of Craighead.

[64] This is evidenced by the fact that all of the cases mentioned which apply the "anxious scrutiny" test were decided in favour of the executive: *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 (HL); *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 (HL); *R v Secretary of State for the Home Department, ex parte Launder* [1997] 3 All ER 961 (HL); *R v Lord Saville of Newdigate, ex parte A* [1999] 4 All ER 860 (CA); *R v Ministry of Defence, ex parte Smith* [1996] 1 All ER 257 (CA); *R v Director of Public Prosecutions, ex parte Kebeline* [1999] 4 All ER 801 (HL).

evidenced by the fact that the UK courts were continually being rebuffed at Strasbourg.[65]

B Post-Human Rights Act

Following the passage of the HRA through Parliament which incorporated the Convention as part of UK municipal law[66], proportionality was rapidly adopted as a separate head of review. In effect the UK courts had to adopt the proportionality head of review given that Convention rights were now directly enforceable within the UK jurisdiction.

The first step towards proportionality review came in *R v Secretary of State for the Home Department, ex parte Amjad Mahmood.*[67] The case concerned the review of a decision made by the Secretary of State regarding an asylum seeker who had sought leave to remain in the UK. Although the HRA had not been enacted at the time of the decision the Court of Appeal proceeded as if the Act had been in force. The Master of the Rolls described the test to be applied:[68]

> [W]hen anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was *necessary* to achieve one or more of the legitimate aims recognised by the Convention.

This was the first time the courts had directly scrutinised the *necessity* of the executive's decision. It should be noted that this major shift in judicial

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[65] See Part II A *Substantive Guarantees*.
[66] See the Human Rights Act 1998 (UK) Long Title: "An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights … ".
[67] *R v Secretary of State for the Home Department, ex parte Amjad Mahmood* [2001] HRLR 14 (CA).
[68] *R v Secretary of State for the Home Department, ex parte Amjad Mahmood*, above, para 40 Lord Phillips of Worth Matravers MR (emphasis added); It is important to note that the Court was still quick to point out that the judiciary should not usurp its role: *R v Secretary of State for the Home Department, ex parte Amjad*

attitude directly coincides with the domestic incorporation of the Convention into UK municipal law. The UK judiciary were aware that their decisions and reasoning regarding Convention rights were open to ECHR scrutiny. The courts could no longer excuse their decisions on the basis that the Convention was not part of domestic law.

In the two key decisions of *R(Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions*[69] and especially *R(Daly) v Secretary of State for the Home Department*[70] proportionality review began to gain acceptance as a separate ground of review.

In *Alconbury* Lord Slynn of Hadley openly embraced the concept of proportionality as a separate ground of review.[71] His Lordship believed that the HRA made it necessary for the courts to ask whether the executive action was compatible with Convention rights.[72] His Lordship believed that that inquiry would often require the principle of proportionality to be satisfied.[73]

In *Daly* Lord Steyn, whose comments were unanimously endorsed, expressly affirmed proportionality as a separate head of review.[74] While admitting that there will inevitably be some overlap with the other heads of review his Lordship maintained that the intensity of review under proportionality review is somewhat greater than under the traditional heads.[75]

Mahmood, above, paras 29, 33 Laws LJ; See also *R v Secretary of State for the Home Department, ex parte Amjad Mahmood*, above, para 38 Lord Philips of Worth Matravers MR.

[69] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 (HL).

[70] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 115 (HL).

[71] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*, above, para 51 Lord Slynn of Hadley.

[72] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*, above, para 51 Lord Slynn of Hadley.

[73] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*, above, para 51 Lord Slynn of Hadley.

[74] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 115, paras 24-28 (HL) Lord Steyn (Lord Bingham of Cornhill, Lord Cooke of Thorndon, Lord Hutton, Lord Scott of Foscote concurring).

[75] *R (Daly) v Secretary of State for the Home Department*, above, para 27 Lord Steyn.

Drawing on the differences between proportionality and the traditional heads[76], European jurisprudence[77] and constitutional case law[78] Lord Steyn states that "it is … important that cases involving convention rights must be analysed in the correct way".[79]

The dicta in *Alconbury*[80] and *Daly*[81] are a recognition that fundamental rights are to be subjected to intense scrutiny under the proportionality head of review. The signal being sent was that executive officers could no longer hide behind the veil of deference. However to have had such faith would be to have held a hollow hope. The line of case law since the landmark decision in *Daly* does not cast the judiciary as valiant defenders of human rights, but as meek and subservient partners in the separation of powers.

In *R v BBC, ex parte Prolife Alliance* Lord Hoffman made it forcefully clear that the judiciary was not willing to infringe upon the executive scope of activity. Lord Hoffman commented that in a society based upon the rule of law and the separation of powers it is necessary to decide the legal limits of those powers.[82] He made the point that it will sometimes fall to the judiciary to define the limits of their own decision-making power.[83] But when these limits are

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[76] *R (Daly) v Secretary of State for the Home Department*, above, para 27 Lord Steyn: His Lordship highlights three concrete differences between proportionality review and the other heads. The first is that "the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions". Secondly, the proportionality head of review may go further than the traditional heads "inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations". And thirdly, Lord Steyn believed the "anxious scrutiny" test developed by the courts may not go far enough in securing the protection of human rights.

[77] *R (Daly) v Secretary of State for the Home Department*, above, para 27 Lord Steyn: His Lordship places reliance on the ECHR case of *Smith and Grady v UK* (2000) 29 EHRR 493.

[78] *R (Daly) v Secretary of State for the Home Department*, above, para 27 Lord Steyn: His Lordship draws the principle of proportionality from the constitutional case of *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands, and Housing* [1999] AC 69 (PC).

[79] *R (Daly) v Secretary of State for the Home Department*, above, para 28 Lord Steyn.

[80] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 (HL).

[81] *R (Daly) v Secretary of State for the Home Department*, above.

[82] *R v BBC, ex parte Prolife Alliance* [2003] UKHL 23, para 75 (HL) Lord Hoffman.

[83] *R v BBC, ex parte Prolife Alliance*, above, para 76 Lord Hoffman.

drawn it is not out of courtesy or deference, but upon principles of law.[84] So that when a court decides that a decision is within the proper competence of the legislature or the executive they are not being courteous or showing deference, they are abiding legal limits.[85] While this analysis appears relatively coherent, Lord Hoffman draws the limits of the judiciary's responsibilities far too narrowly, and those of the executive far too widely. Lord Hoffman affords the executive far too much lee-way. His Lordship fails to recognise the judiciary's wider constitutional role as guardians and promoters of human rights. If human rights are truly the court's responsibility then any decision that purports to infringe on fundamental rights should fall within the realm of the judiciary, whether the decisions have policy elements or not. By buying into the 'deference industry' Lord Hoffman is failing to apportion fundamental rights and freedoms the requisite protection.

This avid and unquestioning reliance upon deference has found weight in several other judgements of the UK courts.[86] For example in *Secretary of State for the Home Department v Rehman* their Lordships were of the opinion that deference should be accorded not only because of the superior expertise and access to special information the executive possesses, but also because their decisions are legitimised by the fact that them are elected officials.[87] And in *A, X, Y v Secretary of State for the Home Department* Lord Woolf CJ (apparently contravening the European precedents of *Chahal*[88] and *Al-Nashif*[89]) said "[d]ecisions as to what is required in the interest of national security are self-evidently within the category of decisions in relation to which the court is

[84] *R v BBC, ex parte Prolife Alliance*, above, para 76 Lord Hoffman.
[85] *R v BBC, ex parte Prolife Alliance*, above, para 76 Lord Hoffman.
[86] *R (Isiko) v Secretary of State for the Home Department* [2001] HRLR 15, para 30 (CA) Schiemann LJ; *R v Lambert* [2001] 3 WLR 206, 270-273 (HL) Lord Hutton; *R (Anderson) v Secretary of State for the Home Department* [2001] EWCA Civ 1698, para 23 (CA) Lord Woolf CJ; *R (Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139 (CA); *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391, paras 71-79 (CA) Lord Phillips of Worth Matravers MR for the Court; *Brown v Stott* [2001] 2 WLR 817, 834-835 (PC) Lord Bingham of Cornhill.
[87] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, para 62 (HL) Lord Hoffman.
[88] *Chahal v UK* (1996) 23 EHRR 413.
[89] *Al-Nashif v Bulgaria* (2003) 36 EHRR 37.

required to show considerable deference to the Secretary of State because he is better qualified to make an assessment as to what action is called for".[90] And in *Poplar Housing & Regeneration Community Association Ltd v Donoghue* Lord Woolf CJ again preferred to defer to an elected brach of government:[91]

> We are satisfied, that notwithstanding its mandatory terms, section 21(4) of the 1988 [Housing] Act does not conflict with the defendant's right to family life. Section 21(4) is certainly necessary in a democratic society in so far as there must be a procedure for recovering possession of property at the end of a tenancy. The question is whether the restricted power of the court is legitimate and proportionate. This is the area of policy where the court should defer to the decision of Parliament. We have come to the conclusion that there was no contravention of Article 8 or of Article 6.

It is laughable for the courts to purport to use the proportionality test, only to circumvent it where there is the merest trace of policy.[92] This 'deference culture' effectively denies individuals the full enjoyment of their Convention rights where the executive action contains some policy content. Basically, if an executive action contains some trace of policy, the court will refuse to protect fundamental rights and freedoms. This is a heretical departure from principle and is particularly peculiar in light of the fact that the Strasbourg jurisprudence is replete with judgments challenging executive policy decisions.[93]

Even now that proportionality review has been established as a head of review, the British judiciary continue to defer to the executive.[94] The UK

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[90] *A, X, Y v Secretary of State for the Home Department* [2003] HRLR 3, para 40 (CA) Lord Woolf CJ.
[91] *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, para 72 (CA) Lord Woolf CJ.
[92] This approach leads to absurd consequences. See for example Philip Plowden and Kevin Kerrigan *Advocacy and Human Rights: Using the Convention in Courts and Tribunals* (Cavendish, London, 2002) 127-130, where the authors basically advise human rights advocates to give up on the proportionality test where a policy area is involved.
[93] See for example *Kingsley v UK* (2002) 35 EHRR 10; *Smith and Grady v UK* (2000) 29 EHRR 493; *Hatton v UK* (2002) 34 EHRR 1; *Al-Nashif v Bulgaria* (2003) 36 EHRR 37; *Chahal v UK* (1996) 23 EHRR 413. For further examples see Part II A *Substantive Guarantees*.
[94] See generally Nicholas Blake "Importing Proportionality: Clarification or Confusion" (2002) 1 EHRLR 19; Richard A Edwards "Judicial Deference under the Human Rights Act" 65 MLR 859; Paul Craig "The

judiciary are still reluctant to fully embrace a concept that verges upon merits review. The courts appear anxious and cautious when applying the proportionality test – tiptoeing around the executive.

This pattern of deference means that the intensity of review that should be provided by the proportionality test is watered down and weakened. There is no point in pledging to defend fundamental rights through a more exacting ground of review only to blunt the test by deferring to the executive. In many ways the judiciary are copping out of their constitutional duty to protect fundamental rights and freedoms. It is my contention (as I will elaborate upon in the next section) that the judiciary should not be so hesitant in their application of proportionality review and should refrain from showing such deference when dealing with human rights issues. Not only would such a watered down test meet criticism at Strasbourg, but it does not afford human rights the protection required in a free and democratic society.

IV PROPORTIONALITY REVIEW: THE JUDICIARY, EXECUTIVE ACTION AND HUMAN RIGHTS

A The Issues

The courts in the UK, as seen above, have been slow to adopt proportionality as a separate head of review. Indeed it took roughly 15 years for the doctrine to develop as a fully fledged ground of review since Lord Diplock first mentioned the possibility.[95] It was indeed questionable after the decision in *ex parte Brind* which explicitly rejected the idea whether the principle would develop at all.[96] But with the growing influence of European jurisprudence and

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Courts, The Human Rights Act and Judicial Review" (2001) 117 LQR 589; Jeffrey Jowell "Due Deference under the Human Rights Act" in Jonathan Cooper and Jeffrey Jowell (eds) *Delivering Rights? How the Human Rights Act is Working and for Whom* (Hart Publishing, Oxford, 2003).

[95] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (HL) Lord Diplock.

[96] *Brind v Secretary of State for the Home Department* [1991] 1 All ER 940 (HL).

the influence of the landmark HRA proportionality now represents a separate ground of review.

The reason for the tentative approach by the judiciary, in my view, rests in the doctrine of due deference. Judges have been reluctant to cross the line and impinge upon the executive sphere, being more willing to show deference to executive decision making, even where fundamental rights are at stake.[97] The courts before they adopted a proportionality approach were increasingly aware of the importance of human rights, and showed greater scrutiny where such rights were at stake but always stopped short of criticising the actual decision.[98] Even now with the proportionality head of review affirmed in UK law judges continue to show great deference to the executive particularly in cases where public expenditure is involved and where the issue at stake involves a large policy element, such as national security.[99]

There are several reasons why judges are so willing to defer to the executive. Judges defer to the executive on the basis that the executive is better placed to make such assessments and have greater expertise in the area of policy formulation.[100] They also defer on the ground that it is not the role of the judge to interfere in matters which are clearly in the executive realm such as national security policy or where the allocation of scarce resources is concerned.[101] It is also clear that judges continue to prefer a cautious approach to the area of administrative law in general. Traditionally judicial review has been seen as a process whereby the judiciary scrutinises the 'form' rather than the 'substance' of executive acts. The courts have traditionally steered clear of scrutinising the

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[97] See for example *R v Director of Public Prosecutions, ex parte Kebeline* [1999] 4 All ER 801 (HL); *R v BBC, ex parte Prolife Alliance* [2003] UKHL 23 (HL).
[98] See the ECHR analysis in *Smith and Grady v UK* (2000) 29 EHRR 493.
[99] See for example *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 (HL).
[100] See for example *A, X, Y v Secretary of State for the Home Department* [2003] HRLR 3 (CA); *Secretary of State for the Home Department v Rehman*, above.
[101] See for example *R v Ministry of Defence, ex parte Smith* [1996] 1 All ER 257 (CA); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391 (CA); *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 2 AC 418 (HL).

substance of an executive decision ('merits' review), but instead limit themselves to considering the process by which the decision was made.[102] Some believe proportionality to be verging on substantive review which is clear in the hesitant way in which the courts conduct review.[103]

In my view these reasons are spurious and otiose. The point has already been made above that the judiciary must look to the substance of the decision in order to fulfil their international obligations and duties.[104] In this section I will make three additional and equally important points. First, proportionality shows no less an infringement on the executive sphere than the traditional heads of review. Secondly, it is the role of the judiciary to affirmatively protect and promote human rights. Thirdly, the courts power of judicial review derives from the common law and the rule of law and it is thus their inescapable role to set the limits of review.

It is one thing to say judges should not substitute their decisions for that of the executive, but it is quite another to say that deference should be shown to executive decisions that infringe upon human rights. In proportionality review the judges are not re-making the executive decision, they are simply ensuring that the executive decision does not disproportionately infringe upon fundamental rights. It is my contention that deference should not play a role where human rights are at stake. It is my view that it is the courts' role to uphold human rights, and by virtue of that role there is no need to defer to the executive where human rights are at stake. The points I make below advocate this view and defend proportionality as a stand alone head of review.

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[102] See for example *Chief Constable of North Wales v Evans* [1982] 1 WLR 1155 (HL) Lord Brightman.
[103] See for example the speeches of Lord Bridge of Harwich and Lord Roskill in *Brind v Secretary of State for the Home Department* [1991] 1 All ER 940 (HL).
[104] See Part II *European Convention on Human Rights*.

B Proportionality – No More Substantive Review than the Traditional Heads of Review

It is claimed that the proportionality head of review verges on substantive review of executive decisions and that the judiciary is usurping its power in taking such an approach. I would contend that even if this is the case, proportionality review represents no more an infringement on the executive branch than the traditional grounds of review.

Take for example an inquiry into whether a decision-maker took into account irrelevant considerations. It would be impossible for a judge to conduct this exercise without looking at the actual substance of the decision, and scrutinising the content of the decision. For a judge to consider whether a decision-maker took into account irrelevant considerations he or she must look to the actual considerations. He or she must look at the way the decision-maker prioritised those considerations, and how they relate to the final decision. The judge must decide what is irrelevant and what is relevant. This form of review requires a consideration of the substance of the decision.

In considering the rationality of the executive officer's decision the court will be challenging the substance of official decisions.[105] Even where a judge applies the narrow *Wednesbury* test they would need to consider the merits of the decision. Under the *Wednesbury* test a decision can be voided on the ground that it was a decision so unreasonable that no reasonable decision-maker could have reached it.[106] In such a case the judge is called upon to consider the reasonableness of the decision – surely this must entail scrutiny of the substantive decision and not simply the procedure gone through. A judgment

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[105] Jeffrey Jowell and Anthony Lester "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] PL 368, 369.

[106] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228-230 (CA) Lord Greene MR.

whether a decision is reasonable or not entails a challenge by the judiciary as to the substance of an executive decision.[107] The nebulous nature of the test will certainly encourage suspicion that prejudice or policy considerations may lie behind a judgement.[108]

It can also be argued that judges are engaging in substantive review when they consider the legality of a decision. This analysis would entail a consideration of whether the executive officer's decision fell outside the four corners of the parent Act.[109] To answer this question, a judge must again look to the substance of the decision in determining whether the decision-maker usurped their statute granted power. Even where a judge considers the impartiality of the decision-maker they may be called upon to scrutinise the substance of the decision to deduce whether bias swayed the decision-maker.

I don't believe these observations are ground-breaking nor do I think that they are difficult observations to make. However they are important observations when defending proportionality review from those who claim it to be merits review. If proportionality is merits review, then so too are the traditional heads of review, as they all involve a similar legal analysis. When conducting proportionality review a judge must consider the suitability of the exercise of the executive power, whether the exercise of the power was necessary and whether the power was exercised proportionately. Surely these questions entail a legal analysis analogous to that carried out when considering the irrationality and illegality heads of review. When the courts inquire as to whether a Minister brought a rational mind to bear on a question the courts are imposing a judge-made standard on the decision-maker. To propose a more exacting standard under proportionality-type review is no different in principle. A proportionality-type approach represents no more an usurpation of

[107] Jowell and Lester, above, 369.
[108] Jowell and Lester, above, 372.
[109] Jowell and Lester, above, 369.

constitutional propriety than the traditional *Wednesbury* ground.[110] It simply means that when human rights are at stake the courts will be more exacting in their scrutiny of executive action and require sufficient justification for the infringement on the right.

Proportionality review does not entail the courts striking down executive decisions and replacing the executive decision with their own. It does not entail the courts wielding executive powers. Judges are not being set free to second-guess administrators on the merits of their policies.[111] Proportionality review simply involves the courts checking executive power, as do the other heads of review. It is one thing to consider the merits of a decision, and quite another to make the decision.[112]

In fact it has been suggested that requiring the courts to substantiate their decisions in terms of suitability, necessity and proportionality actually reduces the capacity for judges to deliver judgements on the merits of the case, which is a potential for abuse in an amorphous test like the *Wednesbury* test.[113] The establishment of principles like proportionality steer the courts away from policy or personal preference.[114] As Sedley LJ has endorsed, the more principled approach involved in proportionality review promotes certainty and transparency in decision-making.[115]

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[110] Sir John Laws "Is the High Court the Guardian of Fundamental Constitutional Rights" [1993] PL 59, 69.
[111] Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671, 681.
[112] Gareth Wong "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality" [2000] PL 92, 102.
[113] Wong, above, 104.
[114] Jeffrey Jowell and Anthony Lester "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] PL 368, 381; Paul Craig "Unreasonableness and Proportionality in UK Law" in Evelyn Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) 85, 99-100.
[115] *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491, para 57-58 (CA) Sedley LJ: "[Proportionality] replaces an elastic concept with which political scientists are more at home than lawyers with a structured inquiry … It seems to me, with great respect, that this now well established approach furnishes a more certain guide for people and their lawyers than the test of the reasonable recipient's conscience. While the latter has the imprimatur of high authority, I can understand how difficult it is to give useful advice on the basis of it. One recipient may lose sleep a lot more readily than another over whether to make a disclosure, without either of them having to be considered unreasonable. If the test is whether the recipient ought to be losing sleep, the imaginary individual will be for practical purposes a judicial stalking-horse and the judgment more nearly an exercise of discretion and correspondingly less

C The Role of the Judge

What is the role of a judge? This an extremely wide and far reaching question, indeed this subject could occupy an entire volume of legal texts. In this essay I cannot comprehensively answer this question, nor come close. However I do wish to discuss the wider role of the judiciary in a free and democratic society.

It is first important to consider the question of what a real democracy entails. In New Zealand (as in the UK) we have a representative democracy. We have free, fair and regular elections. The party or coalition of parties that have the majority in the House govern, having gained their mandate from the 'demos' (the people). So, therefore, we have a free and democratic society. But do we? The people have expressed their will and the government and legislature are given their legitimacy by the fact they were democratically elected. However there is an inherent problem with propounding that this represents real democracy. Without some other check the interests of all peoples are not represented. Only the interests of the majority are safeguarded. This is formal democracy but it is not substantive democracy.[116] Substantive democracy not only entails the functioning of a representative democratic process but also the supremacy and protection of fundamental rights and freedoms.[117] Ultimate sovereignty in every civilised constitution, it has been said, rests not with those who wield governmental power, but in the conditions under which they are permitted to do so.[118] This is necessary because the minority in a representative democratic regime have no protection otherwise. They are vulnerable to excesses and abuses of power by the majority. Thus we not only require a

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predictable. So for my part I find it more helpful today to postulate a recipient who, being reasonable, runs through the proportionality checklist in order to anticipate what a court is likely to decide, and who adjusts his or her conscience and conduct accordingly".

[116] Aharon Barak "The Supreme Court 2001 Term Forward: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2001) 116 Harv L Rev 19, 38-39; See also Rabinder Singh *The Future of Human Rights in the United Kingdom* (Hart Publishing, Oxford, 1997) 44-48.

[117] Barak, above, 39.

[118] Sir John Laws "Law and Democracy" [1995] PL 72, 92.

democratic process but also the protection of fundamental values and rights of all people. As Sir John Laws says, democratic power requires limits:[119]

> As a matter of fundamental principle, it is my opinion that the survival and flourishing of a democracy in which basic rights ... are not only respected but enshrined requires that those who exercise democratic, political power must have limits set to what they may do: limits which they are not allowed to overstep. If this is right, it is a function of democratic power itself that it not be absolute.

The logical question which follows is "who will protect these rights?" When a tension develops between the views of the majority and individual rights a balance will need to be struck.[120] The legislature and executive will protect the rights of the majority, as they represent their interests. However, without some other check there exists the potential for the minority to be subjected to arbitrary power and for individual rights to be infringed upon. There exists no body or entity to protect the rights of the minority. It must, therefore, fall to the judiciary to perform this function. They are the independent and impartial arm of government. They are free from the influences of the majority, and thus they are the appropriate entity to protect such fundamental rights. They owe allegiance to nothing except their constitutional duty of reaching through reasoned debate the best attainable judgements in accordance with justice and law.[121] We have seen above that judges are willing to defer to the executive when the issue at stake is regarded to be beyond their expertise. But this is the wrong approach. When human rights are involved it is always within the expertise of the judiciary as they are the entity charged with protecting these rights, indeed they are the only body capable of doing so. And it is outside the executive's jurisdiction to disproportionately infringe on human rights. The very fact that the executive are elected and represent the majority is the very reason why the courts should intervene when they impinge on fundamental rights. The judiciary should not be seen as a junior partner in the

[119] Laws, above, 81.
[120] Lord Steyn "Democracy Through Law" (2002) 6 EHRLR 723, 724.

tripartite relationship with the other branches. They are equal partners and as such should not bow to either of the other two branches.

The conclusion to draw from this discussion is that the judiciary has a wider constitutional role. They are not only there to decide the dispute before them, but also to uphold the rule of law and the rights and freedoms of all persons.[122] They must take on this role for a truly free and democratic society to exist: "A people's aspiration to democracy and the imperative of individual freedoms go hand in hand".[123] Sir Robin Cooke, as he then was, commented that "the courts have a constitutional role and it is their duty to fulfil it".[124] In the same article he also stated that "[o]ne may have to accept that working out truly fundamental rights and duties is ultimately an inescapable judicial responsibility".[125] When human rights are involved the judiciary must actively and anxiously protect them, regardless of questions regarding the separation of powers or deference. If human rights are at stake then the case is unquestionably within the realm of the judiciary's jusiticiability. In our Westminster system the courts have dictated that Parliament be sovereign. The executive has no such status, and must be open to the most anxious scrutiny.[126]

D Judicial Review – A Common Law Right

In order to answer whether it is legitimate for the courts to arm themselves with proportionality review it is integral to consider where the courts draw their power to judicially review executive action. Indeed this is a much debated topic. There are two sides to the debate.

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[121] Lord Steyn, above, 724.
[122] See Council of Europe Recommendation on the Independence, Efficiency and Role of Judges No R (94) 12, Principle V(1): "judges have the duty to protect the rights and freedoms of all persons".
[123] Sir John Laws "Law and Democracy" [1995] PL 72, 85.
[124] Sir Robin Cooke "Fundamentals" [1988] NZLJ 158, 164.
[125] Cooke, above, 165; See also Lord Hoffman "Separation of Powers" (COMBAR Lecture, 2001) paras 12-13.
[126] See Ian Leigh "Taking Rights Proportionately: Judicial Review, the Human Rights Act, and Strasbourg" [2002] PL 265, 287 where the author notes there is nothing in the HRA saying the executive is sovereign;

One side argues that the court's judicial review power derives from the ultra vires doctrine and the supremacy of Parliament.[127] It is argued that it is the court's role to ensure the executive does not act outside the powers conferred upon them by Parliament. The court's role is limited to ensuring that the executive work within the four corners of the Act and not beyond.

The other side argues that judicial review is a creation of the common law.[128] The courts acting in their wider constitutional role ensure that executive action does not contravene the rule of law, through judicially reviewing that action. It is up to the courts to develop the rules and principles that should govern judicial review. Executive action which jeopardises or contravenes these principles will be struck out. And if Parliament disagrees with any aspect of judicial review, they have the power to legislate in that area. The fact that they have not could be seen as a tacit acceptance of the courts' common law power to develop the judicial review doctrine.

It is becoming increasingly accepted that the common law is the foundation of judicial review and not a power derived from Parliament's sovereignty. Lord Steyn has commented that the overwhelming weight of reasoned argument has shown that the ultra vires argument is a dispensable

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See also the New Zealand Bill of Rights Act 1990 which has a provision protecting the sovereignty of Parliament (section 4) but no provision protecting the executive.

[127] See generally Christopher Forsyth "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000) 29; Mark Elliot "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000) 83; Mark Elliot "The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review" (1999) 115 LQR 119.

[128] See generally Paul Craig "Competing Models of Judicial Review" [1999] PL 428; Jeffrey Jowell "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] PL 448; Phillip A Joseph "The Demise of *Ultra Vires* – Judicial Review in the New Zealand Courts" [2001] PL 354; Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671; Dawn Oliver "Is the Ultra Vires Rule the Basis for Judicial Review?" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000) 3; Paul Craig "Ultra Vires and the Foundations of Judicial Review [1998] CLJ 63; Gareth Wong "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality" [2000] PL 92; John Laws "Illegality: The Problem of Jurisdiction" in Michael Supperstone and James Goudie (eds) *Judicial Review* (Butterworths, London, 1992) 51.

fiction.[129] However I still believe it is important to briefly discuss this long-standing debate in order to gain a clear understanding of where the courts' power to judicially review executive action derives from, and what the qualities of that power are. The proper justification for judicial review not only matters because it provides a reason for judicial review, but also because it indicates the limits of judicial power and the scope of judicial review.[130]

If the justification for judicial review is the ultra vires doctrine, the courts will be more constrained in what they can and cannot do. They would need to justify the development of a new head of review under the ultra vires doctrine. Under the ultra vires doctrine the courts would need to justify a new head of review through the doctrine of parliamentary supremacy. They would need to show that the new ground of review is necessary to stop the executive usurping their delegated authority, and ensure the executive act within the ambit of the parent Act.

Whereas if the justification for judicial review comes from the common law the courts will have wider discretion as to how they conduct judicial review and how probing they are in their scrutiny of executive action. The common law theory of judicial review admits more room for judicial independence in shaping fundamental norms of executive behaviour.[131] They would need to justify a new head of review as necessary for the maintenance of the rule of law, and the maintenance of a free and democratic society.

Thus it is fundamental to decide which approach is correct when considering the legitimacy of a new head of review such as proportionality. It is

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[129] Lord Steyn "Democracy Through Law" (2002) 6 EHRLR 723, 725; See also *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, 585-591 (HL) Lord Steyn, which points towards the rule of law justification.

[130] Jeffrey Jowell "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] PL 448, 449.

[131] Gareth Wong "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality" [2000] PL 92, 100.

my view that the foundation of judicial review is the common law, and I will briefly discuss why.

Proponents of the ultra vires view believe to premise judicial review on anything other than the ultra vires doctrine would be to compromise the sovereignty of Parliament.[132] However, there is in my view nothing to substantiate this claim. The courts have developed judicial review as a common law body of rules, analogous to that of torts or contract.[133] There is nothing to suggest that the development of a common law doctrine infringes on Parliamentary sovereignty.[134] If Parliament disagrees with the development of such rules they are able to pass a statute abolishing those rules, and the courts would be forced to obey. Proponents of the ultra vires view also claim that to allow the courts unfettered power to develop judicial review is to advocate a supreme judiciary.[135] However this must also be a false concern. The judiciary does not act unchecked, as every development in the common law can be overridden by Parliament. Thus the judiciary are not supreme.

There is of course also the fact that all of the grounds of review except legality cannot be justified on the premise that the courts are acting as agents of Parliament. Irrationality and procedural impropriety cannot be justified on the ground that they exist so as to ensure executive power is exercised within the four corners of the parent Act. These two grounds are given life and nurtured by the courts and nowhere is it suggested that they are any less legitimate because

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[132] Mark Elliot "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000) 83, 86; See generally Christopher Forsyth "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000) 29.

[133] See Paul Craig "Competing Models of Judicial Review" [1999] PL 428, 434 for a fuller explanation.

[134] See Craig, above, 437 for a fuller explanation.

[135] Mark Elliot "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000) 83, 86.

of the lack of explicit legislative approval.[136] It could of course be argued that the courts are acting to protect legislative intent as Parliament could not have intended a discretionary power to be exercised irrationally or procedurally unfairly. And it has further been argued that Parliament has intentionally delegated authority to the judiciary to carry out evaluations of executive action.[137] However this reasoning is not only strained but also superficial. Jowell suggests that the ultra vires justification is artificial because it supplies an intention to the legislature which is wholly fictional; the legislature is unlikely ever to have considered the matter, and if it had, might well have formed a different conclusion from that implied by the courts.[138] This point can be supported by the case law in this area.[139] The fact that no judges feel it necessary to justify their review powers on the grounds of Parliamentary sovereignty is rather telling.

Two other ancillary arguments can be made in favour of the common law view. Firstly, it has been argued that judicial review predates any concept of ultra vires, its rich lineage dating as far back as the Magna Carta and the splitting up of the Curia Regis into the executive, the legislature and judiciary.[140] It would thus be profound if a modern doctrine such as ultra vires could retrospectively be used to justify judicial review which many writers have propounded stretches back to the seventeenth century.[141] Secondly, it has been argued that ultra vires

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[136] Gareth Wong "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality" [2000] PL 92, 99.
[137] Christopher Forsyth "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000) 29, 41.
[138] Jeffrey Jowell "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] PL 448, 449.
[139] See Paul Craig "Competing Models of Judicial Review" [1999] PL 428, 443 and Paul Craig "Ultra Vires and the Foundations of Judicial Review [1998] CLJ 63, 79-85 for a fuller explanation.
[140] Phillip A Joseph "The Demise of *Ultra Vires* – Judicial Review in the New Zealand Courts" [2001] PL 354, 363-365.
[141] See for example Joseph, above, 367-368.

cannot justify the fact that judicial review now stretches to non-statutory bodies.[142]

Thus, it is, in my view, clear that the ultra vires doctrine is not the foundation of judicial review. The power of the judiciary to review the exercise of executive power derives from the common law and the courts' wider constitutional role to protect the rule of law.[143] The justification for review is rooted in deeper constitutional principle.[144] Joseph has commented that "[w]here judicial power is inherent … the courts must look beyond the formal constitution to the logically prior concept of the rule of law".[145] It is thus for the judiciary to decide upon the procedural and substantive principles of judicial review which should apply to executive action. It is for the judiciary to decide the level of scrutiny to be given to any one executive decision. The courts will impose standards that they believe to be in line with the rule of law and a democratic society. In their wider constitutional role, as discussed above they will protect society from the excesses of executive power. It is for the courts to decide the limits to be placed on executive action as they are the body entrusted with the task. If Parliament disagrees with this they can pass legislation to that effect. There can be no qualm with proportionality review on this level.

Viewing judicial review in this way implies that it is not only legitimate but also natural that the judiciary will create new heads of review as the rule of law and justice require. New principles emerge by a process of accretion reflecting the constitution's changing imperatives and needs.[146] The proper role of judges requires that they be sensitive to the changing constitutional context in which they operate, and take note of developing principles of democratic

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[142] See for example *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815; Jeffrey Jowell "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] PL 448, 459.
[143] Lord Woolf "Droit Public – English Style" [1995] PL 57, 68: "the Courts derive their power from the rule of law".
[144] Jowell, above, 455.
[145] Phillip A Joseph "The Demise of *Ultra Vires* – Judicial Review in the New Zealand Courts" [2001] PL 354, 358.
[146] Jowell, above, 455.

government and administration, of which proportionality is one.[147] Like other branches of common law, administrative law develops and changes according to current perceptions of what is required of the courts in their distinctive judicial function.[148]

E What I Am and Am Not Saying

In this section I have advocated the proportionality head of review, and attempted to justify its adoption. In my view it infringes no more on the executive branch than do the grounds of irrationality and illegality review. Regardless of this comparison I have also attempted to justify the UK judiciary's adoption of the doctrine on two other grounds. First, by considering the wider constitutional and supervisory role of the judiciary in the separation of powers. And secondly, by considering the foundation of judicial review.

I have, though, gone further than simply advocating proportionality review. I have also through my discussion of the role of judges and the genesis of judicial review advocated a more active approach by the judiciary where human rights are at stake. I have advocated a judicial approach which should place the protection of human rights above deference to government. I have advocated this approach because I believe this is the appropriate course of action for the judiciary to take given their role in the separation of powers. If they do not anxiously protect human rights no person or entity will. The price that society pays for not protecting these rights is the degradation of the rule of law and the possibility of the arbitrary exercise of power. If the result of this is a limiting of the scope of executive power, then so be it. Compromising fundamental tenets of a free and democratic society is too high a price to pay simply to grant the executive some lee-way.

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[147] Gareth Wong "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality" [2000] PL 92, 100.

In making these propositions I am not suggesting the judiciary wage war on the executive nor am I suggesting that the judiciary replace executive decisions with their own where they feel appropriate.[149] Such action would be to grossly compromise and undermine the separation of powers, the independence of the judiciary and the stability of society.

What I am suggesting is that the judiciary do have a duty to uphold and protect fundamental rights so as to enhance the rule of law. The courts have a duty to prevent the executive infringing on those rights to an unacceptable level.[150] When the courts void an executive action for being disproportionate they are not infringing on the executive's sphere but simply fulfilling their own duty.

V PROPORTIONALITY REVIEW AND NEW ZEALAND

In this section I suggest that proportionality review must be adopted in New Zealand in light of our international commitments and the New Zealand Bill of Rights Act 1990 ("the NZBORA"). I consider the status of proportionality review in New Zealand. I highlight several positive steps that have been made in the area of judicial review, which point to the adoption of proportionality review in New Zealand soon.

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[148] *Thames Valley Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd* [1994] 2 NZLR 641, 652 (CA) Cooke P.

[149] See Paul Craig "Unreasonableness and Proportionality in UK Law" in Evelyn Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) 85, 85-87: Craig makes it clear that proportionality review does not entail the judiciary substituting their decision for that of the primary decision-maker.

[150] See also Nicholas Blake "Importing Proportionality: Clarification or Confusion" (2002) 1 EHRLR 19, 26: "Judicial review is not a lawyers' paradise but a constitutional safeguard against an active and intrusive executive".

A The International Dimension: The ICCPR

It is important to view the possibility of proportionality review being adopted in New Zealand in light of our international obligations and duties. In my opinion New Zealand's international obligations, particularly under the ICCPR[151], the Convention against Torture ("the CAT")[152] and the Convention on the Rights of the Child ("the CRC")[153], require proportionality review to be adopted in order to give fundamental rights the protection required by those treaties.

1 No Incorporated Convention – Does It Matter?

It is first important to note that there is no substance in the argument that non-incorporation of a Convention-type document into municipal law precludes the development of proportionality review in New Zealand. In *Alconbury*, Lord Slynn of Hadley states that the proportionality ground of review should be accepted as part of administrative law without reference to the HRA.[154] And in *Daly*, Lord Cooke of Thorndon echoed this proposition:[155]

> [W]hile this case has arisen in a jurisdiction where the European Convention … applies, and while the case is one in which the Convention and the common law produce the same result, it is of great importance, in my opinion, that the common law by itself is being recognised as a sufficient source of the fundamental right … Thus the decision may prove to be in point in common law jurisdictions not affected by the Convention. Rights similar to those in the Convention are of course to be found in constitutional documents and other formal affirmations of rights

[151] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.
[152] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.
[153] Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3.
[154] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, para 51 (HL) Lord Slynn of Hadley.

> elsewhere. The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.

Thus the fact that New Zealand does not have a Convention-type document should not stand in the way of the New Zealand courts developing proportionality as a separate head of review. It would also seem inequitable and out of step with international norms for the citizens of European countries to have their rights more anxiously protected from executive action than the citizens of New Zealand.

2 New Zealand's International Obligations and the Proportionality Requirement

Aside from these points though, New Zealand has ratified and is bound by the ICCPR.[156] New Zealand has also ratified the first optional protocol to the ICCPR allowing individuals the right of petition to the Human Rights Committee ("the HRC").[157] The ICCPR is further strengthened in New Zealand municipal law by its express inclusion in the NZBORA long title.[158] The ICCPR and European Convention are largely identical in nature, content and purpose.[159] Both treaties, broadly speaking, seek to protect the individual from arbitrary State action by protecting the most fundamental of civil and political rights.[160] The rights protected in both are very similar.[161] One particular aspect which

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[155] R *(Daly) v Secretary of State for the Home Department* [2001] 2 AC 115, para 30 (HL) Lord Cooke of Thorndon.

[156] Date of ratification: 28 December 1978.

[157] Date of accession: 26 May 1989.

[158] New Zealand Bill of Rights Act 1990, Long Title reads: "An Act - … (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".

[159] This point has been acknowledged by the New Zealand Court of Appeal in *Lange v Atkinson* [1998] 3 NZLR 424, 457 (CA) Blanchard J (Richardson P, Henry J, Keith J concurring).

[160] See International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, preamble; European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221, preamble.

[161] For example compare International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 2(3) to European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221, art 13 (right to an effective remedy); compare ICCPR, above, art 17 to European Convention, above, art 8 (right to respect for private and family life); compare

characterises both treaties is the limitation clauses on certain individual rights.[162] Both the ICCPR and the European Convention provide that rights can be infringed upon in certain circumstances – most typically where the infringement on the individual's right is balanced against a wider objective (often the public benefit). Where an infringement does not fulfil this test (i.e. is disproportionate) the right will have been violated by the State and the international obligation breached.

It is pertinent to note that many of the HRC general comments regarding limitation clauses expressly outline that any limitation placed upon a right must fulfil the European style proportionality test. For example the general comment regarding the right to freedom of movement (Article 12) requires:[163]

> [R]estrictive measures [to] conform [with] the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected ... The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and *judicial authorities* in applying the law.

One difference, though, does exist between the HRC and ECHR analysis of limitation clauses, which is the approach of each body to the "margin of appreciation". While the ECHR adheres to the doctrine, the HRC does not. The Committee has expressly rejected the doctrine[164], meaning that New Zealand is

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ICCPR, above, art 14 to European Convention, above, art 6 (fair trial rights); compare ICCPR, above, art 9 to European Convention, above, art 5 (habeas corpus).

[162] See *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 262-265 (CA) Cooke P for the Court: the Court of Appeal used ECHR jurisprudence regarding limitation clauses to clarify the requirements of New Zealand's international law obligations where rights were to be infringed upon.

[163] Human Rights Committee, General Comment No 27 on Article 12 (freedom of movement), UN Doc HRI/GEN/1/Rev5 (1999) para 14-15 (emphasis added).

[164] Human Rights Committee Communication No: 511/1992: *Länsman v Finland*, 8 November 1994, CCPR/C/52/D/511/1992 para 9.4: "A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27". The Committee has affirmed this position in the New Zealand context: Human Rights Committee Communication No 547/1993: *Mahuika v New Zealand*, 15 November 2000, CCPR/C/70/D/547/1993 para 9.4; The State party

subject to much closer scrutiny under the ICCPR than the UK is under the European Convention.

Thus, just as the UK judiciary were required to adopt proportionality review because of their obligations under the European Convention, so too *must* the New Zealand judiciary because of their obligations and duties under the ICCPR. To fail in this obligation would be to breach international law. Thus where an executive interference purports to disproportionately infringe upon a citizen's right, the courts must remedy and safeguard against such an infringement.

3 Have the Judiciary Been Receptive?

The New Zealand courts have shown they are willing to consider international obligations in judicial review proceedings.[165] In *Tavita v Minister of Immigration* the Court of Appeal were asked to decide whether the Minister of Immigration should have regard to the international treaty obligations (under the ICCPR and the CRC) concerning the child and the family in considering whether to enforce a removal order.[166] The Court relied heavily upon the jurisprudence of the ECHR, and in particular the European Court's proportionality approach where a right was to limited.[167] The Court of Appeal found that a European style balancing exercise is required at times, and that a broadly similar exercise may be required under New Zealand's international

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has argued for a margin of appreciation to be applied to no avail in several other communications: Committee on the Elimination of Racial Discrimination Communication No. 17/1999: *BJ v Denmark*, 10 May 2000, CERD/C/56/D/17/1999; Committee on the Elimination of Racial Discrimination Communication No. 26/2002: *Hagan v Australia*, 14 April 2003, CERD/C/62/D/26/2002; Committee Against Torture Communication No 65/1997: *IAO v Sweden*, 6 May 1998, CAT/C/20/D/65/1997.

[165] *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA); *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (HC); *Patel v Minister of Immigration* [1997] 1 NZLR 252 (HC); *Patel v Chief Executive of the Department of Labour* [1997] 1 NZLR 102 (HC); *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA); *New Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA).

[166] *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

[167] *Tavita v Minister of Immigration*, above, 262-265 Cooke P for the Court.

instruments.[168] The Court found the argument that the Minister is entitled to ignore international treaties to be "an unattractive" one, as this would imply New Zealand's international obligations were merely window-dressing.[169] The Court held that some international obligations and duties were so manifestly important that no Minister could fail to take them into account.[170] Further, the fact that recourse was available to the HRC meant that the courts would be open to scrutiny if they were to hold the exercise of statutory discretions to be unfettered by international instruments.[171]

The unanimous decision in *Tavita* and its progeny signal a positive step in the judiciary's realisation of their role in ensuring compliance with New Zealand's international obligations. The decision also demonstrated a willingness to adopt a European balancing-type test in light of the requirements of international instruments, which was further than the UK courts had got at the time.[172] And in *Lange v Atkinson* the Court of Appeal believed recourse to decisions interpreting the ICCPR and European Covenant were of direct relevance.[173] This growing commitment to international obligations was echoed in *Patel v Minister of Immigration* where Baragwanath J stated that the Minister had to take account of all circumstances, including New Zealand's international obligations when exercising a discretion.[174]

Thus there are signs that the New Zealand judiciary is embarking upon a realisation of its international obligations. Several cases have drawn on the European style proportionality test, given the similarity of the Convention with the ICCPR. The fact that the judiciary have expressly acknowledged the

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[168] *Tavita v Minister of Immigration*, above, 265 Cooke P for the Court.
[169] *Tavita v Minister of Immigration*, above, 266 Cooke P for the Court.
[170] *Tavita v Minister of Immigration*, above, 266 Cooke P for the Court.
[171] *Tavita v Minister of Immigration*, above, 266 Cooke P for the Court.
[172] The law in the UK at the time was *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 (HL) in which the House of Lords had expressly rejected proportionality review.
[173] *Lange v Atkinson* [1998] 3 NZLR 424, 457-459, 465-467 (CA) Blanchard J (Richardson P, Henry J, Keith J concurring).
[174] *Patel v Minister of Immigration* [1997] 1 NZLR 252, 256 (HC) Baragwanath J; See also *Patel v Chief Executive of the Department of Labour* [1997] 1 NZLR 102, 110 (HC) Baragwanath J.

importance and relevance of the proportionality test in light of international requirements provides even greater impetus for the adoption of proportionality review. The judiciary should now openly adopt proportionality as a stand alone head of review, to ensure compliance with New Zealand's international treaty obligations.

4 International Human Rights Law and Effective Remedies

The remedial aspect of judicial review is equally important in New Zealand[175] as under the European Convention[176], particularly in light of New Zealand's ICCPR commitment and the Court of Appeal's landmark decision in *Baigent's Case*.[177] The fact that the ECHR has found that the traditional grounds of review are inadequate to provide an effective remedy should send a signal to the New Zealand jurisdiction that the time has come to adopt proportionality as a separate head of review.[178]

New Zealand, like the UK, is also under an international commitment to provide effective remedies. Under Article 2(3) of the ICCPR New Zealand is under a commitment to provide an effective remedy to any person whose rights or freedoms are violated. The UK carries the same obligation under Article 13 of the Convention.[179] Given the fact that the NZBORA is an Act "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights"[180] this imposes an obligation on the courts to provide effective remedies where rights have been breached. Indeed, in *Baigent's Case* the majority held that the NZBORA should not be viewed in a vacuum and that the ICCPR is

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[175] It has been affirmed by the New Zealand courts that judicial review is a type of remedy. See for example: *R v Goodwin* [1993] 2 NZLR 153, 191-192 (CA) Richardson J; *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 (CA). It is also a deeply rooted principle of the law that where there is a right there is a remedy: *Ashby v White* (1703) 2 Ld Raym 938, 953-954 Holt CJ.
[176] See Part II A 4 *Article 13*.
[177] *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).
[178] See Part II A 4 *Article 13*.
[179] See Part II A 4 *Article 13*.
[180] New Zealand Bill of Rights Act 1990, Long Title.

brought in through the long title.[181] Both President Cooke, as he then was, and Hardie Boys J held that the courts had a *duty* to provide an effective remedy.[182]

Thus, the New Zealand courts are under an obligation to provide effective remedies for violations of fundamental rights and freedoms. The fact that the ECHR has found that the traditional grounds of judicial review cannot provide such vindication for rights breaches[183] should send a clear signal that New Zealand must adopt proportionality as a separate head of review. This argument is further strengthened by the fact that Article 13 (of the Convention) and Article 2(3) (of the ICCPR) are carbon copies of one another. To ignore this signal would be to allow rights violations to go without effective vindication, and for the New Zealand judiciary to breach their international obligations.

B The New Zealand Bill of Rights Act 1990

1 Long Title – A Positive Guarantee

In New Zealand I believe proportionality review is both mandated and required by the NZBORA.

The NZBORA long title reads:

> An Act –
>
> (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

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[181] *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, 676 (CA) Cooke P; *Baigent's Case*, above, 691 Casey J; *Baigent's Case*, above, 699-700 Hardie Boys J; *Baigent's Case*, above, 717-718 McKay J.

[182] *Baigent's Case*, above, 676 Cooke P; *Baigent's Case*, above, 699-703 Hardie Boys J.

[183] See Part II A 4 *Article 13*.

This long title imparts a positive obligation on the judiciary, not simply to observe rights, but to "affirm, protect and promote" them.[184] The NZBORA long title impresses a duty to actively protect fundamental rights, affirming the judiciary's wider constitutional role in a free and democratic society. This is of course enhanced by the inclusion of the ICCPR in the long title.[185] This means there exists a statutory obligation on the judiciary to protect individual's rights against executive action which attempts to infringe upon those rights. And thus it would not only be legitimate but required that the New Zealand courts adopt proportionality as a separate head of review as it aids in the protection of fundamental rights and freedoms.[186]

2 Sections 3 and 5 – The Judiciary's Obligations

The above NZBORA argument is strengthened even further in relation to the rights listed in the Act by sections 3 and 5. It is my view that when read together, these sections impose a duty on the judiciary to adopt proportionality review when NZBORA rights are at stake. Section 3 of the Act ordains that the NZBORA applies to acts done by all three branches of government, including the judiciary. President Cooke, as he then was, affirmed this in *Baigent's Case*: "Section 3 … makes it clear that the Bill of Rights applies to acts done by the Courts. The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed".[187]

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[184] See *R v Goodwin* [1993] 2 NZLR 153, 191-192, 193-194 (CA) Richardson J: ""affirm", "protect" and "promote" are all words expressive of a positive commitment to human rights and fundamental freedoms".
[185] *Baigent's Case*, above, 699 Hardie Boys J: "I would be most reluctant to conclude that the [New Zealand Bill of Rights] Act, which purports to affirm this commitment [to the International Covenant on Civil and Political Rights], should be construed other than in a manner that gives effect to it".
[186] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 115, para 27 (HL) Lord Steyn: "the intensity of review is somewhat greater under the proportionality approach".
[187] *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, 676 (CA) Cooke P.

Section 5 of the Act reads:

> Justified limitations – Subject to section 4 of this Bill of Rights [which preserves the sovereignty of Parliament], the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 5 signals that the rights in the NZBORA are not absolute but may be subject to justified limitations.[188] In *Ministry of Transport v Noort* Richardson J highlighted the international genesis of section 5, being derived from the Canadian Charter, the ICCPR and *interestingly* the European Convention.[189] Richardson J also found the section 5 test to be analogous to international concepts of proportionality.[190]

In *Moonen v Film and Literature Board of Review*, Tipping J, in delivering the judgment of the Court, outlined the current approach to be taken to a section 5 inquiry concerning a statute:[191]

(1) The objective of the legislature in enacting the provision in question should be identified as well as the importance and significance of that objective;
(2) There should be proportionality between the importance of the objective and the way the legislature has sought to achieve it – "a sledge hammer should not be used to crack a nut";
(3) The means used must have a rational relationship to the objective;
(4) In achieving the objective there should be as little interference as possible with the affected right or freedom;

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[188] This point is affirmed in *Alwen Industries Ltd v Collector of Customs* [1996] 3 NZLR 226, 229 (HC) Robertson J.
[189] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 (CA) Richardson J.
[190] *Ministry of Transport v Noort*, above, 283 Richardson J.
[191] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17 (CA) Tipping J for the Court; It should be noted that although Tipping J is outlining this test in the context of legislation, there is no reason why the same test should not also apply to executive action. In *Police v Beggs* [1999] 3 NZLR 615 (HC) the High Court found that any limit imposed upon a right in the exercise of a public power had to fulfil the section 5 test.

(5) The section 5 inquiry involves a value judgement by the court "on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they are social, legal, moral, economic, administrative, ethical or otherwise".

It is apparent that this test bears remarkable resemblance to the European proportionality test. The third limb of the *Moonen* test is analogous to the suitability limb of the proportionality test, while the fourth limb is very similar to the necessity limb of the proportionality test. It is also apparent that the second limb of the *Moonen* test is identical to the proportionality limb of the European test. It is further important to note the fifth limb in Tipping J's *Moonen* inquiry. Tipping J states that courts will make a value judgement even if the case involves social or economic issues.[192] This contrasts with the UK application of the proportionality test where great deference has been shown in these policy-type areas.[193]

Thus it can be concluded that section 5 provides for a test virtually identical to the ECHR proportionality test where rights are infringed upon.[194] Because the NZBORA applies to acts of the judiciary (by virtue of section 3), the courts must utilise the section 5 test in any case where a NZBORA right is being infringed, to ensure that the infringement is a proportionate one. Just as the English courts apply the proportionality test where HRA (Convention) rights are at issue in judicial review proceedings, so too must the New Zealand courts apply the section 5 test where NZBORA rights are at stake.

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[192] See also Sir Ivor Richardson "Rights Jurisprudence – Justice for All?" in Phillip A Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) 61, 82 in relation to section 5: "[T]he Court undertakes an extensive empirical examination supported by economic, statistical, and sociological data, makes a cost-benefit analysis of the effects of various policy choices and chooses the solution which best reflects a balancing of the values involved"; Compare this to the French style "bilan-coût-avantages" (cost benefit-analysis): See Nicholas Emiliou *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International, London, 1996) 67-114.

[193] See Part III *Proportionality Review and the UK.*

[194] In *Lange v Atkinson* [1998] 3 NZLR 424, 466 (CA) Blanchard J (Richardson P, Henry J, Keith J concurring) the Court noted the value of decisions made under the European Convention in their analysis of section 5.

The net result of reading sections 3 and 5 together is that the section 5 proportionality test must be available in judicial review of executive action. Therefore if an executive decision or action represents an unjustifiable limitation on a right it must be voided. The New Zealand courts may not be able to strike down incompatible legislation[195] but there is nothing in the Act preventing the voiding of inconsistent executive action.

3 Section 27(2) – The "Rights-Enhancing" Effect

It is lastly important to note the rights-enhancing nature of section 27(2). Section 27(2) of the Act provides that every person whose rights, obligations or interests protected or recognised by law have been affected by the determination of a tribunal or public authority has the right to apply, in accordance with law, for judicial review of that determination. Thus section 27 affirms the right to judicial review where an individual's rights are affected by the determinations of a public authority. Section 27, though, does more than simply affirm the right to judicial review. The NZBORA places positive obligations upon the courts, which the common law does not.[196] The NZBORA has been acknowledged as having a rights-enhancing effect[197], which is consistent with overseas jurisprudence.[198] Rather than simply affirming the common law position the NZBORA enhances the scope and strength of rights. The inclusion of section 27(2) thus elevates judicial review above other common law rights, making it a fundamental right. The inclusion of section 27(2) serves to heighten the scope and intensity of review. This enhancing effect would be consistent with the adoption of a more intensive ground of review such as proportionality which would serve to further protect and promote rights.

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[195] New Zealand Bill of Rights Act 1990, s 4.
[196] New Zealand Bill of Rights Act 1990, Long Title; *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, 676 (CA) Cooke P; *R v Goodwin* [1993] 2 NZLR 153, 191-192, 193-194 (CA) Richardson J.
[197] *R v Goodwin* [1993] 2 NZLR 153, 193-194 (CA) Richardson J; *Ministry of Transport v Noort* [1992] 3 NZLR 260, 270 (CA) Cooke P.
[198] For example *Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution* (1985) 19 CCC (3d) 195, 231 (FCA) MacGuigan J.

C The New Zealand State of Affairs

Proportionality has not yet been accepted by the New Zealand courts as a stand alone head of judicial review, contrary to international obligations and the NZBORA. There is however a clear trend in the case law pointing towards the adoption of proportionality review. Indeed it seems inevitable that the day will soon come when proportionality does represent a stand alone head of review in New Zealand.

In the pre-NZBORA decision of *Isaac v Minster of Consumer Affairs* Tipping J expressly rejected proportionality as a stand alone ground of review.[199] Tipping J considered the principle of proportionality to be no more than a criterion upon which the courts could consider whether a decision was unreasonable or not.[200] Thus Tipping J did recognise the principle in New Zealand law, but merely as a principle to be taken into account when assessing the reasonableness of an executive action.

Proportionality was next considered by Thomas J in *Waitakere City Council v Lovelock*.[201] Thomas J emphasised the fact that the standard of unreasonableness will vary depending on the subject-matter.[202] He observed that a more rigorous examination of the executive decision may be warranted where fundamental rights are at stake.[203] He also commented that this more exacting standard would also be expected where the executive decision bears on a fundamental constitutional document.[204] In *Thames Valley Electric Power Board v NZFP Pulp and Paper* Cooke P made comments of a similar nature: "[a]t times it becomes necessary to give especial weight to human and civil

[199] *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606, 635-636 (HC) Tipping J.
[200] *Isaac v Minister of Consumer Affairs*, above, 636 Tipping J.
[201] *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).
[202] *Waitakere City Council v Lovelock*, above, 403, 411 Thomas J.
[203] *Waitakere City Council v Lovelock*, above, 403, 411 Thomas J.
[204] *Waitakere City Council v Lovelock*, above, 403 Thomas J.

rights, including class or group rights", perhaps signalling a greater level of scrutiny where rights are involved.[205]

Regarding proportionality, Thomas J saw it as uncertain whether it would evolve as a separate ground of review.[206] He thought there to be a close affinity between the concept of proportionality and reasonableness.[207] Thomas J thought it to be impossible to divorce the concept of proportionality from that of reasonableness and believed there to be no problem with treating proportionality as an aspect of unreasonableness.[208] Thus while leaving the possible development of a separate head of proportionality review open Thomas J did signal that the principle of proportionality should, at least, form part of the reasonableness ground of review.

The most recent judicial comment on proportionality came in *Institute of Chartered Accountants of New Zealand v Bevan*.[209] Keith J delivered the judgment of the Court and in a carefully worded discussion chose to leave open the question whether proportionality should represent a separate ground of review in New Zealand.[210]

It appears that proportionality will soon represent a separate and discrete head of review in New Zealand. The fact that Keith J did not expressly dismiss the idea as Tipping J had 12 years earlier does represent a change in judicial attitude. This shows the judiciary is gradually warming to the idea, in an environment where the courts are becoming more aware of the implications of their international obligations. This is echoed in the fact that the judiciary has

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[205] *Thames Valley Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd* [1994] 2 NZLR 641, 653 (CA) Cooke P. See also *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616, para 65 (CA) Blanchard J for the Court: "In cases involving human rights the events which are impugned will be closely scrutinised".

[206] *Waitakere City Council v Lovelock*, above, 407 Thomas J.

[207] *Waitakere City Council v Lovelock*, above, 407 Thomas J.

[208] *Waitakere City Council v Lovelock*, above, 408 Thomas J.

[209] *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154 (CA).

[210] *Institute of Chartered Accountants of New Zealand v Bevan*, above, para 55 Keith J for the Court.

said that greater scrutiny is required where issues are raised regarding human rights or constitutional documents.

D New Zealand and Merits Review: Positive Signs

The New Zealand judiciary has traditionally been unwilling to conduct merits review, preferring to focus on the procedure by which an executive decision is made and show deference to the executive decision-maker.[211] However the courts have also shown a willingness to consider new strands of review which verge upon merits review. Joseph has noted several developing grounds of review, which "embrace substantive review simpliciter".[212]

The Court of Appeal in *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* tentatively affirmed substantive unfairness as a stand alone ground of review in New Zealand, intimating that the judiciary could look to the substantive fairness of a decision.[213] Cooke P held that "[i]nevitably this means, whatever the verbal formula of review adopted, that the quality of an administrative decision as well as the procedure is open to a degree of review"[214], but stopped short of saying a judge could substitute his or her own decision for that of the executive's.[215]

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[211] See for example *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650, 656 (CA) Richardson P; *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601, 606 (HC) Baragwanath J; *Northern Roller Milling Co v Commerce Commission* [1994] 2 NZLR 747, 750 (HC) Gallen J; *Thames Valley Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd* [1994] 2 NZLR 641, 654 (CA) Fisher J; *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537, 545-546 (CA) Richardson P; *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, 197-198 (CA) Richardson J; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, 397 (CA) Richardson P.

[212] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) para 20.3.4.

[213] *Thames Valley Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd* [1994] 2 NZLR 641, 652 (CA) Cooke P (MacKay J, Fisher J concurring).

[214] *Thames Valley Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd*, above, 652 Cooke P.

[215] *Thames Valley Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd* , above, 653 Cooke P.

In *Patel v Chief Executive of the Department of Labour* Baragwanath J found consistency of decision-making to be a head of review.[216] Thus one person cannot be treated differently from another where their circumstances are indistinguishable.[217] Baragwanath J believed consistency of decision-making to be a constitutional principle required by the rule of law.[218] This type of review also verges on merits review as it necessarily involves the judge considering the substance of the decision and scrutinising it for consistency. In a broader sense this would mean the judge would overrule the executive's decision if it were found to be inconsistent, and replace it with a consistent one.

Joseph concurs that both substantive unfairness and consistency of decision making represent a shift towards merits review.[219] He also points to two other developing heads of review.[220] The first is the "innominate ground" as developed by Lord Donaldson MR in *R v Panel on Take-overs and Mergers, ex parte Guinness plc*.[221] The Master of the Rolls asked simply: "whether something had gone wrong of a nature and degree which required the intervention of the Court".[222] In New Zealand this ground was affirmed in *Seataste Products Ltd v Director-General of Agriculture and Fisheries*, where Gallen J also noted that the heads of review were not limited to the existing ones.[223] The second developing head that Joseph notes is "constitutional review".[224] He believes "constitutional review" to be a "values-driven" form of review, aimed at upholding fundamental constitutional standards, based on the Treaty of Waitangi, international obligations, and the NZBORA.[225]

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[216] *Patel v Chief Executive of the Department of Labour* [1997] 1 NZLR 102 (HC).
[217] *Patel v Chief Executive of the Department of Labour*, above, 111 Baragwanath J.
[218] *Patel v Chief Executive of the Department of Labour*, above, 110-111 Baragwanath J.
[219] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) para 20.3.4.
[220] Joseph, above, para 20.3.4.
[221] *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 (CA).
[222] *R v Panel on Take-overs and Mergers, ex parte Guinness plc*, above, 160 Lord Donaldson MR.
[223] *Seataste Products Ltd v Director-General of Agriculture and Fisheries* [1995] 2 NZLR 449, 461 (HC) Gallen J.
[224] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) para 20.3.4.
[225] Joseph, above, para 20.3.4.

Thus the dicta of the courts in *Thames Valley* and *Patel*, as well as the two developing heads of review highlighted by Joseph, show the willingness of the judiciary to openly consider the substance of an executive decision. In light of this gradual shift in judicial attitude it would not be too far a step for the New Zealand courts to adopt proportionality review. Proportionality review would represent no greater a step towards merits review than the traditional heads,[226] let alone these other developing heads.

E Proportionality Review and the Rule of Law

While the debate between the ultra vires justification and the common law justification continues in the UK, the New Zealand courts have settled the issue.[227] In New Zealand the courts have grounded judicial review upon the common law and the rule of law.

In the landmark decision of *Peters v Davison* the Court of Appeal grounded judicial review on the common law and the rule of law.[228] The majority held that the High Court's judicial review powers "are based on the central constitutional role of the Court to rule on questions of law", the essential purpose of judicial review being to "ensure that public bodies comply with the law".[229] The majority couched the error of law ground of review in the common law, and not in the ultra vires doctrine: "Error of law is a ground of review in and of itself; it is not necessary to show that the error was one that caused the

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[226] See Part IV B *Proportionality – No More Substantive Review than the Traditional Heads of Review*: Above it has been argued that the traditional heads of review themselves involve merits review.
[227] See Part IV D *Judicial Review: A Common Law Right* for a fuller discussion on the "ultra vires versus common law" debate.
[228] *Peters v Davison* [1999] 2 NZLR 164 (CA). See also Phillip A Joseph "The Demise of *Ultra Vires* – Judicial Review in the New Zealand Courts" [2001] PL 354; Philip A Joseph "The Shifting Terrain of Judicial Review" [1999] NZLJ 278.
[229] *Peters v Davison*, above, 188 Richardson P, Henry J, Keith J.

tribunal or Court to go beyond its jurisdiction".[230] The power of judicial review thus derives from the courts' constitutional role of upholding the rule of law.[231]

Thus the judiciary's mandate in judicial review proceedings is given to them by the rule of law. The common law justification casts the judiciary in a wider constitutional role – ensuring that the executive does not encroach upon the rule of law. The Court of Appeal's contemplation of judicial review would require that new heads of review be developed as both the rule of law and justice require. Given this foundation of judicial review it would not be difficult for the New Zealand courts to justify the adoption of proportionality as a new head of review, given that it affords greater protection to fundamental rights and thus aids in the protection of the rule of law.

VI CONCLUSION

I have contended that proportionality review is a legitimate separate and discrete head of review. First, it cannot be said to represent a greater infringement upon the executive sphere than the traditional heads of review. Secondly, the adoption of proportionality review is mandated by the judiciary's constitutional role as the bulwark of human rights and fundamental freedoms.[232] Thirdly, judicial review is a common law doctrine designed to scrutinise executive action for consistency with the rule of law. As such it is only natural that new heads of review such as proportionality will be required so as to adequately protect and promote individual rights in the face of executive interference.

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[230] *Peters v Davison*, above, 181 Richardson P, Henry J, Keith J.

[231] See also *Patel v Chief Executive of the Department of Labour* [1997] 1 NZLR 102, 110-111 (HC) Baragwanath J.

[232] American President James Madison described the Supreme Court's power to judicially review legislation as an "impenetrable bulwark against every assumption of power": Speech of 8 June 1789, 1 Annals of Congress 457.

The crux of my argument, though, has centred on the fact that proportionality review is mandated and required by international treaty obligations. The ICCPR and the European Convention (among others) both require that any interference with an individual's right be proportionate to the legitimate aim pursued. If the judiciary allows disproportionate executive action to go unchecked the judiciary is failing in its duties and obligations under international law.

Steps have been made over the last decade in both the UK and New Zealand towards establishing proportionality review, largely because of international obligations under the European Convention and the ICCPR respectively. However both jurisdictions, in my view, continue to fall short of adequately protecting and promoting fundamental rights and freedoms from executive interference. The UK courts have adopted proportionality review because of the domestic incorporation of the Convention; however they still continue to apportion great weight to the decision of the primary decision-maker via the doctrine of deference. While, in New Zealand the courts remain woefully behind the times, not even having adopted proportionality review.

It is my view that the UK courts are wrong to apply the doctrine of due deference when exercising proportionality review where human rights are at stake. The application of deference serves to weaken the intensity of review under the proportionality head. Instead of exposing the executive action to the most anxious of scrutiny some judges appear to tip-toe around the executive. Such an approach does not afford human rights the protection required in a free, open and democratic society. In propounding that deference is a spurious doctrine in the area of human rights I am not suggesting the judiciary wage war on the executive nor am I suggesting that the judiciary replace executive decisions with their own. I am simply contending that it is the courts' role to uphold human rights, and in discharging that role there is no need to defer to the

executive where human rights are at stake. To do otherwise, is to emasculate the very rights which the courts are duty-bound to affirm, protect and promote.

I have also advocated that the New Zealand courts must adopt proportionality review. It is required by our international obligations, especially under the ICCPR. Proportionality review is also statutorily mandated by the New Zealand Bill of Rights Act 1990. By not adopting proportionality review the New Zealand courts are failing to afford adequate protection to fundamental rights and freedoms. The courts are failing in their international, statutory and constitutional obligations.

Over 2,500 years ago Confucius realised the importance of proportionality. It is an enduring and pervasive concept which ought to shape the future development of administrative law in Commonwealth jurisdictions.[233] It should be recognised as a governing concept in the relationship between the judiciary, the executive and human rights.

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[233] "Laws thus proportionate and mild should *never* be dispensed with" (emphasis added) Thomas Jefferson, Letter to Edmond Pendelton, 26 August 1776, in Julian P Boyd (ed) *Papers of Thomas Jefferson* (1950) 1:505.

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