

Balancing Freedom and the Common Good in Human Rights Discourse: Judicial approaches to legal challenges relating to Covid-19 regulation and intervention in the UK

TRACIE LEA SCOTT
School of Social Sciences
Heriot Watt University
Dubai Campus, Dubai Knowledge Park, P.O. Box 38103 Dubai, U.A.E.
UNITED ARAB EMIRATES

Abstract: - The novel coronavirus pandemic has presented unprecedented challenges to individuals, businesses, and governments around the world. There has arguably never been a comparable global crisis of this scale and severity, though we may face challenges similar in scope in the future if there is not global action on other evolving issues such as global warming, and other global sustainability challenges. In this paper it will be argued that the response to SARS-CoV-2 presents a unique window into examining the tensions between individual freedom and measures implemented for the common good. This paper will examine select legal challenges to government regulations and interventions in response to the SARS-CoV-2 pandemic to distill the principles that UK courts are employing to balance individual freedom and the common good in the application of human rights. In *R. (on the application of Dolan) v. Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, the Court of Appeal emphasises the principal of balancing individual rights and the general interests of the community in applying the European Convention on Human Rights, finding that the pandemic is sufficient rationale for restrictions on individual rights. The balancing of Convention Rights, however, as illustrated by cases such as *Philip v Scottish Ministers* [2021] CSOH 32, *Free Speech Union v Office of Communications* [2020] EWHC 3390 (Admin), and *Leigh v Commissioner of Police of the Metropolis* [2021] EWHC 661 (Admin) can result in varying outcomes depending on the weight afforded to different aspects of the proportionality analysis. It will be argued that whilst this balancing approach may not leave the legal observer with a confidence in the predictability of the outcome of such cases in the future, it may have the advantage of a desirable flexibility as we continue to face greater collective challenges in the future.

Key-Words: - Human Rights, Proportionality, European Convention on Human Rights, SARS CoV-2, UK.

1 Introduction

There is an inherent tension within human rights discourse between the protection of individual freedoms and the common good. Whilst not the first crisis of its like (eg. Minenko, 2021) the SARS-CoV-2 pandemic that spread across the globe in late 2019 has provided the background for incredibly heated and divisive manifestations of this tension in countries across the world. In the UK home 'lockdown' orders, mask mandates, and vaccination 'passports' have all elicited strong responses both from the proponents of individual freedoms, and the advocates supporting the public health measures. In the courts, this battle has been fought both in the realm of constitutional limitations, and human rights discourse. This paper will specifically examine how the courts have approached the inherent tension in the human rights analysis between individual freedoms and the common good (or public interest,

terms which here will be used interchangeably). This paper will first provide an introduction to proportionality (the general judicial approach for balancing state action and human rights). It will then review some of the criticisms of this approach, in particular the criticism that the proportionality test "has neither consistency nor coherence" (Barak, 2012, p. 482). Once the general jurisprudential framework has been examined this paper will explore how this framework has been applied to state restrictions imposed in response to the SARS-CoV-2 pandemic in the UK. This analysis will confirm reflects the criticisms that the test may provides too much "interpretive room" (Iacobucci, 2003, p. 158). The analysis will also demonstrate, however, that a specific and detailed application of the proportionality test provides enough "interpretive room" to both serve the public interest and protect human rights.

2 Proportionality and its critics

This tension between individual freedoms and the public interest is manifest not only in the fact that many human rights are qualified rights (Sweet and Matthews, 2019, p. 32), but also in the judicial proportionality approaches found in human rights jurisprudence in countries around the world. In the UK, the Human Rights Act 1988 (HRA 1988) adopted the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), and in effect jurisprudence from the European Court of Human Rights in Strasbourg. The text of the ECHR, and the jurisprudence arising from Strasbourg and the UK Courts, balances the preservation of freedom and the necessity of limitations on these freedoms in the interest of the common good. Article 5, for example provides that "everyone has the right to liberty and security of person" (ECHR). This right however can be derogated in accordance with the law in several different circumstances, including "the lawful detention for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants. (ECHR, Art. 5(e)). The courts are therefore tasked with deliberating on when these freedoms are to be protected, and when it is a legitimate for a state to restrict these freedoms. The SARS-CoV-2 pandemic provides the opportunity to observe the judicial balancing of freedoms and the common good in relation to the limitation of freedom in the context of a public health crisis.

2.1 The proportionality test

Since the inception of human rights protections, courts have been developing judicial tests to determine where a freedom is being unduly restricted by the state. Jurisprudential consideration of Convention rights has developed the concept of proportionality. Barak defines proportionality in the human rights context "as the set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible" (2012, p. 3). The proportionality test is comprised of four stages wherein "the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether the objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and

(iv) whether, having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community" (*Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, para 20 (*Bank Mellat*)).

The proportionality test has been the subject of many learned commentaries. It would be beyond the scope of this endeavour to do an exhaustive review of the elements of the proportionality test. It is however, useful to engage in a brief review of the different branches of the analysis. In order to trigger the application of the proportionality test, it must first be established that a right has been limited. This step places the onus of proof onto the petitioner to establish that the state has imposed some restriction upon a protected right. At this stage of the analysis any state limitation in exercising a right is generally accepted and triggers the application of the proportionality test (Barak, 2012; Sweet & Matthews, 2019). Even in instances where the state has revoked the measure which infringed the right courts have been willing to apply the proportionality test to provide precedent for the future. In both *Philip v Scottish Ministers*, [2021] CSOH 32 (*Philip*) and *R. (on the application of Dolan) v Secretary of State for Health and Social Care*, [2020] EWCA Civ 1605 (*Dolan*) the court proceeded with the proportionality analysis even though some of the challenged measures had ceased or were soon to be revoked. Whilst the particular issue may be moot, these judgments provide guidance for legislators for future state actions.

2.1.1 The proportionality test – proper purpose

Once the burden of establishing that a right has been discharged, the first stage of the proportionality test is 'proper purpose' test. This stage of the analysis seeks to determine whether the legislative objective is appropriate. Barak categorises 'proper purposes' into four categories, "specific purposes appearing in general and specific limitation clauses" (2012, p. 260), "implicit purposes" (2012, p. 261), "protection of the rights of others" (2012, p. 262), and "public interest considerations" (2012, p. 265). These are useful categories as they allow for the categorisation of different legislative intentions by their sources. For example, "specific purposes appearing in general and specific limitation clauses" (2012, p. 260) are found within the relevant human rights document. In Article 9(2) the ECHR, for example, the right to "manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of

public order, health or morals, or for the protection of the rights and freedoms of others." There is therefore a built-in identification of measures that would be considered proper objectives for limiting the enumerated right. "Implicit purposes" (2012, p. 261) are objectives that may not explicitly appear in the text of a human rights document, but may be read in based upon the text in the document. As Barak notes, "constitutional silence should not be interpreted as a negative solution" (2012, p. 262). The "protection of the rights of others" (Barak, 2012 p. 262) recognises that the rights of one individual or group may have the effect of limiting the rights of other individuals or groups. This consideration is particularly acute when positive rights are invoked (Möller 2012, Stoyanova 2018, Mattei, Ugo, Albanese, Rocco Alessio and Fisher and Ryan 2019). Barak's final category of proper legislative purposes, "public interest consideration" (2012, p. 265) invokes many similar rights conflicts, as this category includes such jurisprudential land mines such as the interests of national security which has pitted fundamental rights against state interests in a world where terrorism is a continuing threat (*eg. R. (on the application of Begum) v Special Immigration Appeals Commission*, [2021] UKSC 7).

2.1.2 The proportionality test – rational connection

The second branch of the proportionality test is whether the legislative measure is connected to the legislative purpose. At this stage of the analysis the issue is not whether it is the best, most logical, or least intrusive means for achieving the objective. The concern is only whether there is a logical connection between the measure and the intended outcome. As Rivers explains "[t]he second stage of proportionality considers whether the decision, rule or policy under review is capable of pursuing the legitimate aim identified by the public authority" (2006, p. 196). There is, however, latitude built into this stage of the analysis. Indeed, the first two stages of the analysis function to ensure the "public duty to avoid illegitimate aims and ineffective means" (Rivers 2006, p. 198). As such, this test has been called a "threshold test" (Barak 2012, p. 315), rather than a "balancing test" (Barak 2012, p. 315). This test therefore requires only a logical factual linking between the measure imposed and the objective that it seeks to achieve. Later branches of the proportionality analysis is where a detailed balancing of the specific measures with the infringed right is more fully considered.

2.1.3 The proportionality test – necessity test

The third branch of the proportionality test has been called the "necessity test" (Barak, 2012), or the "less restrictive means test" (Barak, 2012). It has been argued that this test is an expression of the "Pareto efficiency" principle (Rivers 2006, Beatty 2004). The Pareto efficiency test asks whether a less intrusive the measure could be imposed "at no cost to anyone and to the benefit of one person." (Marzal 2017, p. 637). This formulation, however, has been criticised as "transforming proportionality to a technocratic norm" (Marzal 2017, p. 622) which does not allow for "fuzzy evaluative assessments" (Marzal 2017, p. 637) like the more philosophical deliberations of the values of a democratic society. Jurisprudence has also recognized that the less restrictive test does not allow for a court to substitute its measures without a level of consideration. The court should not create its own schemes that may achieve the aims of the measuresless impairment of the right. This was noted by Justice Sopinka in the Supreme Court of Canada in *R. v. Butler*, [1992] 1 S.C.R. 452 wherein "it is not necessary that the legislative scheme be the "perfect" scheme, but that it be appropriately tailored in the context of the infringed right" (p. 504-5). Whether once accepts the more factual formulation of the necessity test (Pareto efficiency), or a more incommensurable version of the test it is required that the state action is determined to be the least restrictive alternative in relation to the purpose of the measure.

2.1.4 The proportionality test – balancing test

The final branch of the proportionality test is the balancing test. At this final stage the court balances the benefits of the measures with the harm caused by the limitations of the rights. There is an abundance of academic analysis of this final test, which mirrors the larger criticisms of the overall proportionality test. This test has been described as a "balance between costs and benefits" (Cianciardo, 2010, p. 181), which invokes criticisms that these balancing measures cannot protect human rights so long as there is an "end which is important enough and a means that can be justified by that end" (Cianciardo, 2010, p. 182). This has led to efforts to formulate a doctrinal construction of the proportionality test (the balancing test in particular) to avoid the incommensurability of the balancing test (Barak 2010). Another critique is that when adjudicating the weight of human rights and individual freedoms the application of terms such as costs and benefits is not an exercise with "a common metric to assess the relative importance of

values or interests that come into conflict in rights adjudication" (Barak, 2012, p. 38). There is an alternative analysis proposed by former Supreme Court Justice Frank Iacobucci, emerging from the Canadian version of the proportionality test, which argues that the final 'balancing' test should rather be conceived as a stage where rights can be reconciled. He argues that rather than viewing the analysis as conflicting rights being balanced at the final stage (eg. the state interest in public health vs. the individual's freedom), it should instead be seen as a reconciliation between rights (eg. the right for the public to be protected from a pandemic needs to be reconciled with the individual's freedom) (Iacobucci 2003). Iacobucci's argument is therefore that the final stage of balancing allows for the specific factual circumstances to define the scope of the rights that need to be reconciled, allowing for "properly defining the scope of the right [which] avoids a conflict in [the] case" (*Trinity Western*, [2001] 1 S.C.R. 772, para 29).

2.2 Critiques of the proportionality test

The current endeavour may be to examine how the UK courts are deliberating on alleged human rights infringements in the context of the SARS-CoV-2 pandemic, however, a brief dalliance into the critiques of the proportionality test serves to better define the ongoing theoretical and philosophical debates. As has been foreshadowed by the above discussion, the proportionality test is familiar to quite a few Commonwealth, jurisdictions. As such, criticisms arising from the jurisprudence of countries other than the UK is instructive. Whilst it is a rough characterization, criticisms of the proportionality test can be mapped along a spectrum of certainty on one hand and 'incommensurability' on the other (to borrow the term from Barak (2012, p. 482). On the one hand there is a desire for rights to be fundamental, absolute, and inviolable. On the other there is the more complicated world where different rights conflict with the exercise of others. This is one common criticism of the proportionality test – balancing rights ultimately means that they are not being being protected as the violation of such rights can be rationalized (Cianciardo 2010, Ramshaw 2017, Tsakyrakis 2009). For rights to be meaningful they should be certain and absolute, not subject to qualification. Another criticism, specifically of the proportionality test itself, is that the balancing of rights and interests is an irrational exercise based upon no common criteria (Habermas 1996). As Barak summarises: The argument is that any act of balancing between competing interests is based entirely on intuition

and improvisation. It lacks any rational foundation. It is not based on any rigorous criteria. In addition, it lacks an objective component and instead relies entirely on subjective considerations of the person conducting the balance (be it a legislator, judge, or a member of the executive branch). herefore, similar cases receive different solutions and therefore the notion of balancing is arbitrary (2012 p. 484-485) There are rejoinders to these criticisms, which to describe fully would also be beyond the scope of this particular exploration. One defence, from a Justice who is familiar with these determinations, was discussed earlier. As Justice Iacobucci argues, one should not perceive these deliberations as balancing conflicting rights (limiting one right for another), but reconciling rights within their particular scope within the specific facts of the case which he believes "allows courts to make case-specific determinations without sacrificing legal precedent or principle" (2003 p. 156). Whatever the criticisms and defences, however, the proportionality test – in its different versions across jurisdictions – is an essential analytical model for the deliberation of human rights issues and will continue to be the subject of debate so long as human rights are under judicial consideration.

3 UK measures in response to SARS-Covid-2 and Human Rights

The word 'unprecedented' has been uttered an inestimable number of times since the inception of the SARS-CoV-2 pandemic. In response to this global pandemic the public health measures imposed by government were greeted with a rather polarized response. Indeed, this is not surprising as there has been few global events that have been met with such unprecedented (it is a rather appropriate word) state action affecting the lives of millions. The measures introduced in response to the pandemic included many measures that had a direct effect on individual liberties from home 'lockdowns', curfews, mask mandates, business closures, restrictions on assembly, and restrictions on free expression. These restrictions on individual rights have resulted in multiple human rights challenges. As such, these cases provide a unique window into how the courts have balanced individual freedoms and restriction imposed in the name of public health.

3.1 R. (on the application of Dolan) v Secretary of State for Health and Social Care (Dolan)

The *Dolan* case is a general challenge against the panopoly or restrictions brought in by regulation in March 2020 and July 2020 under the Public Health (Control of Disease) Act 1984, as amended by the Health and Social Care Act 2008 (Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350), Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations (SI 2020/684). These regulations included the mandatory closing of non-essential businesses, the closure of places of worship, prohibitions against persons leaving their houses, and prohibitions on public gatherings. Criminal penalties were applied to these offences, however, the regulations included an exception of reasonable excuse. It is notable that the procedural background of this case is an application for judicial review. *Dolan* was an appeal of a Queen's Bench decision refusing permission for judicial review. The Court of Appeal, however, has the discretion to determine the claim itself rather than submit it to the High Court. The appellants had challenged on three grounds. First, that the regulations were *ultra vires*. Second, that the regulations were unlawful under public law. Thirdly, that they violated Convention rights under the HRA 1998. The only matters that will be examined here are the Convention grounds. While various Convention challenges were in fact academic, as the measures were no longer in force, the court addresses them as they had heard the full arguments (para 42).

The regulations were challenged based on Article 5 (personal liberty), Article 8 (respect for private and family life), Article 9 (freedom of religion), Article 11 (right to peaceful assembly), First Protocol Article 1 (peaceful enjoyment of possession), and First Protocol Article 2 (right to education). Chief Justice Lord Burnett of Maldon, Lord Justice King and Lord Justice Singh dispose of the challenge to the home 'lockdown' regulation as a violation of Article 5 by finding that these orders were not indeed a deprivation of liberty under Article 5 as they were "subject to numerous, express exceptions, which were non-exhaustive, and the overriding exception of having a reasonable excuse" (para 93). According to this analysis there is not even a requirement to engage in analysing the express exemptions in Article 5(1)(e) relating to the controlling infectious disease and engage in a proportionality analysis. They also determined that the regulations did interfere with respect for private and family life (Article 8). As a qualified right they

found that the government had to be afforded a "wide wide margin of judgement"(para 97) and dispensed with the proportionality analysis in a rather perfunctory manner. The court found that "there can be no doubt that the regulations did constitute an interference with article 8 but it is clear that such interference was justified under article 8(2). It was clearly in accordance with law. It pursued a legitimate aim: the protection of health. The interference was unarguably proportionate" (para 96). Article 9 (freedom of religion) is not dealt with as it is determined to be an academic matter as the restrictions had already been suspended, though they note that another case on this issue, *R. (on the application of Hussain) v Secretary of State for Health & Social Care*, [2020] EWHC 1392, was pending in the High Court. Mr. Hussain later lost his application for interim relief on the grounds that the infringement of his Article 9 rights was not disproportionate (para. 24).

The court also determines that the infringement of Article 11 (right of peaceful assembly) rights was proportionate considering the exceptions provided, and the "powerful public interests which lay behind" (*Dolan*, para. 103) the restrictions. The nature of the infringement of the rights in relation to Article 1 of the First Protocol (peaceful enjoyment of possession) is characterized as a control of use matter, and not the deprivation of property. This characterization, and the "exceptional situation created by the pandemic" (para 108) led to the disposition that there was no disproportionate interference with Article 1. They also find that the measures implemented related to Article 2 of the First Protocol (right to education) are also not in violation as "article 2 of the First Protocol, reflecting a theme which runs throughout the Convention, envisages a fair balance having to be struck between the rights of the individual and the general interests of the community. In the exceptional circumstances of the pandemic, there is no arguable ground on which a court could interfere with the actions of the Government in this respect" (para 114). While procedurally *Dolan* is an appeal to a decision refusing judicial review, and thus squarely within administrative law, the case has been subsequently used as precedent in relation to its treatment of Convention rights (*Leigh, Francis*). The application of full proportionality test, however, is notably absent.

3.2 *Leigh v Commissioner of Police of the Metropolis [2021] EWHC 661 (Admin)*

In *Leigh* the applicants requested an interim declaration relating to the Metropolitan Police Service's decision prohibiting a vigil to commemorate the tragic passing of Sarah Everard in Clapham Common. The applicants challenged the decision on Article 10 (freedom of expression) and Article 11 (freedom of assembly and association). The court declines to make an interim declaration primarily on the administrative law grounds that the communication do not amount to a decision, and is therefore not reviewable under judicial review (para 27). The court does however, relies on *Dolan* in relation to the Article 10 and 11 challenges:

In *R (on the application of Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605*, the Court of Appeal had to consider, amongst other things, the compatibility of an earlier version of the Regulations with provisions of the Human Rights Act. The court dealt with Article 11 at paras. 101 to 106. It is common ground between the parties in these proceedings that the reasoning of the Court of Appeal in those passages applies equally to the regulations with which I am concerned today. The court rejected the submission that the regulations were inconsistent with the rights conferred by Article 11 to peaceful assembly and association. They did so on the basis that the regulations provided a general defence of "reasonable excuse" (para. 101).

The court therefore relies on *Dolan* to dispose of the Article 10 and 11 challenges with very little discussion of the nature of the impairment of the right, or whether the measure is proportionate.

3.3 *Free Speech Union v Office of Communications [2020] EWHC 3390 (Admin)*

The *Free Speech Union* case is an application for judicial review of Guidance Notes to broadcasters issued by Ofcom relating information about the SARS CoV-2 pandemic. As in *Dolan* an *ultra vires* argument is made, in addition to an Article 10 (freedom of expression) challenge. The Communication Act 2003, s. 318 allows for Ofcom to set standards in programming to secure standards objectives. One of these objectives is to set standards relating to preventing "the inclusion of advertising which may be misleading, harmful or offensive in television and radio services" (Communications Act 2003, s. 318(h)). The Ofcom Guidance Note states that broadcasters must take care when broadcasting " statements that seek to

question or undermine the advice of public health bodies on the Coronavirus, or otherwise undermine people's trust in the advice of mainstream sources of information about the disease" (Ofcom, 2020, p. 2). The broadcaster, however, can "editorial decisions about how to provide adequate protection to the audience in the circumstances" (Ofcom, 2020, p. 2). In light of the content of the Guidance, Mr. Justice Fordam concludes that the guidance was "legitimately and squarely within Ofcom's vires and squarely compatible with Article 10 freedom of expression under the Human Rights Act and at common law" (para 30). It should be noted that not caselaw is cited in support of this conclusion, and no fulsome proportionality analysis is undertaken in support of this conclusion. As in *Dolan* this is an application for judicial review and therefore has a different legal burden than human rights claims brought through different procedural mechanisms. The burden in the judicial review is whether the court finds a "realistic prospect that [the reviewing court] claim would grant the declarations that were sought on the judicial review claim form" (para 32). This presents a strange Catch-22. The court hearing the application for the judicial review is making this determination without a fulsome analysis of the legal tests that would likely have been applied later in a full judicial review.

3.4 *Philip v Scottish Ministers [2021] CSOH 32*

Philip is the judicial review (not just the application for judicial review) of Scotland's closure of places of worship in response to the SARS-CoV-2 pandemic. The measures, brought in under the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3) mandated the closure of places of worship in areas designated Level 4, excluding for a few exceptions (funerals, a commemorative event, a marriage ceremony of no more than 5 persons, and essential voluntary services) (Regulation 4(b) Schedule 5 IA). Criminal penalties apply to the contravention of the regulations. The measures were challenged as *ultra vires* the Scottish Parliament, and on the grounds that the measures violated Articles 9 and 11 of the ECHR. The challenge failed on the *ultra vires* argument, which is not going to be reviewed in detail here. On the Articles 9 and 11 challenge Lord Braid held that the measures were not proportional in respect to the freedom to manifest religious belief (Article 9(2)). This conclusion is based upon Lord Braid's fulsome application of the proportionality test. First, he finds that the measures pass the

legality test and are indeed prescribed by law, "are in precise terms and are not arbitrary in their application"(para 98). He finds that the measures have the legitimate aim to reduce the spread of SARS-CoV-2 virus. On the issue of whether the measures are proportionate he applies the *Bank Mellat* proportionality test. First, Lord Braid holds that the measures have a proper purpose as formulated in *Bank Mellat*, as the protection of the public from disease is an important enough objective to justify the limitation of rights (para. 101). On the second branch of the test Lord Braid finds that measures reducing human interaction are rationally connected with the objective of reducing transmission of the SARS COV-2 virus (para. 103). On the third branch of the *Bank Mellat* test Lord Braid has more difficulty with the measures. He finds that the respondents failed to demonstrate how less restrictive measures could not have achieved the objectives. In particular, Lord Braid identified that restriction on private prayer in places of worship as unjustifiable (para 115). On the fourth branch of the test, the balancing or proportionality arm, he finds that the measures have a disproportionate effect, in particular the restrictions on "all forms of worship, including private prayer, communion, confession and baptism"(para 126). Lord Braid's conclusion that the measures did indeed violate Article 9, however, do not lead him to a remedy which had the effect of overriding the regulations. Instead, he allows time for the respondents to amend the regulations in light of his decision (para 134). When the full proportionality analysis is applied in the *Philips* case it is not so easy for the court to dismiss the more particular effects of the enacted measures on the affected rights.

4 Conclusion

The SARS-CoV-2 pandemic has presented unprecedented challenges. In the name of public health, we have seen extraordinary measures implemented by the government to control the spread of the pandemic. Many of these measures have had a direct effect on individual human rights. The judicial treatment of the cases arising from these measures provides an interesting window into how the court will balance individual rights with the public interest in the face of a crisis. Human rights jurisprudence provides a rigorous, though not universally liked, test to assist the balancing of human rights and the public interest. The above analysis examines the critiques of this proportionality test, and in particular the criticisms

that (1) that the ability of individual rights to be qualified or 'balanced' fundamentally undermines the integrity of those rights, and (2) that balancing lacks consistency and coherence (Barak, 2012). An analysis of the above UK cases on government measures in response to the SARS-CoV-2 pandemic leads to a rather different preliminary conclusion. In *Dolan*, it is not the proportionality test that allows for Convention rights to be abrogated, but rather the failure to apply the proportionality test in a specific and rigorous way. *Free Speech Union* illustrates this problem by dismissing a claim without a rigorous analysis, as it is merely an application for judicial review. The danger of this procedural loophole is that a decision like *Dolan* (an application for judicial review) can be used as precedent for cases like *Leigh*, which avoids the particular and rigorous application of the proportionality test to the specific issue. When the court fully applies the proportionality test, as in *Philip*, we see a different outcome with the measure failing to pass the proportionality test.

In times of emergency rights need to be protected even more rigorously (Inter-Parliamentary Union and United Nations, Human Rights (Office of the High Commissioner), 2016). When the court applies the proportionality test thoroughly in *Philips* it provides a more nuanced and robust protection of fundamental rights than was afforded in *Dolan*. The fact that the legislative objective is a worthy one should not preclude a more rigorous analysis of the measures impact on rights. *Philips* does not, however, overturn the legislative measure. The decision does put the government on notice that the measures as applied are inconsistent with Convention rights. The full application of the analysis is not therefore a substitution of the court's decision for that of Parliament. It is instead, as Iacobucci describes "a vital exercise since it both invites and facilitates dialogue between the legislative and judicial branches of government"(2003, p. 162). While the critics of the proportionality test speak of it being too subjective and "incommensurable", an analysis of *Dolan*, *Leigh*, *Free Speech Union* and *Philips* demonstrates that it may indeed be the failure to apply the proportionality test in a rigorous way that leads to the erosion of individual freedoms. The problem then, may not be in the proportionality test, but rather in the failure of courts to apply it in a specific and meaningful way.

References:

- [1] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39
- [2] Barak, A., *Proportionality: Constitutional Rights and their Limitations* (Cambridge Studies in Constitutional Law), Cambridge University Press, 2012.
- [3] Cianciardo, J. The Principle of Proportionality: The Challenge of Human Rights, *Journal of Civil Law Studies*, Vol. 3, No.1, 2010, pp. 177-186.
- [4] Beatty, D M., *The Ultimate Rule of Law*, Oxford: Oxford University Press, 2004
- [5] Communication Act 2003, c. 21
- [6] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.
- [7] *Free Speech Union v Office of Communications [2020] EWHC 3390 (Admin)*
- [8] Habermas, J., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, MA: The MIT Press, 1996.
- [9] Health and Social Care Act 2008 (Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350)
- [10] Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations (SI 2020/684)
- [11] Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3)
- [12] Human Rights Act 1988, c.42
- [13] Iacobucci, F., Reconciling Rights"" the Supreme Court of Canada's Approach to Competing Charter Rights, *The Supreme Court Law Review: Osgoode's Annual Constitutional Conference*, Vol. 20, 2003, p. 137-165).
- [14] Inter-Parliamentary Union and United Nations, Human Rights (Office of the High Commissioner). *Human Rights: Handbook for Parliamentarians No. 26*, 2016. Retrieved 03.05.2020 from <https://www.ohchr.org/documents/publications/handbookparliamentarians.pdf>
- [15] *Leigh v Commissioner of Police of the Metropolis* [2021] EWHC 661 (Admin)
- [16] Marzal, T., From Hercules to Pareto: Of bathos, proportionality, and EU law, *International journal of constitutional law*, Vol. 15, No. 3, 2017, pp. 621-648.
- [17] Mattei, U, Albanese, R A, Fisher, R J, Commons as possessions: The path to protection of the commons in the ECHR system, *European law journal : review of European law in context*, Vol. 25, No. 3, 2019, pp. 230-250.
- [18] Minenko, M., A tale of two cities: 'Spanish Flu' mask laws in Alberta, Canada, *King's Law Journal*, Vol. 32, No. 1, 2021, pp. 168-177.
- [19] Möller, K., *The Global Model of Constitutional Rights*, Oxford University Press, 2012.
- [20] Ofcom, *Guidance Note*, 27 March 2020. Retrieved 02.05.2020 from https://www.ofcom.org.uk/data/assets/pdf_file/0018/205713/annex-a-important-guidance-broadcast-content-on-coronavirus,-27-march-2020.pdf
- [21] *Philip v Scottish Ministers* [2021] CSOH 32
- [22] Public Health (Control of Disease) Act 1984, c.22
- [23] Ramshaw, A. The case for replicable structured full proportionality analysis in all cases concerning fundamental rights, *Legal Studies*, Vol. 2018, 2018, pp. 1-23.
- [24] Rivers, J., Proportionality and Variable Intensity of Review, *Cambridge Law Journal*, Vol. 65, No. 1, 2006, pp. 174-207.
- [25] *R. (on the application of Begum) v Special Immigration Appeals Commission*, [2021] UKSC 7
- [26] *R. (on the application of Dolan) v. Secretary of State for Health and Social Care [2020] EWCA Civ 1605*
- [27] *R. (on the application of Hussain) v Secretary of State for Health & Social Care*, [2020] EWHC 1392
- [28] *R. v. Butler*, [1992] 1 S.C.R. 452
- [29] Stoyanova, V. The Disjunctive Structure of Positive Rights under the European Convention on Human Rights, *Nordic journal of international law = Acta scandinavica juris gentium*, Vol. 87, No. 3, 2018, p. 344-392.
- [30] Sweet, A, and Mathews, J., *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach*, Oxford University Press, 2019.
- [31] *Trinity Western*, [2001] 1 S.C.R. 772
- [32] Tsakyrakis, S. Proportionality: An assault on human rights, *International Journal of Constitutional Law*, Vol. 7, No. 3, 2009, p. 468-493.