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Proportionality in English Administrative Law

Resistance and Strategy in Relational Dynamics

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Abstract

Proportionality is at the centre of heated debates in English administrative law. It has been adopted for matters pertaining to European law and the European Convention on Human Rights, but its use in other areas parts of English administrative law is highly contentious. While some arguments in favour or against applying proportionality in England are similar to those exchanged in relation to other legal systems (such as tensions between increased objectivity in judicial control over administrative action vs. the desirability of more limited control), other arguments are more specific to English administrative law. To understand the challenges encountered by proportionality in English administrative law, this paper adopts a contextual analysis, putting the emphasis on the relational dynamics framing the interactions between the main actors involved in the proportionality test. Paradoxically, this perspective rehabilitates the analysis of the legal techniques behind transplants such as proportionality: indeed, transplants are vehicles for legal changes in ways that go beyond the circulation of ideas across the world. Instead of being merely superficial and rhetorical, transplants engage deeply with the whole gamut of institutions and actors in a legal system, calling on them to rearticulate their implied and explicit relationships.

1. Introduction

When a range of legislative and administrative measures were taken to fight the Covid-19 pandemic in the UK in early 2020, a spat broke out

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on social media between Yossi Nehushtan[1] and Jeff King.[2] This controversy brought the different conceptions of proportionality to light: should it be assessed at a largely conceptual level or in the concrete circumstances of the case? Should we look at the whole country or at individual decisions? Where does the legitimacy of the measures fit in, if at all? The UK government assured the House of Lords that it would act with proportionality to fight the pandemic.[3] This statement leads us to wonder whether proportionality has finally successfully 'infiltrated' English administrative law, to borrow Nason's expression.[4] This paper answers this question in distinguishing two aspects of the debates pertaining to proportionality: on the one hand, its very technique is now well-established and has contributed to expanding judicial review of administrative action; on the other hand, it is embedded in relational dynamics between key players such as judges, the executive and academics which, taken as a whole, tend to shape the proportionality test and its scope of application to make it of minimal technical relevance to English administrative law. Yet, the ways in which these relational dynamics must take proportionality into account in a range of debates and practices mean that proportionality is a significant driver for legal changes in English administrative law.

This paper suggests using the concept of "relational dynamics" as a heuristic device to provide a framework for making sense of the complex interactions between significant actors (such as administration and judges) in English administrative law. Linking together context, techniques[5] and narratives, the concept of "relational dynamics" helps to interpret the unique evolution of proportionality as a transplant in English administrative law. The paper also shows that while these multi-faceted interactions can be formal or informal, explicit or implied, constructive or defensive, they are never static. In analysing both the technique and the relational dynamics of proportionality, this paper shows that English courts rely on proportionality when dealing with a point of EU law or one made under the European Convention of Human Rights,[6] but that its use outside these disputes remains open to debate. On the face of it, proportionality has not been fully transplanted into English law. This would

1 Y Nehushtan, 'The British Lockdown is Disproportionate' IACL-IADC blog, 9 April 2020 <https://blog-iacl-aidc.org/2020-posts/2020/4/9/the-british-lockdown-is-disproportionate> accessed 07 April 2021.

2 J King, 'The Lockdown is Lawful: Part II - 'Quarantine' or Mere 'Restriction'?' UK Constitutional law blog, 2 April 2020 <https://ukconstitutionallaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii/> accessed 07 April 2021.

3 Contribution by Lord Bethell to the House of Lords Debate, Vol 802, Col 1778 (25 March 2020) <https://hansard.parliament.uk/Lords/2020-03-25/debates/3C266E78-4BB7-4330-9199-D361CDBAE2AD/CoronavirusBill#main-content> accessed 07 April 2021.

4 S Nason, *Reconstructing Judicial Review* (Hart 2016) 208.

5 For the definition of 'technique', see Y Marique and E Slautsky, 'Resistance to Transplants in the European Administrative Space – An Open-Ended Reading of Legal Changes' in this issue.

6 This paper technically focuses on England, leaving aside the other devolved entities in the UK.

probably come as a surprise, as proportionality is a well-travelled idea more recently connected to the rise of global constitutionalism.

Thus, this paper takes the view that one does not have to choose between the scholars who conceive of borrowing as a means of legal change[7] and those who reject the very reality of transplants.[8] Both approaches reflect reality in part. This paper argues that English judges exercise strategic choices to navigate between these two options: they were strategic in invoking the proportionality test at first and in implementing it in practice; they are also strategic in how they navigate the contextual constraints weighing on their choice. In short, strategically choosing to use a legal transplant has two faces: developing the transplant for one's own purpose of generating new solutions, and recognizing that other purposes may subordinate the transplant to internal limits, especially those set by relational dynamics within the English constitution.

Comparative law scholarship recognises the role of specific actors in facilitating the circulation of transplants, including international organisations, civil society actors, academics, lawyers, etc. Judges also relay legal ideas and solutions while looking for inspiration in other jurisdictions.[9] This use of foreign law is disputed: in using comparative law, especially when human rights are litigated, it is argued that judges become activists pursuing a political agenda. As proportionality provides courts with a reasoning and argumentative process rather than substantive answers, judges may indeed exhibit these trends. Although the proportionality test is embedded in a specific narrative of global constitutionalism and protection of human rights, it is also about the relationships between constitutional and administrative actors (especially the administration, the judge, and citizens) within a particular context. In this sense, judges need to consider a wide array of constraints in their strategic use of the proportionality test. Judges' roles are only partly defined by judges themselves; they are also informed by procedural rules, the constitutional framework, the relationships to the executive and the specific audiences they are addressing. Faced with each of these parameters, judges can position themselves strategically in various ways if they want to gain more power or merely maintain the position they enjoy. However, the specificity of English judges – by comparison to their continental counterparts – is to be recognised as creator of law as well as a check on executive power. They balance these two roles strategically by being responsive to the consequences at home and in the wider world, with a view to long-term effects.

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7 T Goldbach, 'Why Legal Transplants?' (2019) 15 Annual Review of Law and Social Science 583–601.

8 P Legrand, 'The impossibility of transplants' (1997) 4 Maastricht Journal of Comparative Law 111, who argues that transplants can never happen as the rule/institution/solution is transformed by the transplantation process.

9 E Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart 2015).

This paper argues that the English judiciary has been using proportionality in a sophisticated and multi-layered strategy, not only in using the proportionality test but also in *not* using it, thus being strategic in recognising their place in relational dynamics and preserving it as much as they can over time. In this respect, the concept of "relational dynamics" unlocks original insights often overlooked by comparative law: such as the willingness of key actors to keep doors ajar for evolving interpretation or to opt for the 'legal' community they aspire to belong to.

In order to develop this multi-layered approach, and the interactions framing its impact on the receiving legal system, this paper starts with an overview of proportionality in general (Section 2). It then goes on to look at how proportionality has been inserted in English administrative law. Section 3 analyses how English judges have used their strategic choices in shaping their techniques for judicial control over administrative action. Section 4 turns to the constraints resulting from relational dynamics that English judges must accommodate in their strategies. This leads to a conclusion that attempts to draw lessons beyond proportionality in English administrative law for further comparative analysis when it comes to judicial control of administrative action.

2. Proportionality: a technique embedded in a complex narrative

Proportionality is multifaceted. This makes it difficult to capture the reality of this concept, as it can refer to either a legal principle, a method of reasoning, or a kind of logic of action.[10] Despite these challenges, one senses that proportionality refers to the way in which judges operate within their constitutional and administrative context – judges invoke proportionality in their decisions to link their control over administrative action to the legal framework within which the executive exercises its power. From its Prussian origin and its rediscovery in German constitutional law in the 1950s, techniques and narratives of proportionality have migrated across legal orders and are relied upon in a range of national and regional systems. Furthermore, the move from administrative to constitutional law has enabled proportionality to circulate widely across constitutional orders, so much so that it has become identified with the debate on global constitutionalism. This leads to methodological considerations concerning the mapping of the two sides of proportionality, namely its technical aspects and its normative content, not to mention the relational dynamics between the main actors in proportionality.

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[10] Nason (n4) 205.

2.1. The rise of a technique

As a technique of judicial control over administrative action, proportionality is often ascribed a 19th century Prussian origin. Proportionality became a tool for assessing whether the police had acted in a way that protected public order. The proportionality test limited the police's and administration's discretion when maintaining public order in the event of demonstrations or when issuing building permits. Proportionality became increasingly linked to the *Rechtsstaat*: police and decision-makers could only act within the confines of the law. Indeed, individual rights were increasingly recognised against the administration, rights that courts could be asked to protect and enforce.[11] Decision-makers could no longer encroach on these individual rights without judicial control. Thus, proportionality became the way to adjudicate when individual rights and administrative discretion collided. Individual rights could only be set aside when: (i) no less intrusive means would be equally effective for decision-makers, (ii) the means resorted to by the decision-makers were appropriate to meet their objective, and (iii) the end justified the intrusion. Consequently, individual freedoms and rights were protected, as well as public order and safety. All in all, arbitrariness was no longer possible – a major milestone in the evolution of the "rule of law".[12]

Proportionality took a back seat after WWII. However, the German Constitutional Court resorted to proportionality from the 1950s to arbitrate similar conflicts between individual rights and the power of Parliament to limit them. Some commentators presented this evolution as natural and logical, "*a response to a universal legal problem*"[13]. Open-textured, proportionality can be used in flexible ways, which allows for easy adaptation to a wide range of constitutional and administrative contexts. Schwarze[14] was one of the first to document this circulation within Europe in the late 1980s, with a specific role given to the reliance on proportionality in the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).[15] For instance, the CJEU recognised the proportionality principle as derived from the

11 O Mayer, *Deutsches Verwaltungsrecht* – Vol I (1924 Dunker & Humblot repr 1961) 218-225.

12 B Schlink, 'Proportionality (1)' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law*(OUP 2012) 719-736, 728-29.

13 ibid 729. See also B Schlink, 'Proportionality in Constitutional Law: Why Everywhere but Here' (2012) 22 Duke Journal of Comparative and International Law 291, 296.

14 J Schwarze, *Europäisches Verwaltungsrecht* (2nd edn Nomos 2005) 661-842.

15 For proportionality in Scandinavian countries, H Wenander, 'Europeanisation of the Proportionality Principle in Denmark, Finland and Sweden' (2020) 13 REALaw 133-153; for Italy, P Borriello, 'Principle of Proportionality and the Principle of Reasonableness' (2020) 13 REALaw 154-174.

rule of law in early case law,[16] at a time when proportionality was only used in one Member State – Germany.[17] Since Schwarze's writings, a wide literature has confirmed and nuanced this migration of proportionality.[18]

2.2. Diffusion of proportionality within the narrative of global constitutionalism[19]

According to Kumm, proportionality is one of "the most successful legal transplants in the second half of the twentieth century".[20] Yet, the comparative literature on transplant cautions us: ideas, principles, tools, techniques, institutions or processes may ostensibly be borrowed or copied from elsewhere, but there are always processes of differentiation and transformation at work.[21] Also, Cohn tells us to look beyond a binary evaluation of transplants in terms of success versus failure, and at the wider impacts of transplants on the target legal system.[22] In the case of proportionality, this paper contends that this principle, because of its flexibility, has circulated primarily as an idea, partly as a judicial test, partly as a standard for administrative action, and partly as a value to be pursued to allow for peaceful coordination of rights in a democratic society. Proportionality has circulated widely as part of the global constitutionalism movement, even though it was originally developed for reviewing administrative action.

Global constitutionalism has different meanings depending on the author: it can refer to the development of constitutions across the world, the identification of principles for framing the activities of regional or international organisations, and even the search for constitutional principles and institutions structuring global governance, etc.[23] For Stone Sweet and Mathews, global constitutionalism expresses the idea that a new form of constitutionalism has spread around the world with the following requirements: the constitution en-

16 Case C-4/73 *Nold v. Commission* EU:C:1974:51; T Tridimas, 'The Principle of Proportionality' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law – The European Union Legal Order* vol 1 (OUP 2018) 243.

17 A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72, 144.

18 eg S Ranchordas and B de Waard (eds), *The Judge and the Proportionate Use of Discretion – A Comparative Study* (Routledge 2016).

19 Stone Sweet and Mathews (n17).

20 M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on *A Theory of Constitutional Rights*' (2004) 2 International Journal of Constitutional Law 574, 595.

21 See introduction to the present special issue for the relevant literature on this point.

22 M Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 American Journal of Comparative Law 583-629.

23 C Mac Amhlaigh, 'Harmonising Global Constitutionalism' (2016) 5 Global constitutionalism 173.

shrines all institutions of government and its own process of amendment, ultimate power is recognised to the people, all uses of power must conform with the constitution and, finally, the constitution protects rights and freedoms and entrusts judges with enforcing this protection. Thus, in this global constitutionalism, judges are tasked with adjudicating between competing human rights or between human rights and public interests. For Stone Sweet and Mathews, this judicial role leads to judicial law-making. This recognition has implications for sovereignty:[24] it becomes binary – with political sovereignty vested in Parliament, and legal sovereignty in the judiciary. Stone Sweet and Mathews make important additional points regarding the implications of this development. As judges are tasked with enforcing (difficult) constitutional bargains, they develop strategic tools to frame, legitimise, or even disguise their political power. Proportionality is such a tool: it was adopted by courts involved in the adjudication of rights to help them deliver on constitutional adjudication. It provided judges with a doctrinal underpinning for the expansion of their power.[25] Furthermore, the flexibility of proportionality was attractive for courts that wanted to be part of the same constitutional 'family': in using the vocabulary shared by 'other family members', courts signalled their belonging, despite differences in the use of this concept.

Against this background Stone Sweet and Mathews explain the mechanisms of this 'viral spread' of proportionality around the world. First, they point out that proportionality soon emerged as best practice globally and benefitted from a consensus among the relevant national elite groups that led to them normatively committing to proportionality.[26] Indeed, Stone Sweet and Mathews argue that identifiable agents – namely judges and law professors-turned-judges – are directly responsible for the development of proportionality at international level[27] and that it would be possible: "(...) *in principle [to] map the network of individuals, and the connections between institutions, that facilitated the spread of [proportionality]*"[28]. Called 'normative isomorphism', this mechanism is in direct contrast with 'coercive isomorphism', the other mechanism Stone Sweet and Mathews identify as being at play behind the circulation of proportionality, i.e. the diffusion of institutional forms and practices that are backed by monitoring and enforcement mechanisms such as the CJEU and the ECtHR.[29]

Since this seminal account, proportionality has been the subject matter of countless discussions. Four comments are relevant here. First, proportionality is not neutral in itself. At the conceptual level it has been claimed that propor-

24 A Young, *Democratic Dialogue and the Constitution* (OUP 2017) 85.
25 Stone Sweet and Mathews (n17).
26 ibid 162 (footnote omitted).
27 ibid 161.
28 ibid 161.
29 ibid 161-162.

tionality, although widespread, is also attached to a specific understanding of the constitution where economic efficiency is attached to the law, with little space for social justice.[30] Consequently, it is connected to systems where legal positivism is prevalent. Suggesting that proportionality is universal occults the fact that it may not fit well with specific institutions, doctrines, social and cultural choices, as these may not attach the same importance to economic efficiency and give life differently to social justice. Such contextual factors shape how proportionality is implemented in a given legal system.

Secondly, empirical investigations have shown that proportionality differs from jurisdiction to jurisdiction. It is not to be reduced to specific deliberate choices made by judges to decide in a more or less political manner for the sake of amassing power. A range of contextual variables needs to be taken into account to map the different uses of proportionality in view of the diversity of legal systems. Indeed, *"[l]egal methods are entrenched in the attitudes and background knowledge of officials and lawyers in each constitutional culture"*.[31] The local context within which judges adjudicate shapes the ways in which they make use of proportionality. The superficial similarity of proportionality across many jurisdictions operates as a rhetorical device, concealing the many local political and contingent factors that cannot be replicated in other contexts.[32]

Thirdly, this narrative of proportionality papers over major political and constitutional controversies about the roles of judges and their control of both Parliament and the executive. As a result, key questions remain unanswered: should proportionality act as a rational and structured conduit for judges to control administrative action, or as an open-ended tool? Is the open-endedness of proportionality a beneficial feature or a dangerous one? In leaving these questions unanswered, proportionality supports the rise of (global) constitutionalism. To move beyond these questions, scholars have argued that a key benefit and justification for the spread of proportionality is that it supports a "culture of justification":[33] as it requires public bodies to give reasons for their decisions, proportionality contributes to (political) decisions of better quality.

Fourthly, while proportionality is recognized as a key principle both in global administrative law[34] and in global constitutionalism, it has travelled around thanks to its embeddedness in global constitutionalism. In weaving together the umbrella concepts of constitutionalism and proportionality, a su-

30 Nason (n4) 208.

31 C Bernal Pulido, 'The Migration of Proportionality across Europe' (2013) 11 New Zealand Journal of Public and International Law 483, 487.

32 D Kenny, 'Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland' (2018) 66 American Journal of Comparative Law 537.

33 M Cohen-Eliya and I Porat, 'Proportionality and the Culture of Justification' (2011) 59 *American Journal of Comparative Law* 463-490.

34 B Kingsbury, N Krisch and R Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15-61.

perficial consensus is found: a close inspection of the individual rights recognised in national constitutional law reveals how the principle is implemented very differently in practice – thus highlighting the relativity and pluralism of the whole global constitutionalism endeavour.[35] The temptation of some scholars is then to arc back to something more or less clearly recognizable across systems. Indeed, while judges grow aware of belonging to the same professional community, they learn to develop strategic choices that help them dialogue across legal systems.[36] However, there is a lack of a common framework for these discussions and a recognition that *"[m]eaningful communication among judges within judicial networks presupposes more than just strategic interaction"*,[37] and that there may be a plurality of communities intersecting at any one point in time. By analysing the English reception of proportionality through the prism of "relational dynamics", this article highlights the impact that these strategic interactions can have on the transplanting process.

2.3. Methodological considerations

As mentioned above, proportionality is a successful transplant at the global level: it has been circulating widely. Yet, the comparative literature on transplants cautions us to be careful when analysing legal transplants. Transplants need to adapt to local circumstances, political/cultural mindsets, and practical needs. Proportionality is no different. If we are to examine the reception of proportionality in England, and the contribution of proportionality to legal change there, we need to take heed of these warnings and distinguish two levels of analysis.

The first level of analysis pertains to mapping how and to what extent the legal transplant has been received as a technique, as a strategic tool in the hands of judges for pushing direct and indirect legal changes. In this respect, this paper revisits two ideas put forward by Cohn when she analysed proportionality as a transplant in England; namely, (i) the need to examine the transplant on a long temporal continuum rather than simply at the reception point,[38] and (ii) the need to analyse the overall outcome and wider impact of the transplant in the legal system, beyond a mere binary evaluation of the transplant in terms of success/failure.[39] Section 3 below enriches these insights with the benefit of

35 K Lachmayer, 'Counter-developments to Global Constitutionalism' in M Belov (ed), *Global Constitutionalism and its Challenges to Westphalian Constitutional Law* (Hart 2018) 81-102; J Klabbers, 'International Constitutionalism' in R Masterman and R Schütze (eds), *Cambridge Companion to Comparative Constitutional Law* (CUP 2019) 498-520.

36 AM Slaughter, *A New World Order* (Princeton University Press 2004) 100-103.

37 V Perju, 'Comparative Constitutionalism and the Making of a New World Order' (2005) 12 Constellations 464, 471.

38 Cohn (n22) 600, figure 4.

39 ibid 593.

ten more years of case law, including the symbolic times around Brexit: this section demonstrates that the reception of a transplant is not necessarily linear, that reception may not be permanently settled and that the wider impact can also be in flux.

The second level of analysis reflects on this overall process of legal change: taking a step back, it moves to a contextual analysis unpacking the stakes of proportionality, especially in terms of how relational dynamics between the main actors in English administrative law have framed the choices available to these actors. Here, the paper identifies the specificities of English administrative law using the parameters identified by Stone Sweet and Matthews;[40] namely, (i) the content of the constitution (i.e. formal protection of constitutional rights), (ii) the constitutional position of judges (and their relationship to the executive), (iii) the need for tools to justify/support the development of judicial control, and (iv) the (cosmopolitan outlook of the) judicial community. This last parameter is also related to Cohn's idea that one needs to go beyond the exporter-importer relationship so as to take in the complex influences of multiple players.[41] Revisiting these aspects in light of developments in English law over the last decade will add a degree of sophistication to their overall analyses, highlighting that these parameters are not monolithic. Still, these parameters frame our analysis of the reception of proportionality in English administrative law. Also, they help us increase our understanding of the way transplants behave over a longer period of time, including at key turning points.

3. Proportionality: a strategic choice for controlling administrative action

We turn here to our first level of analysis, where this paper maps the legal changes in English administrative law that proportionality has triggered. Two different aspects of these legal changes need to be discussed. At first, proportionality was suggested as a way to strategically expand judicial control over administrative action, especially in the fields of human rights and EU law. The strategies varied before (3.1) and after the adoption of the Human Rights Act 1998 (3.2). This gradual acceptance of proportionality in English administrative law triggered a second-order question as to whether proportionality should replace older techniques that judges had been using to exercise this control. In short, boundary issues emerged around "reasonableness". If judges had been strategic in seeking ways to use proportionality in the human rights and EU law fields, they were even more so when deciding how far proportion-

40 Stone Sweet and Mathews (n17).
41 Cohn (n22) 601.

ality should permeate into other aspects of judicial review: while they blurred the distinction between proportionality and reasonableness (3.3), they postponed merging the two concepts, a very strategic decision in light of the Brexit referendum (3.4).

3.1. Before 1998: shaping a strategic tool

Lord Diplock was the first to suggest adopting proportionality in English administrative law, in 1985 in *GCHQ*.[42] After famously restating the grounds of judicial review as illegality, irrationality and procedural impropriety, he also stated that the principle of proportionality might be added to this list in the future. Thus, a well-respected member of the judicial committee of the House of Lords began this transplant's long history. Taking inspiration from Lord Diplock's statement, Lester and Jowell argued from 1987 for replacing '*Wednesbury*[43] unreasonableness'[44] with proportionality.[45]

At the time of Diplock's statement, English administrative law was experiencing a procedural and conceptual transformation. Despite administrative law's long history in England,[46] it is often portrayed as having awakened in the 1960s with a series of famous cases such as *Ridge* v. *Baldwin,*[47] *Anisminic*[48] and *Padfield,*[49] and as being transformed by the procedural reform launched in 1977.[50] The latter triggered a rapid conceptual evolution of English administrative law that continues to this day. Against this background, proportionality was soon presented as a necessary part of this re-formulation of the grounds of review. With proportionality, judges would also have a better tool for reviewing discretionary powers: it certainly provided a more structured reasoning than

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42 *CCSU v. Minister for the Civil Service* [1985] AC 374.

43 *Associated Provincial Picture Houses Ltdv Wednesbury Corporation* [1948] 1 KB 223.

44 A cinema was granted a licence by the Wednesbury Corporation on the condition that no children under 15 were admitted on Sundays. The owners of the cinema challenged the legality of the restrictions on the grounds that they were outside the power of the Corporation. While deciding the case, Lord Greene specified the grounds for review of a public body's exercise of discretion: not only will the court review the relevance of considerations taken into account in the decision, but it will also look to see whether the public body "ha[s] nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it". This became the '*Wednesbury* unreasonableness' test.

45 A Lester and J Jowell, 'Beyond Wednesbury: Substantive Principles of Administrative Law' (1988) 14 Public Law 368 and 'Proportionality: Neither Novel nor Dangerous' in J Jowell and D Oliver (eds), *New Directions in Judicial Review –Current Legal Problems* (Rothman 1988) 61.

46 P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 26-29.

47 *Ridge v Baldwin* [1964] AC 40.

48 *Anisminic Ltdv.Foreign Compensation Commission* [1969] 2 AC 147.

49 *Padfieldv.Minister of Agriculture, Fisheries and Food* [1968] AC 997.

50 Order 53 united all remedies available against public bodies in one single procedure called Claim for Judicial Review. This helped claimants considerably, and led to a marked increase of Judicial Review cases (albeit from a rather low base number).

Wednesbury[51] unreasonableness when assessing the rationality of administrative action. Thus, the importing of proportionality was part of a wider transformation of English administrative law.

When advising, in the late 1980s, that *Wednesbury* 'unreasonableness' gives way to proportionality, Jowell and Lester aimed to kill two birds with one stone: first, they planned to add directly to the substantive arsenal of English administrative law, and second, they hoped that the balancing exercise that proportionality facilitates would be responsible for the recognition of other substantive principles and rights. Thus, the operation of the principle of proportionality would act as a Trojan horse and would help bring the protection of fundamental rights into the UK constitution at a time when it did not clearly organise this protection. Indeed, this is exemplified by the challenge mounted in *ex p. Brind*[52] in 1991. In this case the Home Secretary had issued directives to both the BBC (British Broadcasting Corporation) and the IBA (Independent Broadcasting Authority) to restrict the broadcasting of speech by representatives of proscribed terrorist organisations: in future, the voices of terrorists appearing on television would be dubbed. Anthony Lester,[53] the barrister representing the journalists challenging the directives, argued they violated article 10 of the ECHR and that a presumption rested on the Home Secretary to respect the ECHR when exercising discretionary powers.[54] In addition, he contended that the court ought to review the proportionality of the directives, rather than their unreasonableness. The House of Lords rejected both arguments. The bid to increase the substantive arsenal of English administrative law and to address the limitations of the UK constitution had failed. This failure was largely due to a lack of support for proportionality among judges: they were weary of the narrative that proportionality brought with it.

With regard to EEC/EU law, the transplanting of proportionality was gradual: the courts slowly abandoned their early references to the unreasonableness test and started applying proportionality.[55] Thus proportionality had started to make its way into English public law. It would soon be involved in key debates.

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51 *Wednesbury* (n43).

52 *R. v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696.

53 At the time, Lester was involved with Charter 88, that advocated among other things the adoption of a codified Bill of Rights, see A Lester (ed), *A British Bill of Rights* (IPPR 1996).

54 At the time, the ECHR had not been incorporated by an Act of Parliament and had no legal effect in the UK legal order.

55 eg *RvInternational Stock Exchange of the UK and the Republic of Ireland, ex p Else* [1993] BCC 11; *RvChief Constable of Sussex, ex p. ITF Ltd* [1995] 3 CMLR 485.

3.2. 1998: a turning point for strategic calibration

If the strategies to integrate proportionality through case law failed in the 1990s, the discussions relating to the protection of fundamental rights were becoming even more pressing. They led to the incorporation of the ECHR into English law. This incorporation happened at a very specific political time – Tony Blair had just broken eighteen years of Conservative rule, which had been plagued by dissensions about the link between the UK and the EU. A barrister by training, Tony Blair came to power with manifesto promises of constitutional reforms and a positive inclination towards all things European and law-based. The incorporation of the ECHR through the Human Rights Act 1998 (HRA) fulfilled the pledge of better protecting human rights.[56] Also, judges were extensively trained in how to use this new legislation in their judgements.[57] With the HRA, judges would need to use proportionality to adjudicate between competing rights and fundamental freedoms. However, three points need to be made regarding this apparent compliance with the interpretation of fundamental rights. Overall, UK judges sought to keep control over proportionality as much as possible.

The first point pertains to the channel used for receiving proportionality in England. The leading case was decided in the Privy Council, *De Freitas*[58] where the court relied on case law from South Africa, Zimbabwe and Canada. The Privy Council was then truly a global court, as it acted as the appeal court for several Commonwealth jurisdictions and set precedents for these jurisdictions. In all likelihood, the court wanted to give some traction to proportionality as part of the evolution of English administrative law. By relying on cases from South Africa, Zimbabwe and Canada, the court created a precedent that could not only apply to this specific litigation, but was also more likely to be used in any number of common law jurisdictions. This would also enable England's top courts to participate in the judicial 'conversations' that take place in and between any number of common law jurisdictions on various topics concerning human rights[59] and, in particular, proportionality. This shows that the influences and obligations resting on English courts are not limited to the two European treaties. The courts respond to influences or obligations of their own through their judicial position in the Commonwealth: they are certainly responsible for participating in forms of coercive isomorphism themselves. UK judges did not

56 'New Labour – because Britain deserves better' [Labour Party Manifesto for the general election May 1997] <www.fes.de/fulltext/ialhi/90057/90057001.htm accessed> 07 April 2021.

57 D Feldman, 'The Human Rights Act 1998 and constitutional principles' (1999) 19 Legal Studies 165-206, 170.

58 *De Freitas v Permanent Secretary of Ministry of agriculture, fisheries, lands and housing* [1999] 1 AC 69 (PC).

59 H Tyrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Hart 2018).

want proportionality to be seen as a merely European technique; thus, they sought to strategically 'acclimate' it and create a channel for further expansion outside the UK.

The second point turns around the interpretation to be given to reasonableness in the field of human rights. Indeed, the debate opposing unreasonableness to proportionality was reignited shortly before the incorporation of the ECHR. Famously, the government's policy of banning homosexuals from the military was the subject of a judicial review challenge: the Court of Appeal did not find the policy to be *Wednesbury* unreasonable.[60] However, when argued before the ECtHR, it was found that the unreasonableness test did not provide a sufficiently in-depth review of the minister's exercise of discretionary power.[61] The timing of this decision was far from accidental: the HRA had just been passed by Parliament and was due to come into force on 2 October 2000. Clearly, the Strasbourg court was identifying the unreasonableness test as unfit for purpose. While the UK courts had sought to retain control over the test to be applied in human rights, the ECtHR imposed its own interpretation. This points towards relational dynamics where collaboration, dialogue and mutual respect were lacking. One wonders whether the ECtHR would have gained greater cooperation by giving UK courts more time to find their bearings.

The third point pertains to the English specificities in the formulation of the proportionality test. In the leading case on this point, *Bank Mellat*,[62] the UK Supreme Court (UKSC) highlighted that the proportionality test at domestic level cannot purely mirror the proportionality test used by the ECtHR.[63] Lord Sumption formulates the proportionality test as requiring assessment of (i) whether the objective of a measure is sufficiently important to justify the limitation of a fundamental right, (ii) whether a measure is rationally connected to its objective, (iii) whether a less intrusive measure could have been used, and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.[64] This means that the British test of proportionality has four steps and not three, as is usual in the European case law.

While the UKSC has sought to keep control over proportionality, the UK courts have had to rely on proportionality for grounds that involve EU or ECHR law. It will be interesting to see whether the UK courts will continue their use of proportionality on former EU law, now that the UK has left the European Union.

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60 *RvMinistry of Defence, ex p Smith* [1996] QB 517.
61 *SmithvGrady* (1999) 29 EHRR 493.
62 *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39.
63 ibid [71]-[72] (Lord Reed).
64 ibid [20].

3.3. Strategic blurring of reasonableness

Since Lord Diplock mentioned proportionality in 1985, there have been doubts as to how to distinguish proportionality from reasonableness. Indeed, the distinction between the two tests is anything but clear. This is the outcome of an evolution in the definition of the reasonableness test.

In its original formulation, the *Wednesbury* test is a test of "unreasonableness". In the words of Lord Diplock in the mid-1980s,[65] an irrational decision is "a *decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…*".[66] Such a formulation meant that hardly any administrative action would be unreasonable and thus illegal. This led to a slow transformation of the test, first in 1996 with Pannick's expression of unreasonableness as a decision "*beyond the range of responses open to a reasonable decision-maker*",[67] then in 2000 with Laws LJ's formulation that the test was "*a sliding scale of review more or less intrusive according to the nature and gravity of what is at stake*".[68] In short, there has been a process of redefining the content and analytical structure of the reasonableness test to move it closer to proportionality. This identifies a clear process of legal change showing an indigenous concept being shaped by an external factor, the transplanted technique. This process has been summed up in the following way:

> *So, it seems, almost 30 years after CCSU, proportionality has crept into the English common law by the back door, not by the explicit addition of a fourth ground to Lord Diplock's trilogy, as he anticipated, but by the transmutation of the Lord Greene's strict reasonableness test into […] a flexible but structured test which is much better adapted to the task of effective and practical judicial supervision of executive action.*[69] [our underlining].

Overall, this scrutiny of the legality of administrative action seems to reflect the concerns raised first in the 1960s when judicial review started to develop in its modern form. The changes in articulating the test have little to do with global constitutionalism: they are a practical response to the new ways in which the administration started to take decisions around that time. The nub of the question was to identify the procedural role of the administration in England: the decision-maker not just asking himself the right question, but taking "*rea-*

65 *CCSU v Minister for Civil Service* [1985] AC 374.
66 ibid.
67 *R v Ministry of Defence ex p Smith* [1996] QB 517.
68 *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 WLR 1115, 1130 (Laws L).
69 Lord Carnwath, 'From Rationality to Proportionality in the Modern Law' (2014) 44 Hong Kong Law Journal 447-458, 457-58.

sonable steps to acquaint himself with the relevant information to enable him to answer it correctly" (*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065B)".[70] Similar matters were discussed in the Council of Europe around the same time,[71] leading to recommendations at the end of the 1970s.[72] The dates may be partly coincidental: it is difficult to trace back direct connexions between the works of the Council of Europe and the choices made in the UK to develop a certain type of judicial control over administrative action. However, this shows that in the 1970s, the main concrete questions in European circles were at least as much related to the administration as to the constitution. In this sense, English administrative law responded to the need to be creative in scrutinizing administrative action more than it did to global constitutionalism.

3.4. Bifurcation: strategic postponement in unifying proportionality and reasonableness

For a while it appeared that proportionality would finally be accepted fully into English public law. The transformation of reasonableness into a more structured test made this desirable from a conceptual point of view, to avoid confusion between two tests that were close if not identical. However, the definitive step of replacing reasonableness with proportionality in matters falling outside European and human rights did not happen. It seems as if the UKSC had arrived at a point where it was ready to take this decision, but then postponed it[73] – it may have been waiting strategically for the dust to settle with regard to 'Brexit' and to the UK bill of rights. Now, it seems unlikely that the UKSC will take this decision any time soon, if ever.

Unsurprisingly, the English courts chose to resort to proportionality when a violation of an ECHR right was argued. The matter is a little more complex when the litigation could be resolved by reliance upon either the ECHR or common law, as in *Daly*. There, the court wanted to make sure that the rights of prisoners (in this case those rights protecting their privileged correspondence) were enforced under common law rather than just the Convention. In *Daly,*[74] the court decided that a policy directing prison staff to check the legally privileged

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70 ibid 453.

71 X, *Pouvoir discrétionnaire et opportunité des décisions administratives: étendue et limites du contrôle juridictionnel*: Cinquième Colloque des Conseils d'Etat et des Jurisdictions Suprêmes en Matière Administrative des Pays Membres des Communautés Européennes (The Hague, 1977).

72 CM adopted Resolution (77)31 on the protection of the individual in relation to acts of administrative authorities; Recommendation No R (80) 2 concerning the exercising of discretionary powers by administrative authorities. On this process: U Stelkens and A Andrijauskaitė, 'Sources and Content of the Pan-European General Principles of Good Administration' in U Stelkens and A Andrijauskaitė (eds), *Good administration and the Council of Europe – Law, Principles, and Effectivity* (OUP 2020) 19-54.

73 *R (Youssef)vSecretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

74 *RvSecretary of State for the Home Department, ex p Daly* [2001] 2 AC 532 (HL).

correspondence of prisoners during a cell search without the prisoner present constituted an unjustifiable infringement of prisoners' rights under common law. Both Lord Steyn and Lord Cooke compared and contrasted the *Wednesbury* unreasonableness test and the principle of proportionality – Lord Bingham specified that, in the circumstances, both tests would have had the same outcome. However, this should not necessarily be interpreted as a rejection of the ECtHR, but as a policy decision to enable this case law to be used by other common law jurisdictions.

Commentators have labelled this situation as 'bifurcation' and debated its advantages and drawbacks. The concept of bifurcation recognises that rationality review is undertaken using two co-existing tests: for grounds arguing an infringement of EU law or a violation of the ECHR the courts apply the proportionality test, while for grounds based on English law the courts will resort to the *Wednesbury* test. For proponents of bifurcation,[75] proportionality should be limited to the protection of human rights.[76] The proportionality test would bring courts too close to merits review. In addition, routine use of proportionality may compromise the courts' ability to defer to the technical, constitutional, or scientific expertise of the decision-maker. Also, some commentators express concerns that proportionality would compromise the conceptual integrity of judicial review.[77] Finally, the long existence of the *Wednesbury* test has engendered a feeling of familiarity (not to say certainty) that would be lost were it to be replaced by a new test. Having said that, commentators have shown that *Wednesbury* is no more monolithic than the proportionality test and can be applied with differing intensities of review depending on the context.[78]

On the other hand, the proponents[79] of the unification of rationality review argue that the proportionality test would be more transparent in terms of intensity and structure of review:[80] it would highlight the reasoning of judges when undertaking a review of the rationality of an administrative decision and help courts to structure their control. This is particularly true, in view of the assessment by Paul Craig that both tests involve a degree of weighing and balancing.[81]

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75 Among others, Jeff King, Lord Sales, Tom Hickman, and Jason Varuhas, are all supporters of bifurcation.

76 Some would widen this scope further, see eg J King, 'Proportionality: A Halfway House' [2010] New Zealand Law Review 327.

77 Some have even argued that proportionality may lead to the complete annihilation of other grounds of review.

78 A Le Sueur, 'The Rise and Ruin of Unreasonableness' (2005) 10 Judicial Review 32-51.

79 Paul Craig is one of the main proponents of this unification.

80 A Davies and J Williams, 'Proportionality in English Law' in S Ranchordas and B de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2016) 73-108.

81 P Craig, 'The Nature of Reasonableness Review' (2013) 66 Current Legal Problems 131-167.

Also, reliance on one single test for rationality review would be a welcome simplification for claimants.[82]

Despite some early pronouncements by Lord Cooke that *Wednesbury* is "*an unfortunately regressive decision*"[83] or by Lord Slynn that "*trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing*"[84], the early demise of the *Wednesbury* test has failed to materialise. The Court of Appeal indicated in *ex p. Association of British Civilian Internees*[85] that it wished to move to a unified proportionality test, but it also stated that it was not "*to the (Court of Appeal) to perform its burial rites*".[86]

Still, the more recent case law casts doubt on the unification of proportionality review. Several potential cases have failed to engineer this transformation. In *Kennedy,*[87] Lord Mance stated that the proportionality test has a slight edge over *Wednesbury* as it "*introduces an element of structure into the exercise*".[88] If one reads this statement in conjunction with the speech made by Lord Carnwath in 2014,[89] one would be forgiven for believing that unification is quite near. Indeed, a year later, the cases of *Pham*[90] and *Youssef*[91] gave the impression that proportionality would finally be used across the board in England. In the former case, the UKSC reviewed the decision to strip *Pham* of his British citizenship – a decision that had implications in both domestic and EU law. Lord Mance specified that the outcome would be similar under both EU law and common law. Despite this, unification was not achieved. Again, the UKSC seemed on the verge of unifying the grounds of review in *Youssef*.[92] While Lord Carnwath notes that unification would be possible, he states that this decision needs a wider judicial panel of the Supreme Court. This repeats a statement made in

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82 Especially, as pointed by Paul Craig, because many claims combine different legal arguments: some are based on the ECHR, others on EU law and some rely simply on English administrative law. A lack of unification of the test makes this exercise rather complex for the claimant.

83 Lord Cooke of Thorndon in *Daly* at [32].

84 Lord Slynn of Hadley in *R (Alconbury) vSecretary of State for Transport* [2001] UKHL 23.

85 *R (Association of British Civilian Internees – Far East Region) vSecretary of State for Defence* [2003] 1 WLR 1813.

86 Dyson LJ at [35].

87 *Kennedyv.Charity Commission* [2014] UKSC 20 at [54].

88 Lord Mance endorsed Craig's argument that the *Wednesbury* unreasonableness and proportionality tests require a degree of balancing and that both can be applied with varying intensities.

89 Lord Carnwath, 'From Rationality to Proportionality in the Modern Law', at the joint UCL-HKU conference 'Judicial review in a changing society' (Hong Kong University, 14 April 2014).

90 *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

91 *R (Youssef)vSecretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

92 Youssef challenged a decision of the Secretary of State for Foreign Affairs to agree with the UN Sanctions Committee that Youssef be added to the list of persons associated with Al Qaeda who should have their assets frozen.

Keyu.[93] According to Lord Neuberger, moving to proportionality review needed a panel of nine judges to assess its serious constitutional implications.[94] Yet, Lord Neuberger specified that both the reasonableness and proportionality tests would have had the same outcome.[95] However, Lady Hale dissented on the very topic of proportionality and described how the *Wednesbury* test could be applied to a rational decision-maker, leading her to suggest that in this case the decision-maker had not been rational, a result different from the one achieved by the judgment.[96] This shows that this mantra about 'no practical difference between proportionality and reasonableness' may be expressed as a strategy to assuage fears of expanding judicial power. Finally, *Browne*,[97] which has been decided since, seems to imply that unification will not happen any time soon.

Overall, the court managed to show a seemingly outward agreement with proportionality while being responsible for repeated refusals to switch the test. A rather ambiguous response, but a very strategic stance. One can only speculate on the reasons behind this strategic postponement. Some of this strategic resistance may be connected to the general climate, with discussion of a UK Bill of Rights[98] and the upcoming 2016 referendum. The UKSC may have felt it unwise to address the question in this rather uncertain political context.

Another aspect of this strategic resistance may lie in the debate over the foundations of judicial review in English administrative law. Whether one believes, like Forsyth[99] and Elliott, that the constitutional basis for judicial review rests with the principle of parliamentary sovereignty, or, on the contrary, that the source of the review of administrative action is common law, as suggested by Craig,[100] this provides different answers to the reliance upon proportionality.

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93 *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69. Keyu wanted the British government to hold an inquiry into the massacre of Batang Kali in Malaysia when this country was under colonial control.

94 ibid [132].

95 ibid [273]. To be more nuanced, he writes: 'It should also be understood that the difference between a rationality challenge and one based on proportionality is not, at least at a hypothetical level, as stark as it is sometimes portrayed.'

96 ibid, Lady Hale dissenting [308]-[313]. She constructed the notion of a rational decision-maker as undertaking a cost-benefit analysis before deciding.

97 *Browne v Parole Board for England and Wales* [2018] EWCA Civ 2024.

98 P Munce, 'The Conservative Party and Constitutional Reform: Revisiting the Conservative Dilemma through Cameron's Bill of Rights' (2014) 67 Parliamentary Affairs 80–101; M Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 Modern Law Review 883-908; S Lambrecht, 'Bringing Rights *More* Home: Can a Home-grown UK Bill of Rights Lessen the Influence of the European Court of Human Rights?' (2014) 15 German Law Journal 407-436.

99 C Forsyth, 'Of Figs Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 Cambridge Law Journal 122.

100 P Craig, 'The Common Law, Shared Power and Judicial Review' (2004) 24 Oxford Journal Legal Studies 237.

Elliott,[101] in particular, argues that *Wednesbury* and proportionality reflect different understandings by the courts of the separation of powers and contrasting perceptions of their roles. With the European Community Act 1972 and the HRA 1998, proportionality has been given a constitutional basis that legitimizes (and in fact imposes) its reception. This question of constitutional foundations is key to the extension of proportionality to cases/grounds that do not involve EU law or the ECHR. It seems that for the UK courts, unification has 'troubling' constitutional implications. While the use of proportionality derives from the incorporation of the two treaties, the reliance upon proportionality at common law would not. It would be a creation of the court at common law. This certainly explains the reluctance of the courts: in a word, proportionality has been caught up in the wider debates of the courts' constitutional role and of the foundations of judicial review. Still, there are undoubtedly other – contextual – reasons for the strategic choices made by the UKSC in using and *not* using proportionality. Section 4 turns to analysing these.

4. Relational dynamics: constraints on strategic choices

If proportionality was first mooted as a technique to expand judicial control over administrative action, the extent to which it was able to make inroads in non-EU law matters and in non-human rights matters was shaped by the specific context provided by the relational dynamics between the judiciary and the administration in England. All in all, this context is nearly at the antipodes of the key features of the continental model on which the global constitutionalism narrative surfs in broad terms. While proportionality as a technique has been relatively successful, an alternative narrative – that of UK common law constitutionalism – has emerged rooted in the specific relational dynamics involving English judges. When it comes to identifying what may be the reasons behind the development of UK constitutional principles detached from a more global narrative of constitutionalism, Lady Hale writes:

[W]hether this trend (that the UK's constitutional principles should be at the forefront of the court's analysis) is developing as a response to the rising tide of anti-European sentiment among parliamentarians, the press and the public, whether it is putting down a marker for what might happen if the 1998 Act were repealed, whether it is a reflection of distinctive judicial philosophies of the judges who are at the forefront of this development, or whether it is simple irritation that our proud

[101] M Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 Cambridge Law Journal 310.

traditions of UK constitutionalism seemed to have been forgotten, I leave it to you [...] to decide.[102]

However, what emerges is that English judges respond to their context. In this respect, the relational dynamics within UK common law constitutionalism can be broken down into four levels: the general framework for these relationships being the English political constitutionalism (4.1), the concrete political stance taken by successive UK governments in relation to the judiciary (4.2), the institutional mechanisms shaping judicial review (4.3), and the specific international audience whom UK judges are addressing (4.4). Overall, judges take a strategic stance of preserving, maintaining and, where needed, using their power in relation to the executive. However, they do not seek to revolutionize their practice and cognitive mindsets: they move incrementally as a rule and take drastic steps only in extreme cases.

4.1. Old and new constraints of political constitutionalism

In 1979 Griffith suggested the idea that the UK was regulated by a political constitution[103] – a notion in clear opposition to the legal/judicial constitutionalism conveyed by the narrative of global constitutionalism. Political constitutionalism carries a specific vision of the relationships between the main constitutional actors – namely the legislative, the executive and the judiciary. In particular, it has implications for the protection of human rights under the constitution and for the process of accountability of administrative/political action, favouring political processes rather than judicial review.[104] Proportionality can only be marginal under political constitutionalism.

The UK constitution does not foster an environment supportive of the type of judicial control over administrative action that proportionality represents. In fact, the uncodified UK constitution creates a number of difficulties with regard to this principle. For one thing, the regulation of the political system relies heavily on political practices, constitutional conventions, and memorandums of understanding. While political institutions continue to eschew formal and legal regulations, this absence of legal recognition makes it difficult, if not impossible, for the courts to enforce any of these conventions or practices.[105] While legal constitutionalism has made some inroads with the adoption of the HRA,

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[102] Lady Hale, 'UK Constitutionalism on the March?' (2014) 19 Judicial Review 201, 208.

[103] J Griffith, 'The Political Constitution' (1979) 42 Modern Law Review 1. See also G Gee and G Webber, 'What is a Political Constitution?' (2010) 30 Oxford Journal Legal Studies 237.

[104] Young (n24).

[105] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [136]-[151]: even a codified constitutional convention was not recognized as enforceable.

the successive devolution legislations and the Constitutional Reform Act 2005,[106] political constitutionalism still characterises the regulation of the political system. According to political constitutionalism, the executive is controlled largely through the work of Parliament, which reviews the activities and policies of government departments, public corporations, independent agencies, and similar organisations. This reliance upon political accountability does not sit well with the tenets of global constitutionalism. In this context, proportionality cannot fulfil the same objective of providing the key tool for controlling administrative action.[107] While global constitutionalism has facilitated the migration of proportionality around the world, the discourse of human rights protection through constitutional review can only have a limited influence in the UK in view of its constitutional arrangements. In turn, this has impacted the transplanting of proportionality.

As a result of its attachment to political constitutionalism, the UK constitution is characterised by the principle of parliamentary sovereignty, which creates a formidable obstacle to both constitutional review and the protection of rights. With sovereignty placed in Parliament, it is difficult to grant the judiciary power to review acts of Parliament. Since the UK constitution does not contain a formal declaration of rights, the courts lack a textual basis for a substantive review of parliamentary legislation. Review of the parliamentary process itself would be regarded as a clear infringement of separation of powers. Unsurprisingly, the courts have repeatedly refused to undertake such a review in the past.[108]

Importantly, the lack of rights protection has been partly remedied by the adoption of the HRA 1998. With this act, Parliament has given legal effect to the ECHR in UK law. However, to protect the integrity of parliamentary sovereignty, courts finding a violation of a Convention right by an act of Parliament can only issue a declaration of incompatibility. This warning to Parliament has no legal effect for the parties or the legislation in question. Parliament can choose to amend the legislation subsequently but is under no legal obligation to do so; thus, the sovereignty of Parliament is safeguarded. In addition, the debates surrounding the legitimacy of the ECHR and the suggestion that the HRA could be replaced by a UK Bill of Rights, have created a degree of uncertainty regarding rights protection in the UK. A form of mutual support exists

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106 A Tomkins, 'What's Left of the Political Constitution?' (2013) 14 German Law Journal 2275-2292.

107 The use of proportionality in political procedures deserves a more systematic investigation than has been done so far, even though it has been argued that the joint committee uses the same type of approach as courts (M Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 Australian Journal of Political Science 41-55, 45-46) as the practice may have fluctuated since then.

108 *Pickin v British Railways Board* [1974] UKHL 1.

between the HRA and common law constitutional rights.[109] However, this may change, were the Parliament to repeal the HRA. In any event, this illustrates the challenging environment in which proportionality has had to evolve/is evolving. Two key features of global constitutionalism linked to proportionality, namely, constitutional review and judicial protection of human rights, have a different reach under the UK constitution.

Overall, these are strong reasons explaining why proportionality has found it difficult to make its way into English administrative law. When deciding to use proportionality, judges have had to take into account the strong inclination towards political constitutionalism in England – a major difference from the premises on which global constitutionalism is built.

4.2. Political constraints: recurring threat of reform by an increasingly dissatisfied executive

A second key contextual constraint on the development of proportionality outside the realm of EU law and human rights matters can be found in the tense relationships between the judiciary and political actors, especially the UK government. The continuing government hostility to judicial review and the recent high-profile court challenges have certainly encouraged the judiciary to take a careful approach to their review. The conceptual discussions relating to political constitutionalism are not theoretical: they have concrete implications for the interactions between the executive and judiciary.[110]

First, political dissatisfaction with judicial review of administrative action goes back a long way. As early as 2004 the government threatened the imposition of 'ouster clauses' to prevent judges from reviewing immigration decisions.[111] In 2013, threats to restrict standing rules were made, and changes to the costs regime were introduced in 2015.[112] This led to a range of reactions: for instance, the senior judiciary contested the government's proposal that judicial review should be in effect limited to claimants with a direct interest in the matter;[113] later, the UKSC restated the constitutional right of access to courts and quashed

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109 C O'Cinneide, 'Human Rights and the UK Constitution' in J Jowell and C O'Cinneide (eds), *The Changing Constitution* (9th edn OUP 2019) 58-94, 73-76. See also M Elliott and K Hughes (eds), *Common Law Constitutional Rights* (Hart 2020).

110 For an historical perspective on the various changes that made the executive and the judiciary increasingly distant, see A Paterson, *Final Judgment. The Law Lords and the Supreme Court* (Hart 2013) 286-87.

111 Lord Mance, 'The Frontiers of Executive and Judicial Power: Differences in Common Law Constitutional Traditions' (2018) 26 *Asia Pacific Law Review* 109, 120.

112 Criminal Justice and Courts Act 2015 c. 2.

113 Judiciary of England and Wales, Response of the senior Judiciary to the Ministry of Justice's consultation entitled: 'Judicial Review: Proposals for Further Reform', 01 November 2013.

a fee Order for preventing such access.[114] Following on from the UKSC decision that the 2019 prorogation of Parliament had been unconstitutional,[115] the government triggered a new review of judicial review,[116] with a view to limiting it.[117] This has contributed to making the UKSC careful not to expand judicial review, while seeking to maintain the rule of law.

Secondly, this scepticism towards judicial power is not the preserve of the executive. Some academics see the expansion of judicial power as a threat to the UK constitution. Initiatives such as the judicial power project illustrate this academic scepticism.[118]

Thirdly, this scepticism is linked to the question of the institutional competence of judges: are they equipped and trained to really scrutinize administrative decisions? In particular, proportionality is often portrayed as allowing a more intense review of an administrative decision.[119] However, discussions arise about the deference that judges ought to show to the original decision-maker. This mirrors discussions about individual and/or institutional expertise and is the result of political or bureaucratic legitimacy.[120] Proportionality requires expertise in administrative decision-making by the judge.[121] English judges are not acquainted with the working of administrations in the way the French or German judges are. Thus, English judges are, in the main, generalists and not experts in specific administrative law fields, by contrast to many of their continental counterparts. Even though this may be changing, the number of judicial reviews and the complexity of many administrative fields make it difficult for anybody to gain comprehensive expertise in any sub-field of administrative law.[122] Although judges can have prior professional experience in the administration,[123]

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114 *R (on the application of UNISON) (Appellant) v Lord Chancellor* [2017] UKSC 51, [66]-[85].

115 *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 (*Miller 2*).

116 Ministry of Justice Press Release, 'Government launches independent panel to look at judicial review', 31 July 2020 <https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review> accessed 07 April 2021.

117 M Elliott, 'The Judicial Review I: The Reform Agenda and its Potential Scope', 03 August 2020 <https://publiclawforeveryone.com/2020/08/03/the-judicial-review-review-i-the-reform-agenda-and-its-potential-scope/> accessed 07 April 2021.

118 For discussions about this project, see ia P Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36 University of Queensland Law Journal 355; R Ekins and G Gee, 'Putting Judicial Power in Its Place' (2017) 36 University of Queensland Law Journal 375.

119 See Lord Steyn in *Daly*: 'But the intensity of review is somewhat greater under the proportionality review'.

120 J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174-207.

121 J Rivers, 'The Presumption of Proportionality' (2014) 77 Modern Law Review 409–433.

122 This paper does not say anything about proportionality at the level of tribunals, where the situation may differ.

123 Judicial Appointments Commission, 'Eligibility for legally qualified candidates' <https://judicialappointments.gov.uk/eligibility-for-llegally-qualified-candidates/> accessed 07 April 2021.

this is not the most common pathway to becoming a judge in England.[124] As a result, the question of institutional deference is hotly debated, and judges may feel less equipped (and thus more reluctant) to scrutinize administrative decision-making too closely.

Debates have thus raged on the deference that judges owe to the original decision-maker: they have tried to analyse the exercise, type, and degree of deference that judges ought to have in judicial review. Unsurprisingly, this debate has encompassed the reliance upon proportionality. On the face of it, proportionality review appears to be at the opposite end of the spectrum from deference: it may mean a more intensive review and therefore a less deferential treatment of administrative action. While Daly[125] and Craig are at pains to demonstrate that proportionality can vary the intensity of review depending on the context and, according to Craig, the weight given by the court to the decision-maker will be determined by the court and not by reliance upon proportionality,[126] this message is not heard by a large section of the legal community. The topic of deference has grown in parallel with the one on proportionality: it is now central to any analysis of judicial review.[127]

4.3. Pragmatic constraints

A third key contextual constraint on the development of proportionality outside the realm of EU law and human rights can be found in the institutional consequences of such an adoption. Here, views are divided.

Lady Arden[128] and Lord Carnwarth[129] have expressed their preference for proportionality in extra-judicial writings, highlighting its conceptual advantages. However, the UKSC (like the House of Lords before it) takes a consequentialist approach to legal issues:[130] it seeks to understand the consequences of its decisions before taking them. With proportionality being broadly born in continental legal orders, issues arise regarding judicial review's procedural and evidential system that mirrors the common law-civil law dichotomy. As common

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124 Most judges have professional experience as barristers or solicitors: Judicial Appointments Commission, 'Judicial Selection and Recommendations for Appointment', 1 April 2018 to 31 March 2019, 2019, section 3.1.

125 P Daly, *Theory of Deference in Administrative Law* (CUP 2012) chap 5; M Elliott, 'Proportionality and Deference: The Importance of a Structured Approach' in C Forsyth, M Elliott, S Jhaveri, M Ramsden and A Scully Hill (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010) 264, 279.

126 P Craig, 'Proportionality, Rationality and Review' [2010] New Zealand Law Review 265, 288.

127 A Davies and J Williams, 'Proportionality in English Law' in S Ranchordas and B de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2016) 73-108, 97-105.

128 Lady Arden, 'Proportionality: The Way Ahead?' [2013] Public Law 498-518.

129 Carnwarth (n69).

130 Paterson (n110) 275-276.

law judicial procedure is adversarial and the civil law one inquisitorial,[131] judicial proceedings in England tend to ask parties to bring evidence to support their claim in court.[132] Accordingly, questions about burden of proof – who must prove what and at which stage – become crucial.[133] This might even lead to asking about who should bring what evidence for which part of the proportionality formula. Moreover, the determination of questions of facts are discouraged in judicial review. This unveils considerable procedural issues that the UKSC is not necessarily in a position to address in one landmark decision: incremental adaptations over time are likely to be needed, so that the practices and cognitive mindsets of litigants and judges become slowly attuned to the new processes.

However, this pragmatic stance needs to be contextualised: UKSC's annual activity shows the number of judicial reviews to be between ten and twenty per year, with a marked decrease over the last five years.[134] Even if proportionality were more widely used in English courts, it would not be used nearly as often as in the administrative courts of continental Europe. Thus, reliance upon proportionality would have a limited impact, even though judicial review cases have some effects beyond the cases themselves.[135] It is therefore doubtful whether proportionality would transform the relationship between the government and the judiciary, as feared.

4.4. Discursive constraints: a privileged relationship with a common law centred audience

The last key contextual constraint on the development of proportionality outside the realm of EU law and human rights is the question of the audience that English judges wish to reach when controlling administrative action. Stone and Mathews suggest that judges belong to a large cosmopolitan community that shares objectives and values alongside global constitutionalism. However, UKSC judges address a specific audience, that of Commonwealth

131 M Siems, *Comparative Law* (1st edn CUP 2014) 48-58.

132 For examples of issues with secondary evidence, see Lord Mance (n111) 114.

133 Rivers (n120).

134 From 25 less than five years ago, to ten in the last year, for which statistics are available. UKSC, Annual Report and Accounts 2018-19 (HC 2194) 41: 10 cases in judicial review (3 granted / 6 refused permissions to appeal; one other); UKSC, Annual Report and Accounts 2017-18 (HC 1031) 28: 18 cases (9 granted / 9 refused permissions to appeal); UKSC, Annual Report and Accounts 2016-17 (HC 31) 25: 22 cases (9 granted / 13 refused permissions to appeal); UKSC, Annual Report and Accounts 2015-16 (HC 32) 23: 25 cases (14 granted / 11 refused permissions to appeal).

135 M Sunkin, 'The Impact of Public Law Litigation' in M Elliott and D Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015) 236-255; L Platt, M Sunkin and K Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2010) (20 suppl 2) *Journal of Public Administration Research and Theory*, i243–i260.

and common law judges.[136] This is partly due to their role as the judicial committee of the Privy Council for several jurisdictions, but it extends to common law judges and audiences as well.[137]

As mentioned in Section 3.2, UK judges first recognised proportionality in a Privy Council case building on South African, Zimbabwean and Canadian case law. As late as 2016, Lord Carnwath asked for "*an authoritative review in this court of the judicial and academic learning on the issue, including relevant comparative material from other common law jurisdictions ... aim[ing] for rather more structured guidance for the lower courts than such imprecise concepts as 'anxious scrutiny' and 'sliding scales'*".[138] This is in line with research into reliance upon foreign case law by the Supreme Court suggesting that most references to foreign cases are from common law countries.[139] Similar factors probably play a role when borrowing techniques such as proportionality. With regard to proportionality, the UKSC refers to cases from the common law world as well as from Europe.[140] Finally, as the UKSC wishes its case law to be relevant for other common law jurisdictions,[141] it may fear that adopting a too strongly European stance may weaken its position among common law jurisdictions.

Individual judges are also intensively interacting with a common law audience. If annual reports from the UKSC reveal that judges visit Luxembourg, Strasbourg and other European courts on a regular basis, they also report extensive interactions with common law, beyond institutional interactions, such as the fact that two UK judges sit on the Hong Kong Court of Final Appeal. English judges regularly give lectures in common law jurisdictions and write papers published there. Among the topics discussed, judicial control over administrative action comes up regularly.[142]

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136 M Elliott, 'The United Kingdom Constitution' in R Mastermann and R Schütze (eds), *Cambridge Companion to Constitutional Comparative law* (CUP 2019) 69-91, 85-89, especially footnote 26 referring to C Harlow, 'Export, Import. The Ebb and Flow of English Public law' [2000] Public Law 240; R French, 'The Globalisation of Public Law: A Quilting of Legalities' in M Elliott, J Varuhas and S Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018).

137 R Pennington-Benton and H Massod, 'The Judicial Committee of the Privy Council – Contribution to Judicial Review and Public Law' (2008) 23 Judicial Review 65-82.

138 *Youssef* (n91) [55] [our underlining].

139 C Lienen, 'Judicial Constitutional Comparativism at the UK Supreme Court' (2019) 39 Legal Studies 166, 176. She highlights transferability when courts share history, language values and legal traditions.

140 S Nason, 'The Impact of Pan-European General Principles of Good Administration on United Kingdom Administrative Law: Shared Principles in a Strained Relationship' in U Stelkens and A Andrijauskaitė (eds), *Good administration and the Council of Europe – Law, Principles, and Effectivity* (OUP 2020) 3/94-3/99.

141 C Saunders, 'Transplants in Public Law' in M Elliott, J Varuhas and S Wilson Stark (eds), *The Unity of Public Law?* (Hart 2018) 257-278.

142 eg Lord Mance (n111); Lord Carnwarth (n69).

This audience matters, as judges in other common law jurisdictions are establishing their own approaches to proportionality in ways that differ from jurisdiction to jurisdiction. Proportionality is not necessarily well-accepted in these jurisdictions or as widely accepted as in continental Europe. To give a few examples, India understands proportionality and reasonableness to be two different matters;[143] in Australia, similar constitutional issues have arisen in relation to fundamental freedoms as in the UK, leading to sophisticated scholarly debates;[144] in the Cayman Islands, proportionality is explicitly provided as a ground of review in the constitution, and yet questions of bifurcation still arise.[145]

5. Conclusions

To answer the question of the possible infiltration of proportionality into English administrative law, this paper first located proportionality in its wider narrative of global constitutionalism, then analysed how UK judges have been strategic in using technical aspects of proportionality in English administrative law beyond EU law and human rights. Finally, it turned to the contextual constraints that relational dynamics put on these judicial strategies. From this systematic analysis of proportionality in English administrative law, three lessons can be drawn.

The first lesson pertains to proportionality as a vehicle of judicial control over administrative action. Against the oft-repeated claim that proportionality is self-evident, this paper has demonstrated that this is not the case. For proportionality to carry a degree of self-evidence, it requires a specific constitutional context that is by no means universal. It is even less universal when one considers proportionality in terms of administrative law, a field where historical and political specificities have often led to distinctive relationships between its major actors; namely, the executive, the judges, and the citizens. This interaction between the constitutional and the administrative planes is usually overlooked in scholarship. Accounting for the specificities of English administrative law in an analysis of proportionality would contribute significantly to the foreseeable developments in this field owing to Brexit and the possible repealing of the HRA.

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143 L Marsons, 'Bifurcation, Unification, and Calibration: A Comparison of Indian and English Approaches to Proportionality' (2018) 2 Indian Law Review 26-50.

144 R Dixon, 'Calibrated Proportionality' (2020) 48 Federal Law Review 92–122; A Stone, 'Proportionality and its Alternatives' (2019) 48 Federal Law Review 123–153; C Bernal, 'The Migration of Proportionality to Australia' (2020) 48 Federal Law Review 288–291; E Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47 Federal Law Review 551–582.

145 B Simamba, 'Proportionality as a Constitutional Ground of Judicial Review with Special Reference to Human Rights' (2016) 16 Oxford University Commonwealth Law Journal 125-159.

The second lesson pertains to rehabilitating the legal concept of transplants at a time when it has been widely overshadowed by scholarship preferring cross-fertilisation, migration, diffusion, and circulation of ideas. Analysing the legal techniques embedded in a transplant contributes to a better understanding of the underlying processes, making an alien technique more familiar and acknowledging its limits: factors such as time, context, procedures, and audience come prominently to the fore.

The third lesson pertains to the contribution of transplants to legal changes in administrative law. There is no single theory available to frame legal changes and administrative reforms. The suggestion made by Sweet Stone and Mathew that proportionality would lead to some isomorphism must be strongly challenged, now that we have the benefit of hindsight and knowledge of the process of change and adaptation in English administrative law. They rightly suggest that judges exercise strategic choices when selecting their tools and performing their control over administrative action. However, judges need to address a large range of audiences (e.g., key actors): the parties to the case, past, present, and future litigants, judiciaries in Europe and across common law systems. Consequently, the UKSC has strategically increased its control over administrative action, but kept a close eye on its most significant interlocutor, the government.

Overall, the rule of law hinges upon judicial control over administrative power. The UKSC (and the House of Lords before it) has been experimenting with securing this judicial control since the 1970s. Proportionality has been one tool in the toolbox. Now that the UK is leaving the EU, it remains to be seen how this toolbox will evolve, and how resistance and strategy among the main administrative actors may shape this evolution.