

Forthcoming
50(1) *Israel Law Review* (2017)
Published by CUP

UK Public Law Non-Identical Twins: Reasonableness and Proportionality

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Abstract

Ever since the *Wednesbury* decision in 1947 UK courts and UK public law scholars have been struggling to comprehend the meaning of ‘reasonableness’ and its relation to ‘proportionality’.

The main purpose of this article is to promote conceptual clarity in UK public law by describing the nature of reasonableness and proportionality as grounds of judicial review and by highlighting the overlooked similarities and differences between them.

The main arguments of this article are that (1) reasonableness is in its essence a balancing and weighing test; (2) proportionality adds very little to already existing grounds of judicial review in UK public law; (3) this addition is not necessarily focused on the administrative weighing and balancing process; and (4) since proportionality adds very little to already existing grounds of judicial review, no conceptual or normative reason prevents having proportionality as a general ground of judicial review in UK public law.

Key words: reasonableness, proportionality, judicial review, public law.

1. Introduction

The main purpose of this article is to promote conceptual clarity in UK public law, even though the conceptual-analytical arguments also have important normative implications, which will be discussed very briefly. The main arguments in this article result from a

preliminary contention that the reasonableness test, as a ground of judicial review, is in its essence a balancing and weighing test. This proper understanding of what reasonableness means leads to the following arguments: first, proportionality adds very little to already existing grounds of judicial review in UK public law (including that of reasonableness, properly understood); second, that addition does not necessarily concern the administrative weighing and balancing process; and third, since proportionality adds very little to already existing grounds of judicial review no conceptual or normative reason prevents having proportionality as a general ground of judicial review in UK public law. The latter argument is made in light of UK courts' traditional unwillingness to apply proportionality as a ground of judicial review in cases which fall outside the scope of EU law or the European Convention on Human Rights (ECHR), and in light of common views amongst UK scholars who approve this judicial unwillingness.

The argument that proportionality should be a general ground of review in UK public law is, of course, not new. However, even those who support this argument sometimes overlook important similarities and differences between proportionality and reasonableness. As to the overlooked similarities, it is often argued that proportionality should be a general ground of review precisely because it brings something new to UK public law. This new addition, so it is argued, finds its expression in allowing courts to apply stricter scrutiny in appropriate cases which do not necessarily concern protected rights. I will argue that within the context of the extent of judicial scrutiny, proportionality adds nothing to already existing grounds of review, especially that of reasonableness. Highlighting the overlooked similarities between proportionality and reasonableness strengthens current arguments for having proportionality as a general ground of review in public law – or more accurately – helps refuting arguments against having proportionality as a general ground of review. As to the overlooked differences between proportionality and reasonableness, I will argue that even though these differences are meaningful, they do not result in equating proportionality with 'judicial activism' or in equating reasonableness with judicial deference. These differences also do not give rise to reasons against having proportionality as a general ground of judicial review in UK public law.

2. Reasonableness as a weighing and balancing test

In the *Wednesbury* decision from 1947 reasonableness was clearly described as an independent ground of judicial review in public law.¹ Reasonableness was also perceived – and rightly so – as the last resort or as a safety net. We can only use it after other ‘conventional’ grounds of review are proven to be insufficient. In the *Wednesbury* case itself, the court stated that we can scrutinize the reasonableness of an administrative decision only after establishing that the decision was *intra vires* (within the powers of the administrative body); that the decision-making process was intact; that all the relevant considerations were taken into account; and that irrelevant considerations were not taken into account.² How and when can such a decision still be unreasonable? The iconic answer that was given in *Wednesbury* was that such a decision will be unreasonable and therefore illegal if ‘it is so unreasonable that no reasonable authority could ever have come to it’.³

Over the years, and especially since the 1990s, the courts have loosened the *Wednesbury* test (even in cases that had nothing to do with fundamental rights). The test was applied in a way that made it closer to asking whether the court believed that the exercise of discretion was reasonable.⁴ The question that is now being asked is ‘was the decision one that a reasonable authority could have reached?’⁵ The court has to be satisfied that the challenged decision was so unreasonable that it would not have been made by any reasonable public authority. The modified meaning of reasonableness is now being applied alongside *Wednesbury* reasonableness.⁶ However, both ‘*Wednesbury* reasonableness’ and ‘modified reasonableness’ fail to describe and to apply the reasonableness test as what it is – a balancing test.

As at 2016, one can only describe as a complete mess the judicial practice with regard to reasonableness as a ground of judicial review. As Craig sharply stated (after reviewing a sample of 200 cases), some courts cite *Wednesbury* rhetoric but in fact apply a more lenient

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¹ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA).

² *Wednesbury* (n 1) 233–34.

³ *Wednesbury* (n 1) 234.

⁴ P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 647.

⁵ P Craig, ‘The Nature of Reasonableness Review’ (2013) 1 *Current Legal Problems* 32; *R v Secretary of State for the Home Department, Ex p Daly* [2001] 2 AC 532, 549.

⁶ *Braganza v BP Shipping Ltd and another* [2015] UKSC 17, para 24.

test; some courts do not indicate how demanding they perceive the test to be; while other courts deploy terms such as ‘higher scrutiny’ or ‘anxious scrutiny’, without elaborating on the precise meaning of these terms.⁷ More often than not, courts merely conclude that a decision is or is not ‘reasonable’, does or does not ‘defy logic’, was or was not a decision that a reasonable authority could have made – without reasoning their conclusion and without indicating that they are in fact evaluating the administrative weighing and balancing process. The *Wednesbury* decision is a good example of the common and flawed judicial reasoning within the context of applying the reasonableness test. In *Wednesbury*, Lord Greene concluded that a local authority’s decision to operate a cinema on condition that no children under 15 were admitted to the cinema on Sundays was not unreasonable. However, nowhere in the court’s decision can we find a discussion in both the reasons for and against imposing the condition (apart from a brief reference to the ‘well-being of children’).⁸ Accordingly, nowhere in the court’s decision can we find a discussion in the weight that was or should have been accorded to these reasons. This would be a common trend in future judicial decisions about reasonableness. UK courts do evaluate the administrative weighing and balancing process, but more often than not they are not aware of that or are not willing to admit that. As Craig shows, perceiving reasonableness as a balancing test explains what UK courts actually have been doing – albeit implicitly – when they applied the reasonableness test (regardless of whether a remedy was granted).⁹

Back in 1947, Lord Greene stated in *Wednesbury* that we can scrutinize the reasonableness of an administrative decision only after establishing that the decision was *intra vires*; that the decision-making process was intact; that all the relevant considerations were taken into account; and that irrelevant considerations were not taken into account – or that the administrative body did not try to achieve improper purpose.¹⁰ Lord Greene failed to reach the inevitable conclusion: that after taking all relevant considerations and nothing but relevant considerations into account, the only thing that can go wrong with regard to the legality of the administrative decision is the weight accorded to the relevant considerations. Therefore, for reasonableness to have any meaning in public law it has to allow the courts to scrutinize the weighing and balancing process of the administrative body. It has to be perceived as a

⁷ P Craig, ‘Proportionality, Rationality and Review’ [2010] *New Zealand Law Review* 265, 284–85.

⁸ *Wednesbury* (n 1) 230.

⁹ Craig (n 5) 12–18.

¹⁰ *Wednesbury* (n 1) 233–34.

balancing test.¹¹ The UK Supreme Court has recently acknowledged this point when indicating in *Pham* that ‘there are also authorities which make it clear that reasonableness review, like proportionality, involves considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision-maker’s view depending on the context’.¹² It should be noted though that these authorities are rare exceptions to the common tendency to ignore the issue of weighing and balancing while applying the reasonableness test.¹³

Perceiving reasonableness as a balancing test gives some content to the empty or vague meaning of both *Wednesbury* reasonableness and modified reasonableness. To describe a decision as unreasonable tells us nothing of why the decision is unreasonable – or in *Wednesbury* terminology – why the decision ‘defies logic’.¹⁴ When we perceive reasonableness as a balancing test we acknowledge that unreasonableness can only mean taking into account all the relevant considerations, and only the relevant considerations, while according an improper or distorted weight to those considerations. Administrative bodies must have reasons for making a certain decision as well as reasons against making that decision. A decision will be unreasonable when a less weighty reason or a relatively weak reason for or against the decision was granted too much weight, and accordingly when a relatively strong reason for or against the decision was granted insufficient weight – and when the distorted weight that was accorded to the relevant reasons affected the decision made.

Perceiving reasonableness as a balancing test is not merely another possible way to understand what reasonable means. This is the only possible way of understanding how the reasonableness test in fact operates in UK public law. As Craig puts it, ‘if weight really were off-bounds, if it really were heretical to consider it, then there would be no reasonableness

¹¹ For a more detailed description of the nature of reasonableness as a balancing test see: Y Nehushtan ‘The Unreasonable Perception of Reasonableness and Rationality in UK Public Law’ (forthcoming 2016/7). Most of the arguments on pages 3-7 are taken from that article. See also Craig (n 5).

¹² *Pham v Secretary of State for the Home Department* [2015] UKSC 19, para 114 (Lord Reed).

¹³ For a recent and helpful description of reasonableness in UK public law, which refers to only few cases in which reasonableness was explicitly understood as a balancing test, see J Jowell, ‘Proportionality and Unreasonableness: Neither Merger nor Takeover’ in Wilberg & Elliott (eds), *The Scope and Intensity of Substantive Judicial Review: Traversing Taggart’s Rainbow* (Hart Publishing 2015) 41, 52-53.

¹⁴ For this argument see also P Daly, ‘Wednesbury’s Reason and Structure’ [2011] *Public Law* 238, 240.

review, since it would have no content once the court had adjudged the relevancy and purpose issues'.¹⁵

Two further and very brief points can be made here. First, perceiving reasonableness as a balancing test is not a novel idea. Reasonableness as a balancing test is used in other jurisdictions as a means to control discretion – and in the same way it is (implicitly) used in the UK.¹⁶ This is important because, and as Boughey rightly argued, ‘contrary to conventional views, the local distinctiveness of administrative law does not preclude comparison between jurisdictions, but instead provides compelling reasons for greater attention to comparative administrative law’.¹⁷ Second, applying balancing tests in law and especially in public law is almost inevitable.¹⁸ This insight runs against Lord Diplock’s well-known yet misguided view that judges by their upbringing and experience are ill-qualified to perform a ‘balancing exercise’ when they review administrative decisions.¹⁹ Weighing and balancing competing views, reasons and values is almost a judge’s job description. Apart from cases concerning only fact finding, this is almost the definition of adjudication.

Up till now it was argued that (1) reasonableness is a weighing and balancing test; (2) perceiving reasonableness as a weighing and balancing test is inevitable as otherwise it will

¹⁵ Craig (n 5) 6.

¹⁶ For reasonableness as balancing test in Israeli public law see: A Barak, ‘A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002) 116 *Harvard Law Review* 16, 145; M Cohn, ‘Pure or Mixed? The Evolution of Three Grounds of Judicial Review of the Administration in British and Israeli Administrative Law’ (2011) 6 *Journal of Comparative Law* 86, 103. And in Canadian Public law, see: *Dunsmuir v New Brunswick* 2008 SCC 9 [2008] 1 SCR 190, para 47; CJS Knight, ‘Reasonableness Transformed (in Canada)’ (2008) 13 *Judicial Review* 214; M Lewans, ‘Deference and Reasonableness Since *Dunsmuir*’ (2012–2013) 38 *Queen’s Law Journal* 59; M Walters, ‘Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law’ in Wilberg & Elliott (eds), *The Scope and Intensity of Substantive Judicial Review: Traversing Taggart’s Rainbow* (Hart Publishing 2015) 395.

¹⁷ J Boughey, ‘Administrative Law: The Next Frontier for Comparative Law’ (2013) 62 *International & Comparative Law Quarterly* 55, 56.

¹⁸ Justice Aharon Barak, former Chief Justice of the Israeli Supreme Court wrote that ‘from my judicial experience, I have learned that “balancing” and “weighing”, though neither essential nor universally applicable, are very important tools in fulfilling the judicial role’: Barak (n 16) 93. And on page 94: ‘the concept of “balance” reflects the recognition that fundamental principles have “weight” and that it is possible to classify them according to their relative social importance. The act of “weighing” is merely a normative act designed to give the principles their proper place in the law.’

¹⁹ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 411 (the *GCHQ* case). Even though Lord Diplock was writing here about a particular subset of administrative decisions – i.e. decisions taken under prerogative powers and likely to engage issues of high policy, it seems that Lord Diplock was making a general argument about whether balancing is within the judicial remit rather than a specific argument about whether balancing in respect of certain types of decisions is within that remit. For subscribing to Lord Diplock’s reasoning see: *R v Secretary of State for the Home Department, Ex p Daly* [2001] 2 AC 532, 547; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759; J Goodwin, ‘The Last Defence of *Wednesbury*’ [2012] *Public Law* 445; Sir P Sales, ‘Rationality, Proportionality and the Development of the Law’ (2013) 129 *Law Quarterly Review* 223.

have no meaning and will not be an independent ground of judicial review in public law; and (3) perceiving reasonableness as a weighing and balancing test describes what UK courts have in fact been doing, either explicitly or implicitly, in judicial review cases. The purpose of the following discussion is to explore the implications of these arguments within the context of the dispute about having proportionality as general ground of review in public law.

3. Public law's non-identical twins: reasonableness and proportionality

UK courts have traditionally been unwilling to apply proportionality as a ground of review in cases which fall outside the scope of EU law or the ECHR. The common reason for this reluctance was – and still is – the misguided assumption that proportionality prescribes inappropriate ‘judicial activism’ by allowing or requiring courts to overstep their role and to ‘make the decision for the administrative body’.²⁰

Since the Human Rights Act 1998 came into force in the UK and required UK courts to apply the proportionality test with regard to protected rights, there has been an ongoing and fierce academic dispute about whether the proportionality test should (or even can) be a general ground of judicial review in public law. Here the term ‘general ground of judicial review’ refers to proportionality being applicable to cases that do not concern protected rights or EU law. Sometimes the question is formulated slightly differently, when the dispute is about whether proportionality should be applicable to cases involving interests rather than rights (and here the assumption is that the reasonableness test can and does apply to cases concerning rights and interests).²¹ I will not try to summarize the main arguments here.²²

²⁰ For more details see in the sources below (n 22). This reluctance is part of a broader approach of judicial deference which is often applied by UK courts when they review the legality of administrative acts and decisions. For an in-depth analysis of the doctrine of deference in UK public law see: P Daly, *A Theory of Deference in Administrative Law: Bias, Application and Scope* (Cambridge University Press 2012).

²¹ For offering a different classification which focuses on the importance of either rights or interests see: M Elliott, ‘From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification’ in Wilberg & Elliott (eds), *The Scope and Intensity of Substantive Judicial Review: Traversing Taggart's Rainbow* (Hart Publishing 2015) 61.

²² For the arguments for having proportionality as a general ground of review see: Craig (n 7); M Hunt, ‘Against Bifurcation’ in D Dyzenhaus, M Hunt and G Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford, Hart Publishing 2009).

For the argument against see: M Taggart, ‘Reinventing Administrative Law’, in N Bamforth and P Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart, 2003) Chapter 12; M Taggart, ‘Proportionality, Deference, Wednesbury [2008] *New Zealand Law Review* 423; T Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010) Chapter 9; T Hickman, ‘Problems for Proportionality’ [2010] *New Zealand Law Review* 303; J King, ‘Proportionality: a Halfway House’ [2010] *New Zealand Law Review* 327; D Knight, ‘Calibrating the Rainbow of Judicial Review: Recognizing Variable Intensity’ [2010] *New Zealand Law Review* 393; P Sales, ‘Rationality, proportionality and the development of the law’ (2013) 129 *Law Quarterly Review* 223.

Suffice it to say that if the following argument about the links between proportionality and already existing grounds of review is true, it invalidates all possible arguments against having proportionality as a general ground of judicial review in the UK.

Any argument against having proportionality as a general ground of judicial review can only make sense if there are differences between proportionality and existing grounds of judicial review in UK law, including that of reasonableness. However, proportionality adds almost nothing to existing grounds of judicial review in UK law, thus making the arguments against having proportionality as a general ground of judicial review quite pointless. More accurately, proportionality adds almost nothing in terms of the content, the grounds, or the extent of judicial review. Therefore, there is nothing within this context that provides reasons against having proportionality as a general ground of review. Proportionality does add something new in terms of the structure of judicial review and in terms of the nature of judicial reasoning. These new additions, however, can't possibly provide reasons against having proportionality as a general ground of review in public law.

I will refer to the proportionality test in its most common version, and as a four-stage test which includes: (1) legitimate aim, (2) suitability (or rational connection); (3) necessity (or applying the least intrusive measure); and (4) proportionality in the narrow sense (or proportionality *stricto sensu*).²³ These tests are normally applied in the following way.

The first step under the proportionality test is to find a legitimate aim. The aim should be of the kind that can justify imposing limits on rights or interests. It should also be an aim that the administrative body is authorized to pursue. In fact, we are asking whether the administrative body took into account only relevant considerations or was acting to achieve a legitimate/proper purpose. Relevant considerations and legitimate/proper purposes are existing, non-disputable grounds of review in UK administrative law.²⁴ The first stage of the

Here I wish to ignore general arguments about the shortcomings of balancing tests as such. See, for example, TAO Endicott, 'Proportionality and Incommensurability' in G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law* (Cambridge University Press 2014) 311.

²³ This four-stage test was adopted and applied in *Bank Mellat v HM Treasury* [2011] EWCA Civ 1; [2011] 2 All E.R. 802, paras 68–76 (Lord Reed). For recent, excellent and in-depth discussion of proportionality in public law see A Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge, Cambridge University Press 2012); M. Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture* (Cambridge, Cambridge University Press 2013); G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law* (Cambridge University Press 2014).

²⁴ See, for example, *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386; *Bromley LBC v. GLC* [1983] 1 AC 768.

proportionality test merely sets these grounds of judicial review within a certain structure and determines that within that structure this is the first question that needs to be answered.

The second test is the rationality test. Here we are asking whether the means (that is, interfering with a protected right or with an interest) can achieve the legitimate aim of the law or of the administrative decision. If there is no rational connection of any kind between the means and the end, that is, if the means cannot or does not achieve the end, then this is a decision that no rational person could have made. Rationality, understood in this way, is also an existing ground of judicial review in the UK.²⁵

The third stage is the necessity test. Here the administrative body is required to prove that the means that were applied are necessary to achieve the end. It must find the least restrictive means (in term of restricting protected rights) that is still equally effective. A less restraining demand would be to find a less restrictive means (rather than the least restrictive one) that is still equally effective. Here we still assume that the administrative body is allowed to achieve its legitimate/proper purpose in full. We simply require it to achieve its purpose while inflicting less harm – or the least possible harm – to rights or interests.

The necessity test can be perceived as a special kind of reasonableness test. If this is true, then the necessity test is also not new to UK public law. The necessity test involves weighing and balancing much like the reasonableness test. The necessity test prescribes a fairly specific guide for according the proper weight to protected rights and interests. If the administrative body can achieve its legitimate aim in full while causing less interference with rights or interests, and it nevertheless decides to restrict the right or interest more than necessary, then it has not accorded the proper weight to the protected right or interest and, in other words, has acted unreasonably. The necessity test narrows the ‘zone of reasonableness’. It excludes all possible options from the zone of reasonableness, apart from one possible option (or relatively few options), that is, making the decision that will achieve the legitimate aim in full while applying the least restrictive means (or a less restrictive means) for achieving that aim. The fact that the necessity test is fairly restrictive in terms of limiting administrative discretion does not affect the nature of that test. It still requires the administrative body to accord proper weight to relevant considerations and to balance these considerations properly. As such, it is very similar to the reasonableness test that has been applied in the UK since the

²⁵ J Jowell (n 13) 51. See also *R v Parliamentary Commissioner for Administration, exp Balchin (No 1)* [1997] COD 146 (QB), para 27; *R v North and East Devon Health Authority, exp Coughlan* [2001] QB 213, para 65.

Wednesbury case in 1947 and more so from the 1990s when courts started to apply ‘modified reasonableness’.²⁶

Once the least restrictive means has been found, we apply the fourth test, which is the narrow test of proportionality – or proportionality *stricto sensu*. Here we ask whether the least interference possible with the protected right or interest is still too excessive or indeed disproportionate. Under the narrow proportionality test, we ask whether the weight accorded to the legitimate aim and to the protected right or interest was distorted. We ask whether the legitimate aim is sufficiently weighty to justify the least restrictive means that was applied, which can still be a harsh one. The narrow proportionality test is clearly a test of weighing and balancing and as such it is not different in any sense from the reasonableness test.

Therefore, the first two stages of the proportionality test (legitimate aim and suitability) reflect existing grounds of judicial review (relevant considerations, proper purpose and rationality in the narrow sense). The last two stages (necessity and proportionality in the narrow sense) are weighing and balancing tests much like the reasonableness test. There is no conceptual difference between the last two stages and the already existing reasonableness test. All that the proportionality test does is to divide the reasonableness test into stages (necessity and proportionality *stricto sensu*), to add it to related grounds of review that scrutinize discretion (relevant considerations, proper purpose and rationality in the narrow sense) and to accord it a more structural nature.

This is why proportionality and reasonableness are twins. But they are not identical twins. The reasons for this are twofold. First, and with regard to the necessity test, it is true that there is nothing in the already existing reasonableness test that forces courts and administrative bodies to subscribe to the necessity test. It is also true, however, that nothing in the already existing reasonableness test prevents courts and administrative bodies to subscribe to this presumption. Reasonableness means identifying the relevant considerations and balancing them according to their proper weight. It may but does not have to require the administrative body to achieve its legitimate aim while restricting the protected right or interest to the least possible extent. A court can apply the reasonableness test in a way that allows judicial interference only if the administrative decision is extremely or outrageously unreasonable. Achieving legitimate aims while restricting rights or interests to a certain extent is not necessarily extremely or outrageously unreasonable, even when the aims could

²⁶ And see in the text to note 4.

be achieved while applying less restrictive means. The necessity test, however, imposes an explicit duty on the authorities to find the least – or merely less – restrictive means, which are equally effective. Thus, reasonableness may but does not necessarily consist of proportionality (or ‘necessity’). Put differently, and because of the nature of the necessity test, every unreasonable decision is also disproportionate but not every disproportionate decision is necessarily legally unreasonable.

Second, even though the necessity test and the narrow proportionality test are both weighing and balancing tests, only the application of the narrow proportionality test requires making value-based judgments as part of the weighing and balancing process – and in that aspect it is identical to the reasonableness test. Applying the necessity test, on the other hand, does not require making value-based judgments as part of the weighing and balancing process – and in that aspect it differs from both the narrow proportionality test and the reasonableness test. More accurately, and as will be explained in detail below, the necessity test itself does reflect a value-based judgment regarding the importance of rights and the weight that should be accorded to them. However, deciding whether the necessity test was applied appropriately does not require the courts to make any value-based judgments. It only requires the courts to decide a question of fact.

These two observations (that reasonableness may but does not necessarily consist of proportionality; and that applying the necessity test does not require making value-based judgments) are elaborated in the next section.

4. Proportionality, reasonableness, value-based decisions and levels of scrutiny

One may agree that proportionality and reasonableness are identical in some aspects but argue that the proportionality test allows or even requires a high level of scrutiny of administrative decisions to an extent that is not required by the reasonableness test. According to the common view, there is a spectrum of judicial review on the merits of administrative decisions (in terms of levels of scrutiny) where at its one end we find *Wednesbury* reasonableness and at its other end we find the proportionality test. Between these ends we find ‘modified reasonableness’ and ‘anxious scrutiny’ (in cases concerning rights).²⁷ This way of describing the difference between the various types of the reasonableness test and the proportionality test is only partly accurate. It is true that the proportionality test does allow (or perhaps requires) stricter scrutiny. However, this common

²⁷ Craig (n 4) 643; A Le Sueur, *The Rise and Ruin of Unreasonableness?* (2005) 10 *Judicial Review* 32, 39–40.

observation should be qualified by two less common insights. First, there is nothing in the reasonableness test that prevents the courts from applying a ‘proportionality-like’ level of scrutiny. Second, the more intense scrutiny required by the proportionality test does not involve moral or value-based evaluation of the weight that was accorded to the relevant considerations and of the balance that was conducted between them. Therefore, this stricter scrutiny is not as problematic as most lawyers think. It does not cause difficulties in terms of violating the separation of powers principle and does not allow ‘inappropriate’ judicial activism. These insights need further elaboration.

a. Proportionality, reasonableness and levels of scrutiny

As was noted above, the only component of the proportionality test that may prescribe stricter scrutiny is its third sub-test: the necessity test. This is the only sub-test that may bring something new to UK public law. Within the proportionality test the necessity test sets an irrefutable presumption according to which any decision that is designed to achieve a legitimate aim while not restricting the protected right or interest to the least possible extent (or merely to a lesser extent – while achieving the desired end in full and without any diminution of its efficacy) is unlawful. The reasonableness test does not necessarily require courts and administrative bodies to subscribe to this presumption. However, nothing in the reasonableness test prevents the court from requiring that the administrative body should achieve its legitimate aim while restricting the protected right or interest to the least possible extent.

The argument that the proportionality test is different from the reasonableness test, as only proportionality allows (in fact requires) courts to apply stricter scrutiny of administrative decisions, implies that there is a conceptual difference between proportionality and reasonableness. However, the fact that UK courts equate proportionality with stricter scrutiny and reasonableness with a more moderate or lenient scrutiny, has very little to do with the concepts of proportionality and reasonableness. It has to do with judicial practice and policy rather than with conceptual differences. It has to do with the way reasonableness is often applied by English judges, or more accurately the deference that some judges show to the executive and legislative branches. Put differently, the reasonableness test properly understood (reviewing the administrative weighing and balancing process) is an ‘open’ test that can be applied with various levels of scrutiny, including a ‘proportionality like’ stricter scrutiny.

The view that the reasonableness test is an ‘open’ test that can be applied with various levels of scrutiny contradicts two common views in UK public law. The first is the view that proportionality and reasonableness differs significantly in terms of both the type and the extent or degree of judicial review that they allow or demand.²⁸ The second is the view that although proportionality and reasonableness are different, the distinction between them is one of degree rather than of type.²⁹ Elliott argues along this line by stressing that even though both proportionality and reasonableness are balancing tests, the latter ‘accords to the executive a substantial margin of freedom... in contrast, the proportionality doctrine requires much closer scrutiny of the balance.’³⁰ It may be true that when UK courts apply the reasonableness test they still apply the traditional approach in UK public law that requires the courts to defer to the executive, as far as the judicial review scrutinises the content of administrative decisions. Elliott is wrong however when he argues that reasonableness (as a balancing test) conceptually and inherently prescribes a different, lower degree of judicial review. Within the context of the necessity test, as a general test that requires the administrative body to justify the measures which were taken in order to achieve a legitimate aim, Elliott argues that ‘the court might, for instance, insist that the measure be shown to be strictly necessary and proportionate, or reasonable, or not flagrantly unreasonable, or that it satisfies some other different or interstitial standard’.³¹ It is true that a ‘general’ necessity test can be applied with various levels of scrutiny. It may also be true that the necessity test – as part of the proportionality test – is normally applied in a way that requires the measure to be ‘strictly necessary’. It is not true, however, that reasonableness, in and of itself, prescribes a lesser degree of scrutiny. ‘Reasonableness’ merely refers to the practice of reasoning and justifying a decision by way of weighing and balancing. It does not decide the level of judicial scrutiny and therefore can’t be classified as more or less ‘intrusive’ than the proportionality-like necessity test.

Those who hold the view that reasonableness conceptually and inherently prescribes a different, lower degree of judicial review, often refer to the *Smith* case as a clear example that

²⁸ For a description of this view see M Elliott, ‘The Human Rights Act 1998 and the Standard of Substantive Review’ (2001) 60 *Cambridge Law Journal* 301, 312.

²⁹ Elliott (n 28) 313.

³⁰ Elliott (n 28) 313.

³¹ Elliott (n 21) 73. See also on page 81: ‘asking whether a decision is reasonable is less demanding than asking whether it is proportionate’.

proves this point.³² In *Smith* the Court of Appeal reviewed the legality of the policy to discharge personnel from the British Armed Forces on the basis of them being gay (homosexuals or lesbians). The reasons for the investigating and discharging policy were protecting national security, preventing disorder, protecting morale and ensuring operational effectiveness. The main argument against the policy was its destructive effect on the right to privacy or the right to 'private life'. The Court of Appeal applied the reasonableness and rationality tests and decided that the policy was legal as it was not unreasonable or irrational. The ECtHR however, applied the proportionality test and decided that the policy was disproportionate and therefore illegal. The ECtHR concluded, in short, that the government did not have sufficiently convincing and weighty reasons for investigating soldiers' sexual orientation or discharging them from the army because of their sexual orientation.³³

The fact that the ECtHR decided that the British anti-Gay policy was unlawful whereas the domestic courts decided that the policy was legal was not a result of applying different legal tests. It was a result of a more general attitude concerning the extent to which courts should defer to the legislature or the executive in questions concerning human rights and national security. In the Court of Appeal, Sir Thomas Bingham, as he then was, said the following:

'The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment.'³⁴

Therefore, the Court of Appeal acknowledged that when domestic courts apply reasonableness as a ground of judicial review they have the authority to decide whether a competing public interest is sufficiently weighty to justify the infringement of a human right. Here, like in many other cases, the court implicitly perceives reasonableness as a weighing and balancing test. But more importantly, since reasonableness is a weighing and balancing test, nothing in the concept of reasonableness – and in reasonableness as a ground of judicial review – prevented the Court of Appeal from deciding that the public interests in *Smith* were not sufficiently convincing and weighty to justify the infringement of the right to privacy. Put

³² *R v Ministry of Defence, ex p. Smith* (1996) 1 All ER 257.

³³ *Smith and Grady v UK* [1999] 29 EHRR 493, para 97, 110-11.

³⁴ *Smith* (n 32) 262, quoting Lord Bridge from *R v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 A.C 696, 778-79.

differently, the Court of Appeal could have reached the same conclusion as the ECtHR – and by using the same reasoning – while applying reasonableness as a ground of review and without mentioning ‘proportionality’ even once. Indeed, Sir Bingham added that when the reasonableness/rationality test is applied the threshold of irrationality which an applicant is required to surmount is a high one – but this is not in any way part of the concept of reasonableness. This is merely one possible way to apply the reasonableness test – and choosing this particular way is in fact a judicial policy choice.

Thus, it is not true that in *Smith and Grady* the proportionality test allowed the ECtHR to apply ‘judicial activism’ while the reasonableness test dictated British judicial deference. Proportionality and reasonableness do not prescribe the limits of judicial review by allowing or dictating judicial activism or judicial deference. It is the other way around. A policy of judicial activism or judicial deference prescribes the limits of judicial review and the way in which proportionality and reasonableness are applied.³⁵

In *Smith and Grady* the ECtHR applied a stricter scrutiny test than that applied by the Court of Appeal, not because the ECtHR applied the proportionality test but because it was a more ‘activist’ court. The Court of Appeal, accordingly, deferred to the administrative authorities not because it only had ‘*Wednesbury* reasonableness’ at its disposal, but because it was a more ‘conservative’ court, much like most British courts that tend to defer to the executive when they review the merits of administrative decisions – and because of reasons pertaining to judicial policy and to a certain perception of the separation of powers principle.

It is interesting to note that in *Smith and Grady* even the applicants did not appreciate the distinction between the concept of reasonableness – and judicial policy regarding the application of this concept. The applicants argued before the ECtHR that ‘the domestic courts could not ask themselves whether a fair balance had been struck between the general interest and the applicants’ rights’ (because the domestic courts did not have the proportionality test at their disposal).³⁶ The truth is that the domestic courts could have done exactly that – but chose not to do it. It was the ECtHR that got it right when it concluded that ‘the 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

³⁵ For a similar argument see also: T Allan, ‘Human Rights and Judicial Review: A Critique of ‘Due Deference’’’ (2006) 65 *Cambridge Law Journal* 671.

³⁶ *Smith and Grady* (n 33) para 132.

pressing social need or was proportionate to the national security and public order aims pursued'.³⁷ It is implied here that the 'reasonableness threshold' is not static and that it does not result from the concept of reasonableness itself. Nothing in the concept of reasonableness forced domestic courts to set the 'reasonableness threshold' so high. It was a judicial policy choice.

Fortunately, *Smith* is no longer a proper example of the position of the Supreme Court – as reasonableness is no longer perceived as a 'static-low-scrutiny' test. *Smith*, however, still reflects a dominant view according to which reasonableness conceptually prescribes lower scrutiny than proportionality.

The view that reasonableness does not prescribe, in and of itself, a static standard of judicial review, was recently endorsed by the Supreme Court's decision in *Pham*. In that case, all judges agreed that the nature of judicial review and the level of scrutiny applied in every case depend on the context.³⁸ Moreover, the court accepted the view that 'both reasonableness review and proportionality involve considerations of weight and balance'.³⁹ It was also agreed that nothing prevents the courts from applying the reasonableness test with the same level of scrutiny as prescribed by the proportionality test (and especially its third, necessity sub-test), and that 'the application of a test of reasonableness may yield the same outcome as the application of a test of proportionality'.⁴⁰ Therefore, nothing new will be added to domestic public law, in terms of the ability of the court to review administrative decisions, if proportionality is finally recognized as a general ground of review that can live side by side with the reasonableness test and, at times, to replace the reasonableness test since the latter, as indicated above, is identical to proportionality *stricto sensu*.⁴¹

The statements in *Pham*, even though mostly dicta, are important, as this is one of very few cases in which the Supreme Court acknowledged that the alleged differences between proportionality and reasonableness are mostly imaginary. It is important to note though that

³⁷ *Smith and Grady* (n 33) para 138.

³⁸ For a recent affirmation of this point see *Pham* (n 12) paras 60 (Lord Carnwarth), 94 (Lord Mance), 109 (Lord Reed). This point was agreed by all seven judges who decided this case.

³⁹ *Pham* (n 12) para 60 (Lord Carnwarth) – quoting from Craig (n 5).

⁴⁰ *Pham* (n 12) para 116 (Lord Reed). See also in para 103 (Lord Sumption): 'this assumes that the principle of proportionality as it applies in EU law is liable to produce a different result in a case like this by comparison with ordinary principles of English public law. I question whether this is necessarily correct'.

⁴¹ For the argument that proportionality can and should replace reasonableness see Craig (n 4) 669. For the argument that proportionality should be added to the reasonableness test see J Jowell and A Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] *Public Law* 368; Jowell (n 13). Deciding this dispute is not necessary for the purposes of this article.

in some parts of the court's decision we can still find traces of the previous and misguided approach. This approach finds its expression in a confusing conceptual misuse of the term 'Wednesbury reasonableness'. In *Pham* Lord Reed stated that the *Wednesbury* test, even when applied with 'heightened' or 'anxious' scrutiny, is not identical to the principle of proportionality.⁴² This is confusing because of two reasons. First, if Lord Reed referred to proportionality *stricto sensu*, it does not coincide with other parts in the decision in which it was stated that 'both reasonableness review and proportionality involve considerations of weight and balance',⁴³ and that the nature of judicial review and the level of scrutiny applied in every case depend on the context.⁴⁴ Lord Reed did not provide an explanation as to how and why the 'Wednesbury test' is not identical to the principle of proportionality after all. Second, the *Wednesbury* test, as a special kind of the reasonableness test, cannot be applied with 'heightened' or 'anxious' scrutiny. The 'original' *Wednesbury* test requires judicial deference. It was designed to allow an extremely 'lowered' scrutiny. The general reasonableness test can indeed allow 'heightened' or 'anxious' scrutiny but in this case it will cease to be the *Wednesbury* test. This confusion can be solved if by 'Wednesbury reasonableness' we refer to all types of the reasonableness test that have been applied in UK public law since 1947. Conceptual clarity, however, calls for a distinction between 'Wednesbury reasonableness' which is a test that reflects judicial deference and 'reasonableness' generally which is an open test that can be applied with various levels of scrutiny. This conceptual confusion does not, however, diminish the importance of *Pham* as a decision that leads the way to having proportionality as a general ground of review in UK public law, while acknowledging the non-existent or non-important differences between proportionality and already existing grounds of review, especially that of reasonableness. All possible reasons against having *proportionality* as a general ground of review in domestic public law rely on misconceptions of what *reasonableness* in fact means. The misconception may be that reasonableness and proportionality are different because only the latter is a balancing test. The misconception may also be that even though both reasonableness and proportionality are balancing tests, only the latter allows higher levels of judicial scrutiny. In light of the fiery academic debate that has raged for decades on the legitimacy of having proportionality as a general ground of judicial review, the argument suggested here may be

⁴² *Pham* (n 12) para 115 (Lord Reed).

⁴³ *Pham* (n 12) para 60 (Lord Carnwarth).

⁴⁴ *Pham* (n 12) paras 60, 94, 109.

troubling for many. Has all the academic energy that was put here been in vain? If reasonableness and proportionality are indeed non-identical twins, the inevitable answer is ‘yes and no’. ‘Yes’, because the conceptual differences between proportionality and reasonableness are marginal thus cannot form a reason for applying one test but not the other. ‘No’, because many arguments against having proportionality as a general ground of judicial review in public law are in fact arguments against ‘judicial activism’ in public law. Within the context of the ‘proportionality vs reasonableness’ dispute these arguments are misplaced and rely on misconceptions. However, within the on-going dispute about the nature, scope and extent of judicial review in public law, ‘anti-judicial activism’ arguments are still very much relevant. These arguments should simply be argued within the right context, as arguments against judicial activism rather than as arguments against having proportionality as general ground of review.

Thus far it was argued that the only difference between the proportionality test (and more precisely the necessity test) and the reasonableness test is that the former requires stricter scrutiny whereas the latter merely allows it. The following and complementary insight is that this stricter scrutiny is less problematic than it seems.

b. Proportionality, reasonableness and value-based decisions

The reasonableness test and the proportionality test even more so encounter fierce opposition mainly because of the fear from ‘judicial activism’, that is, the fear that these tests allow or require the court to scrutinize the merits of administrative decisions in a way that is incompatible with the separation of powers principle, parliamentary sovereignty and traditional judicial deference. I have already indicated above that the proportionality test does not include elements that were not already in existence in UK public law. The only possible exception is the necessity test, which sets an irrefutable assumption that a decision designed to achieve a legitimate aim while not restricting the protected right or interest to the least possible extent – or to a lesser extent – is unlawful.

This part of the proportionality test does require a more intense scrutiny – but of a special kind. The initial presumption that administrative decisions are legal only when they apply the least restrictive means for achieving a legitimate aim does involve a moral or value-based evaluation of the weight that ought to be accorded to rights (or interests). But, after the presumption is set and accepted, the courts are not required to make any moral or value-based evaluation of the weight that was accorded to the relevant considerations and of the balance that was conducted between them by the administrative body. The question of whether a

legitimate aim can be achieved while imposing less restriction on a protected right or interest is a question of fact, not of morality. Judicial interference at this stage does not frustrate the administrative aims. It does not interfere with administrative policies or priorities as the administrative body is still allowed to achieve its purpose in full. It merely sets a higher 'quality assurance' standard, but why would any reasonable administrative authority (or anyone else for that matter) object to a judicial review that aims to minimize the restriction of rights and interests while keeping the administrative objective intact?

We can think of two possible cases here. In the first, the administrative body was not aware that there were less restrictive means that could achieve the legitimate aim in full. If these less restrictive means are discovered following a process of judicial review, then only a very unreasonable administrative body, almost *Wednesbury* unreasonable administrative body, will refuse to change its previous decision. Judicial interference in this case can hardly be perceived as improper. It does not prevent the administrative body from achieving its aim. It merely requires it to apply less restrictive means in order to achieve that aim (in full) while better protecting rights and interests.

In the second case, there may be a dispute between the administrative body and the petitioner as to whether the means applied by the administrative body were in fact the 'least restrictive means'. In this case, the proportionality test does not provide any guidance for the court. The court's response will result from a general view about the court's role and responsibilities in a democracy – and not from the requirements of the proportionality test as such. The court may conduct its own inquiry and decide this factual dispute between the administrative body and the petitioner. The court may consult with experts. The court may also defer to the administrative body's view, thus to assume that the means that were applied were the least restrictive possible and continue to the fourth sub-test (proportionality in the narrow sense).

Either way, there is nothing in the necessity test that compels the court to apply stricter scrutiny while reviewing administrative decisions. Yet, if the court takes the necessity test seriously, it must at least ask – and decide for itself – whether the administrative body could achieve its purpose while restricting the protected right to a lesser degree. When the court defers to the executive by being reluctant to exclude too many options from the pool of legal options even though they do not meet the necessity test, the court in fact decides not to apply the necessity test or to leave it for the executive to decide whether the requirements of the test

were met. Presumably, deferring to the executive in such a way will only rarely be appropriate as it in fact means ignoring the necessity test altogether.⁴⁵

To conclude this point, and more generally, there is almost nothing in the proportionality test that necessarily leads to a more intense scrutiny of administrative decisions. Both the proportionality test and the reasonableness test construct administrative decision-making and by extension judicial reasoning and decision-making. The extent to which courts interfere with administrative decisions is dependent on judicial policy and other considerations that are not part of the proportionality and reasonableness tests in and of themselves. The necessity test is the only element within the proportionality test that may require stricter scrutiny, but, as noted above, it does so in a fairly limited way.

This also means that no normative reason can prevent the application of the proportionality test to cases concerning interests rather than rights.⁴⁶ The argument that the proportionality test should not be applied to cases concerning interests normally relies on the assumption that the proportionality test requires stricter scrutiny of administrative decisions, which is only legitimate when these decisions affect rights. This worry can be answered by summarizing what was stated above: (a) proportionality adds very little to existing grounds of review; (b) the only new element that the proportionality test adds to UK public law is the necessity test, which does not allow (and definitely does not require) courts to review the weighing and balancing process of the administrative body; and (c) proportionality is mainly about a more structural judicial reasoning rather than stricter judicial scrutiny.

5. Conclusion

In the last decades UK courts have been contemplating the possibility that English law might adopt proportionality as an additional and general ground of judicial review.⁴⁷ This possibility became more likely since the Human Rights Act 1998 came into force in the UK

⁴⁵ For a principled judicial reluctance to decide whether the means that were applied were the least restrictive possible, see: *R (on the application of Lumsdon and others) v Legal Services Board* [2014] EWCA Civ 1276, para 102: ‘we accept the submission... that the decision-maker's view of whether some less intrusive option would be appropriate as an alternative is likewise not a question on which the court should substitute its own view, unless the decision-maker's judgment about the relative advantages and disadvantages is manifestly wrong’. The Supreme Court rightly replied by stating that ‘a test of whether the decision-maker's judgment was "manifestly wrong" has no place in the present context. A decision of the present kind *is* disproportionate if a less restrictive measure could have been adopted, provided that it would have attained the objective pursued’: *R (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41, para 103 (and see also para 108).

⁴⁶ For refuting the argument that proportionality cannot (rather than should not) be applied to cases concerning rights, see Craig (n 7) 296–300.

⁴⁷ For a relatively early judicial discussion of this option see the *GCHQ* case (n 19) 410 (Lord Diplock).

and required UK courts to apply the proportionality test with regard to protected rights. The question of whether the proportionality test should be a general ground of judicial review in UK public law has not been answered yet by a binding Supreme Court decision. This question is also a source of an ongoing and fierce academic dispute when the views against having proportionality as a general ground of review seem to be the dominant ones.

These decades of academic dispute and judicial reluctance and hesitance can be perceived as lost decades in UK public law. This is so because almost all reasons against having proportionality as a general ground of review rely on misconceptions. The first misconception relates to overlooking the nature of the reasonableness test as a balancing and weighing test, thus overlooking the identical nature of the reasonableness test and proportionality *stricto sensu*. The second misconception relates to overlooking the fact that proportionality adds very little to already existing grounds of judicial review in UK public law, and that this addition is not necessarily focused on the administrative weighing and balancing process. The third misconception, which results from the first two, is the view that reasonableness prescribes, in and of itself, lower judicial scrutiny, whereas proportionality inherently entails stricter scrutiny.

Since domestic courts can make the same decision by applying either the reasonableness test or the proportionality test, and by applying an identical approach of scrutinising the administrative weighing and balancing process, they may as well apply the proportionality test in all appropriate cases, including cases which do not concern rights or EU law. Domestic courts should apply proportionality as a general ground of review mainly because it requires administrative bodies to apply a more structural decision-making process. It also requires the courts to apply a more structural judicial reasoning thus promoting both administrative and judicial integrity, transparency and accountability.

Some argue against this view by asserting that proportionality does not necessarily promote integrity, transparency and accountability, as proportionality can be applied and sometimes is applied in a non-structural way, or in a way that makes it difficult to distinguish it from the reasonableness test.⁴⁸ It is true that proportionality is sometimes applied in that way, but this is the case only when the proportionality test is misunderstood or is applied wrongly. The test itself, properly understood, is inherently more structural than any possible meaning of reasonableness.

⁴⁸ Elliott (n 21) 76.

Recently, the UK Supreme Court showed first significant signs of willingness to have proportionality as a general ground of review in public law. In two recent cases, *Pham* from 2015 and *Kennedy* from 2014, the Supreme Court specified the reasons for its willingness. The court stated that:

The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law.⁴⁹

It is worth emphasising this point: factors such as suitability, appropriateness, necessity and the balance or imbalance of benefits and disadvantages were never absent from UK public law. At the same time, these factors were not always applied by UK courts, even in cases concerning rights.⁵⁰ The proportionality test directs attention to these factors, forces judges to take them into account and introduces an element of structure into judicial reasoning. This is where proportionality adds something new to UK public law, but surely this can't form a reason against having proportionality as a general ground of review.

A better understanding of the concepts of reasonableness and proportionality, as suggested here, will not only promote a better understanding of UK public law but will also improve the quality of both administrative decision-making and judicial reasoning, and will lay out a common conceptual ground for normative arguments about the scope and intensity of judicial review in administrative law.

⁴⁹ *Pham* (n 12) para 95 (Lord Mance); *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808, para 54.

⁵⁰ C Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 *Legal Studies* 1.