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จะมีสิ่งใดเสียหายหรือไม่ หากหลักความได้สัดส่วน
มิได้มีสถานะเป็นฐานทั่วไปแห่งการควบคุมความชอบ
ด้วยกฎหมายของการกระทำทางปกครอง*

Is Anything Lost by not Having Proportionality
as a General Head of Judicial Review of
Administrative Action?

วรพล มลสุขุม[†]

อาจารย์ประจำ คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย

* I would like to thank Assistant Professor Piruna Tingsabadh, my former teacher at Thammasat University who has made a significant contribution to my passion in writing this article. It is common for the study of a country's legal system to start with its domestic laws. This included my undergraduate study at Thammasat University, which focused on Thai law. Only a few optional courses offered lessons on foreign law. One was the European Union ('EU') Law course, taught by Assistant Professor Piruna Tingsabadh, in which EU law was studied as an aspect of international law, as a law that operated the relationship and interaction between the European Union as a supranational organisation and its member states. However, Assistant Professor Piruna taught her students more than that. She also discussed EU law as a distinct legal order which has its own way of distinctive application and interpretation of law. Apart from this, both in and out of class, Assistant Professor Piruna always discussed concepts of French law with her students, since she had graduated in France. I noticed that her eyes glistened when she talked about EU and French law as a comparative approach to Thai law. Her passion for comparative law was transferred to all her students, including me, so much so that my own interest in comparative law led me to Oxford, where I took the (English) Administrative Law and Comparative Public Law courses for my Master's study. Furthermore, in my doctoral study, I conducted research to compare the different substantive understandings of the principle of legality, which is related to legal culture, and the determination of the grounds of judicial review between the English and Australian law.

Day by day, I find comparative law to be just as important and fascinating as I did in those undergraduate days. Since Assistant Professor Piruna has recently become a healthy sixty years old, I would like to take this opportunity to thank her by writing this reflective article with the aim of demonstrating the benefits I gained from studying law in this comparative aspect.

[†] LL.B. (Thammasat University, 1st Class Honours), Thai Barrister at Law, MJur and DPhil, Corpus Christi College, University of Oxford



Voraphol Malsukhum

Lecturer, Faculty of Law, Chulalongkorn University

วันที่รับบทความ 4 ธันวาคม 2562; วันที่แก้ไขบทความ 17 พฤษภาคม 2563; วันที่ตอบรับบทความ 24 พฤษภาคม 2563

บทคัดย่อ

บทความนี้ศึกษาข้อดีและข้อเสียของการที่หลักความได้สัดส่วน (proportionality) มีหรือไม่มีสถานะเป็นฐานทั่วไปแห่งการควบคุมความชอบด้วยกฎหมายของการกระทำทางปกครอง (ground of judicial review) ในระบบกฎหมายปกครองอังกฤษ สหภาพยุโรป และฝรั่งเศส ประการแรก บทความนี้ชี้ให้เห็นถึงประโยชน์ของการที่หลักความได้สัดส่วนมีสถานะเป็นฐานทั่วไปแห่งการควบคุมความชอบด้วยกฎหมายของการกระทำทางปกครองในระบบกฎหมายสหภาพยุโรปในหลายแง่มุม อาทิ การมีระเบียบวิธีการที่ดีกว่า และความหลากหลายที่มากกว่าในการที่ศาลจะเข้าไปควบคุมตรวจสอบการกระทำทางปกครองที่มีชอบด้วยกฎหมาย อย่างไรก็ตาม แม้ในระบบกฎหมายอังกฤษและฝรั่งเศส จะไม่ใช่หลักความได้สัดส่วนในฐานะฐานทั่วไปแห่งการควบคุมความชอบด้วยกฎหมายของการกระทำทางปกครอง ทั้งสองระบบกฎหมายก็มีกลไกอื่นที่ถูกนำมาใช้แทนหลักความได้สัดส่วน ได้แก่ หลักความมีเหตุผล (rationality) และการควบคุมอย่างยิ่งยวด (maximum control) แม้กระนั้น บทความนี้ชี้ให้เห็นต่อไปว่ายังมีประโยชน์บางประการที่มากกว่าอยู่ดี หากหลักความได้สัดส่วนมีสถานะเป็นฐานทั่วไปแห่งการควบคุมความชอบด้วยกฎหมายของการกระทำทางปกครอง อาทิ การเชิดชูหลักความมั่นคงแน่นอนแห่งนิติฐานะ (legal certainty) และความโปร่งใสของการใช้อำนาจตุลาการ (judicial accountability) ดังนั้น จึงไม่อาจกล่าวได้ทั้งหมดว่า ไม่มีอะไรเสียหายเลยจากการที่หลักความได้สัดส่วนมิได้มีสถานะเป็นฐานทั่วไปแห่งการควบคุมความชอบด้วยกฎหมายของการกระทำทางปกครองในระบบกฎหมายปกครองของอังกฤษและฝรั่งเศส

คำสำคัญ: ฐานทั่วไปแห่งการควบคุมความชอบด้วยกฎหมายของการกระทำทางปกครอง หลักความได้สัดส่วน การควบคุมอย่างยิ่งยวด หลักความมีเหตุผล กฎหมายปกครองอังกฤษ กฎหมายปกครองของสหภาพยุโรป กฎหมายปกครองฝรั่งเศส

Abstract

This article investigates the advantages and disadvantages on whether to have or not to have proportionality as a general head of judicial review in English, European Union and French administrative law. Firstly, it demonstrates that having proportionality

as a general head to conduct judicial review is advantageous for EU law in some aspects, namely that it provides a better methodology and variation in undertaking a review. On the other hand, although the English and French systems do not apply proportionality as a general head of judicial review, they have other mechanisms in place for the courts to conduct an intensive review of the administrative decisions respectively, rationality and maximum control. Nevertheless, there are still advantages for claiming that proportionality is preferred over the other two equivalent grounds, for example the matters of legal certainty and judicial accountability. Therefore, it is incorrect to say that ‘nothing (at all)’ is lost in England and France by not having proportionality as a general head of judicial review.

Keywords: general head of judicial review of administrative action, proportionality, maximum control, rationality, English administrative law, European Union administrative law, French administrative law



1. Introduction

It is commonly acknowledged that, since each legal system has a distinctive way of applying and interpreting legal doctrines, a study of the law needs to begin with the domestic legal system. This applies to legal education in any country. Nevertheless, the importance and benefit of comparative law has gradually become universally accepted among legal scholars on the ground that it *'yield[s] a deeper understanding of our legal order'*.¹ As Zweigert and Kotz observe, *'no study deserves the name of a science if it limits itself to phenomena arising within its national boundaries'*.²

The purpose of this article is to elaborate the contribution of comparative law to the advantages and disadvantages of having proportionality as a general head of judicial review of administrative action, which is one of the most highlighted administrative law topics in many legal systems.

In order to ensure the accountability of administrative bodies' performance,³ the courts in any legal system need to take approaches through various grounds of judicial review to determine the legality of an administrative action. Having recognised that the determination of the grounds of judicial review can be different between legal systems due to countries' diverse legal culture,⁴ scholars have begun to take an interest in this area of study.⁵

The possible application of proportionality as an approach to determine the lawfulness of an administrative action has become one of the most debatable issues in recent years.⁶ Based on the German legal system, there is a series of questions to

¹ Edward J. Eberle, "The Method and Role of Comparative Law," Washington University Global Studies Law Review, Vol. 8, No. 3, 451, p.451 (2009).

² K. Zweigert and H. Kötz, An Introduction to Comparative Law, 3rd edition (Oxford: Clarendon Press, 1998).

³ Regarded as one of the main tasks of administrative law (Peter Cane, Administrative Law, 5th edition (Oxford: Oxford University Press, 2011), p.5.

⁴ See more in Voraphol Malsukhum, "Legal Culture, Legality and the Determination of the Grounds of Judicial Review in England and Australia," (DPhil, University of Oxford, 2019).

⁵ For example, Paul Craig, "Proportionality Rationality and Review," New Zealand Law Review, Issue 2, p.265 (2010).

⁶ For example, Cora Chan, "Proportionality and Invariable Baseline Intensity of Review," Legal Studies, The Society of Legal Scholars (SLS) Annual Conference, Bristol UK, 11-14 September In Legal Studies, Vol. 33, No. 1, pp. 1 – 21 (2013). accessed 15 May 2020, from <https://papers.ssrn.com/sol3/papers.cfm?>

consider whether an administrative action is proportionate or not. Firstly, the Sufficiency Question asks if the measure is sufficient to achieve its aim and secondly, the Necessity Question requires a consideration of whether or not the measure taken by the public administration is necessary. Thirdly, the question of the Narrow Sense of Proportionality considers whether there is a balance between burdening an individual and fulfilling the public administration.⁷ An administrative decision, particularly based on the exercise of discretion is regarded as being proportionate and hence, lawful, if it is considered to be sufficient, necessary, and balanced in terms of supporting individuals' rights and simultaneously fulfilling the public administration. Conversely, an action that is insufficient, unnecessary or unbalanced is considered to be disproportionate and hence, unlawful.

As noted, the acceptance and application of proportionality as a ground of judicial review has been adopted differently in different legal systems. For example, while it becomes a general head of judicial review in the EU law, it does not in France and the UK. This article investigates the advantages and disadvantages in such difference between these jurisdictions.⁸

In terms of the EU law, proportionality is a general ground of judicial review in which the European Union courts can review the merits of the decisions taken by

abstract_id=2180463.; Cheng-Yi Huang and David S Law, "Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China," in Francesca Bignami & David Zaring, Comparative Law and Regulation, (Cheltenham: Edward Elgar Publishing, 2016).

⁷ See more Matthias Klatt and Moritz Meister, The Constitutional Structure of Proportionality, (Oxford: Oxford University Press, 2012); Nikolaus Marsch and Vanessa Tünsmeier. "The Principle of Proportionality in German Administrative Law," in Sofia Ranchordás, and Boudewijn Willem Nicolaas de Waard, The Judge and the Proportionate Use of Discretion: A Comparative Study, (Oxford: Routledge, 2016).

⁸ It is recognised that the analysis will become further well-rounded when the German genealogy of proportionality is examined, since this has influenced the European Court of Human Rights, and has thereby been diffused to the UK and France as members of the EU. However, this issue was not examined in this article for two main reasons. Firstly, the EU law has more 'official' influence on the UK and France than the German law based on its status as a supranational organisation. Secondly, the inclusion of another legal system, particularly the German law, may complicate the article's purpose to simply demonstrate the functional benefits of studying law using comparative methodology. Nevertheless, I definitely plan to study the German originality of proportionality and its adoption into Thai law in the near future. Another *caveat* is that it is recognised that the analysis of the different determination of the grounds of judicial review between legal systems will be complete when it is connected to the different constitutional settings and legal cultures of their legal systems. However, this is not the scope of this article, but another work of mine. See Voraphol Malsukhum, *supra* note 4.



Member States or the Commission.⁹ It is argued that this European Union legal system is more desirable than the English and French systems, where proportionality is not a general head of judicial review.¹⁰ Following this introduction, the mechanism and advantages of proportionality applied in the European Union will be examined. Then, the English and French systems will be analysed in the third and fourth part of the article in order to show that, although neither of these systems applies proportionality as a general head of judicial review like EU law, they do provide other mechanisms for the courts to make an intensive review of the merits of the decisions taken by public authorities, namely, rationality and maximum control.¹¹ As a result, the *status quo* in England and France on judicial review of the substantive exercise of discretion cannot be regarded as completely undesirable.

Nevertheless, there are still some advantages for claiming that proportionality is preferred over rationality and maximum control, the equivalent grounds applied in England and France. Therefore, it is incorrect to say that “*nothing (at all)*” is lost in England and France by not having proportionality as a general head of judicial review or administrative action. In essence, legal certainty and judicial accountability are examples of the advantages of proportionality being a general head of judicial review in the EU law as opposed to the English and French law. This article will end with some thoughts extracted from the analysis, particularly of the comparative methodology.

2. EU Law

Historically, proportionality was imported into the EU law from the German legal system during the 1960s and developed as a general principle¹² based on asking a series of questions to consider proportionality, as explained above, namely the

⁹ See footnote 1 in Chapter 19 of Paul Craig, EU Administrative Law, 3rd edition (Oxford: Oxford University Press, 2018), p.642; Paul Craig, Administrative Law, 8th edition (Oxford: Sweet & Maxwell, 2016), [21-027].

¹⁰ For English law, see Paul Craig, Administrative Law, [21-001]; for French law, see Neville L. Brown and John Bell, French Administrative Law, 5th edition (Oxford: Clarendon Press, 1998), pp.239-267.

¹¹ The applications, advantages, and disadvantages of these grounds of judicial review are discussed below.

¹² The case concerning the European Coal and Steel Community (ECSC), for example, *Case 8/55 Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community* [1954-6] ECR 292 and *Case 19/61 Mannesmann AG v High Authority* [1962] ECR 357. Paul Craig, *supra* note 9, p.643.

Necessity Question, Sufficiency Question and Narrow Sense of Proportionality.¹³ Proportionality is applicable to both the main organs of the European Union, namely, the Commission and the Member States, as a general principle of law in order to control administrative actions when acting within the scope of EU law.¹⁴

The application of proportionality is argued to be advantageous because it is accompanied by reviews of varying intensity.¹⁵ This variety of intensity is commensurate to all the three mentioned steps of proportionality.¹⁶ For example, the courts will apply a relatively low level of intensity when the case concerns a policy choice on issues involving political, economic or social aspects, which require a complex assessment.¹⁷ The claimants will have to show manifest disproportionality to the courts, which is relatively difficult in areas such as common policies on agriculture and fisheries,¹⁸ transport,¹⁹ anti-dumping²⁰ etc. This approach implies that the courts would respect greater discretionary areas of judgement when dealing with a public body.²¹ On the other hand, the courts tend to apply proportionality more intensively to cases related to the fundamental rights recognised by the EU law, as well as other important rights, such as the right to life, liberty or freedom of speech, than other rights such as rights related to property, profession, trade or occupation.²²

This is similar to decisions in cases where a party is Member State. The Court's review will vary in intensity, depending on the nature of the decision as well.²³ For

¹³ *Ibid*, p.643.

¹⁴ *Ibid*, p.642.

¹⁵ *Ibid*, p.644; Gráinne de Búrca, "The Principle of Proportionality and its Application in EC Law," Yearbook of European Law, Vol.13, Issue 1, 105, pp.105-150 (1993); M Elliott and Jason Varuhas, Administrative Law: Text and Materials, 5th edition (Oxford: Oxford University Press, 2017), pp.275-278.

¹⁶ Paul Craig, *supra* note 9, p.644; Paul Craig, *supra* note 9, [21-041].

¹⁷ For example, *Case C-491/01 R v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453. See Paul Craig, *supra* note 9, pp.644-655.

¹⁸ For example, *Case C-331/88 Rv Minister for Agriculture, Fisheries and Food, ex p Fedesa* [1990] ECR I-4023. See Paul Craig, *supra* note 9, p.645.

¹⁹ For example, *Case C-27/00 R (on the application of Omega Air Ltd) v Secretary for the Environment, Transport and the Regions* [2002] ECR I-2569. See Paul Craig, *supra* note 9, p.650.

²⁰ For example, *Case T-87/98 International Potash Company v Council* [2000] ECR II-3179. See Paul Craig, *supra* note 9, pp.650-651.

²¹ *Ibid*, pp.644-645.

²² For example, *Case 415/05 P Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351. See Paul Craig, *supra* note 9, pp.656-663.

²³ *Ibid*, Chapter 20.



example, the courts will closely scrutinise public health or the free flow of goods, persons, establishments and services,²⁴ but they will be more flexible in cases concerning the sensitivity of national values.²⁵ In reaching decisions, the principle of proportionality covers a spectrum that ranges from a very deferential approach.²⁶

Apart from a range of various intensities to be appropriately applied to a certain kind of case as exemplified above, the proportionality test is also desirable because it provides a well-structured form of inquiry, which demands that decision-makers justify their behaviour.²⁷ At the same time, if the court is minded to overturn the decision, it will have to do so in the same three questions inquiry. This also relates to enhancing the way in which the court provides evidence. The court would be more comfortable and secure when intervening in the merits with an appropriate foundation of facts, evidence and reasons, especially in cases concerning the important rights of citizens. A well-structured inquiry of proportionality fits this process, since it reminds the court not to trespass into the boundary of the executive power.²⁸

In essence, proportionality as a general head of judicial review in EU law is advantageous on two main grounds. Firstly, it constitutes a better methodology in the form of a structured inquiry to undertake a substantive review. Secondly, it enables the court to scrutinise the administrative action with appropriate intensity.

3. English Law

The starting point of claiming that the European Union system applying proportionality is preferable to the English law is derived from the position of English judicial review on the ground of irrationality.²⁹ The default position of rationality review is the *Wednesbury* doctrine, which Lord Greene described in the case that the court would intervene when ‘*there may be something so absurd that no sensible*

²⁴ *Ibid*, pp.670-676.

²⁵ *Ibid*, pp.684-687.

²⁶ *Supra* note 7.

²⁷ Paul Craig, *supra* note 9, [21-039]-[21-040]; M Elliott and Jason Varuhas, *supra* note 15, pp.270-275.

²⁸ *Ibid*.

²⁹ One of the three basic grounds to review illegal administrative actions, the other two being illegality and procedural impropriety. See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 HL, 410-411.

person could ever dream that it lay within the powers of the authority'.³⁰ This traditional *Wednesbury* doctrine is unreasonably rigorous because it demands a very preserve decision before the courts to intervene.³¹ It makes it very difficult for a claimant to win the case. This is probably because of (excessive) respect to the choice of decision-makers based on their expertise and democratic legitimacy.³² The court considers the fact that the executive derives its powers from the Parliament, the supreme authority in the legal system. Thus, the *Wednesbury* test is argued to be undesirable compared to proportionality in the EU law.

Nevertheless, the notion that the English system reviewing the substantive exercise of discretion is completely undesirable is incorrect for two main reasons. Firstly, there are some areas where proportionality is applied in English law. For example, proportionality is applied in the cases where the decision-makers are acting within the scope of EU law, as described above.³³ Apart from that, when the Human Rights Act 1998 (HRA) was adopted, it incorporated a list of rights contained in the European Convention on Human Rights, to become actionable in England as domestic law. Consequently, the domestic courts can review a decision when public authorities' actions breach the convention rights, and then quash it as being unlawful. Also, the HRA also brought the principles and jurisprudence of the European Convention on Human Rights into the domestic law in order to protect human rights.³⁴ It is clear from the jurisprudence of the European Court of Human Rights (Strasbourg Court) that proportionality is inherent as a general principle of law.³⁵

³⁰ *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 CA, 229.

³¹ Paul Craig, *supra* note 9, [21-001], [21-007]; Peter Cane, *supra* note 3; William Wade and Christopher Forsyth, *Administrative Law*, 11th edition (Oxford: Oxford University Press, 2014), p.303; M Elliott and Jason Varuhas, *supra* note 15, p.263; Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* admitted that this doctrine 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."

³² Peter Cane, *supra* note 3, p.188.

³³ Paul Craig, *supra* note 9, [21-027]-[21-030].

³⁴ By Article 2 (1) which stipulates that "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights..."

³⁵ Paul Craig, *supra* note 9, [20-044].



Consequently, proportionality has been imported into the English law³⁶ and applied in three types of cases.³⁷ Firstly, it is applied in cases where the decision-makers are acting within the scope of the EU law.³⁸ Secondly, it is applied in cases regarding a breach of the convention rights. For example, in *Prolife*, the issue was whether freedom of speech was qualified by Article 10 (2) or not. The court then considered whether the limitation was proportionate or not.³⁹ Thirdly, it is applied in cases concerning legitimate expectations where decision-makers have tried to change their given representation or promise by claiming the public interest and the courts consider whether it is proportionate or not.⁴⁰

When applying proportionality in these three areas, it has also been methodically stated as a series of questions as it is in the EU law.⁴¹ Therefore, in these kinds of case, the benefits of proportionality, namely, various intensities and a well-structured inquiry, are also provided in English law.⁴² For example, the courts will make a more intensive review of cases concerning fundamental rights.⁴³ Indeed, they will further apply different intensities among those same right-based cases in different circumstances. For example, they will review the limitation of political speech at election time more intrusively⁴⁴ than freedom of speech in the context of private interest.⁴⁵

Secondly, although proportionality is not a general head of judicial review in English law since the courts can only apply it in the three aforementioned kinds of cases, the rationality test has been modified in some ways in order to overcome the

³⁶ This was recognised in a number of cases, for example, *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] 2 WLR 1389.

³⁷ Paul Craig, *supra* note 9, [21-001], [21-016]-[21-020].

³⁸ For example, *R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2 AC 418, 452.

³⁹ *R v British Broadcasting Corporation ex parte Prolife Alliance* [2003] 2 WLR 1403; *R v Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532.

⁴⁰ For example, *R v Secretary of State for Education and Employment; ex parte Begbie* [2000] ELR 445; *Nadarajah Abdi v The Secretary of State for the Home Department* [2005] EWCA Civ 1363.

⁴¹ *Huang v Secretary of State for the Home Department* [2007] 2 WLR 581.

⁴² See more in Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law*, Vol. 47, 68, pp.68-149 (2008).

⁴³ *R (Quila and another) v Secretary of State for the Home Department* [2011] UKSC 45.

⁴⁴ For example, *Regina (on the Application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312.

⁴⁵ For example, *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420.

extreme position of the traditional *Wednesbury* unreasonableness.⁴⁶ For example, the intensity of the rationality review would be greater if the case involved human rights in order to protect individuals' rights.⁴⁷ In addition, Craig notes that the courts provide three further techniques to increase the opportunity for claimants in non-rights based cases to win the case. Firstly, the courts claim that they are applying the *Wednesbury* unreasonableness, but in fact, they give serious consideration on the facts of the case. Secondly, the courts avoid a rigorous review by just reformulating the wording in the statute. Thirdly, they apply the concept of anxious scrutiny to cases even if they do not involve individuals' rights.⁴⁸

As a result, despite the fact that proportionality is not a general head of review in English law, it cannot be regarded as absolutely undesirable because it is applied in the three areas of the law under the Human Rights Act. Furthermore, modified rationality and further techniques of the courts provide various intensities of merit reviews in the same way as proportionality does. Nevertheless, I hesitate to agree with the statement that '*nothing at all*' is lost when proportionality is not a general head of review in English law. There are some advantages lost from this *status quo* and they are analysed and categorised into three main reasons below.

Firstly, although it is shown that the English system also provides various intensities of merits review, it contains different methodologies and applications of proportionality. While the modified rationality test involves dividing cases into rights-based and non-rights-based, proportionality applies to all kinds of cases in the EU law. The obvious problem is that the English system cannot clearly distinguish rights-based from non-rights based cases.⁴⁹ There are problems with mixed cases, in which there may be a human rights issue, but also a problem related to national security. For example, although *Bank Mellat* involved property rights, it also related to national security involved with the nuclear issue.⁵⁰ As a result, it was an expedient issue for the

⁴⁶ Peter Cane, *supra* note 3, pp.191-192; regarded *Wednesbury* as '*not monolithic*' in William Wade and Christopher Forsyth, *supra* note 31, pp.304-305.

⁴⁷ For example, *R v Ministry of Defence, Ex p Smith* [1996] QB 517, CA (Civ Div); Peter Cane, *supra* note 3, p.186-187; M Elliott and Jason Varuhas, *supra* note 15, pp.248-250, 252; See Paul Craig, *supra* note 9, [21-010]-[21-011].

⁴⁸ Paul Craig, "Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application," *Public Law*, Jan, p.60 (2015).

⁴⁹ Paul Craig, *supra* note 9, [21-043]-[21-044].

⁵⁰ *Bank Mellat* [2013] UKSC 39; See also *R v Ministry of Defence, Ex p Smith*, *supra* note 47.



courts. In this case, the justification of judicial power in conducting judicial review could easily be contested.

Secondly, when proportionality is not a general ground of judicial review and is only applied to cases related to the Human Rights Act, the equality between Human Rights Act and non-Human Rights Act cases is questionable. Additionally, this divide between Human Rights Act and non-Human Rights Act cases creates an unnecessary ossification in the judicial review process. Since many cases could be pleaded on the grounds of proportionality based on the Human Rights Act and normal rationality,⁵¹ this would confuse the claimants when they pleaded the case, as well as the court when choosing to apply proportionality or rationality. In terms of the latter problem, it would bring the issue of expediency to the court's determination again.

Thirdly, as a key reason, proportionality facilitates a reasoned and structured form of inquiry.⁵² In applying the ground, decision-makers have to explain why they believe that the challenged action is necessary and sufficient for public administration and does not impose an excessive burden on the applicant when weighing the benefit gained from the measure. Conversely, if the court would like to overturn the decision, it would have to do so in the same proportionality inquiry. This approach could reduce the problem of expediency stated above. When the English courts overturn a decision on the ground of modified rationality, there is no kind of inquiry to be made in the case of proportionality inquiry. They may claim that their decision was very well-considered; however, the approach of proportionality provides a more transparent methodology, and therefore, enhances their accountability to the public. In other words, it promotes trust in judicial intervention. Even though it is argued that the courts are illegitimate because they are unelected, they could show that they intervene in decisions in order to protect individuals' rights without placing an unnecessary, insufficient or excessive burden on those individuals. This approach provides a reasonable process for the courts and it is also more in accordance with the separation of powers and the rule of law than the courts quashing decisions by

⁵¹ For example, *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696; as a case which the government prohibited broadcasts of voices of members of terrorist organizations.

⁵² Peter Cane, *supra* note 9, pp.190-192; William Wade and Christopher Forsyth, *supra* note 31, pp.310-312; M Elliott and Jason Varuhas, *supra* note 15, pp.270-275.

their expediency.⁵³ In essence, the proportionality test can solve the problems of legal certainty and judicial accountability. Also, a structured proportionality test may encourage public bodies to provide reasons for the decisions they have taken in a way that respects the principle of proportionality.

It is also worth noting that proportionality is criticised for some reasons. For example, it is said to allow the courts to be excessively intrusive in the decision-makers' area of expertise and democratic legitimacy.⁵⁴ King and Hickman object to proportionality because the test makes the review inherently extremely intrusive.⁵⁵ On this point, it is argued that proportionality provides for reviews of varying intensity, which appear to apply to all enquiry of proportionality, as mentioned above. Apart from that, if this argument is correct, it would be true for normal modifications as well because the courts also weigh the decisions in a rationality review. The court in *Kennedy*, held according to Craig, that both proportionality and rationality reviews involve the consideration of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision-maker's view, depending on the context.⁵⁶ Additionally, proportionality is often explained with the principle of deference to determine the appropriate position of the court in a certain case.⁵⁷ It does not mean to be intrusive in all cases. It could even be argued that the rationality test is more intrusive than proportionality because proportionality has to pass the first and second levels of necessity and sufficiency before moving to the balancing level, while rationality goes directly to the balancing level. Despite being intrusive, the criterion to act intrusively is clearer and more justified than the rationality test.

In summary, it can be argued that the English law has lost a great deal by not applying proportionality as a general head of review; for example, the possibility of an equal review of cases related to the Human Rights Act and non-Human Rights Act,

⁵³ Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Public Law*, Aug, p.467 (1997).

⁵⁴ For example, in *R v Secretary of State for the Home Department, ex p Brind*, the House of Lord considered that proportionality would give license to excessive judicial interference with public decisions by allowing judges to pronounce on the merits of decisions and rules; See Peter Cane, *supra* note 3, p.191-192.; Paul Craig, *supra* note 9, [21-042].

⁵⁵ Tom Hickman, "Problems for Proportionality," *New Zealand Law Review*, Issue 2, p.303 (2010).; Jeff King, "Proportionality: A Halfway House," *New Zealand Law Review*, Issue 2, p.327 (2010).

⁵⁶ *Kennedy v Charity Commission* [2014] UKSC 20 SC at [54].

⁵⁷ William Wade and Christopher Forsyth, *supra* note 31, pp.308-310; M Elliott and Jason Varuhas, *supra* note 15, pp.284-302.



accountability and reasoned methodology for the court to intervene in decisions, as well as legal certainty. The judgment in *Kennedy* confirms that the advantage of the terminology of proportionality is that it introduces an element of structure into the exercise by directing the attention to factors such as suitability or appropriateness, necessity, and the balance or imbalance of benefits and disadvantages.⁵⁸

4. French Law

Similar to English law, although proportionality is not a general principle of judicial review in France, it does not mean that it should be regarded as being completely undesirable. There is an equivalent approach of the Conseil d'État to extensively review the merits of a decision called '*Maximum Control*'.⁵⁹ By applying this ground, the court goes further than just substituting judgment when there is a manifest discretionary error; it will both substitute and give the frame of reasoning or suggestion for decision-makers.

There are two types of maximum control,⁶⁰ the first of which deals with the protection of human rights and civil liberty. For example, the decision in *Benjamin*⁶¹ prohibiting the conferences to be advertised in the programmes of the literary galas was taken in order to preserve public order because the character of the conference could have caused political disruption. However, the court held that there were other measures that the mayor could have applied to maintain public order, such as calling in police from an outside source. The values in this case were that the Conseil d'État provided detailed facts about the element of the problem, and gave a suggestion for public administration, apart from substituting the decision. The French refer to this as '*the control of proportionality*'.⁶² However, as can be seen, it is not the same proportionality, with the three inquiries and methodology, as analysed in English and EU Law.

⁵⁸ *Supra* note 56.

⁵⁹ John Bell, Sophie Boyron, and Simon Whittaker, *Principles of French law*, 2nd edition (Oxford: Oxford University Press, 2008), pp.186-188.

⁶⁰ The categorization between these two types can be variable. Some literature mention maximum control separately from the control of proportionality. For example, Neville L. Brown and John Bell, *supra* note 10; *ibid*.

⁶¹ CE 19 May 1933 Benjamin, 541, D. 1933 III 345, concl. Michel.

⁶² Neville L. Brown and John Bell, *supra* note 10, pp.233-235.

Secondly, the maximum control concerns planning and labour law decisions on projects of public interest that require a cost and benefit analysis. In France, decree n. 59-701 requires a public building project to be decorated with public utilities. The courts have to balance the cost and benefit gained from the building in order to interpret the wording ‘*public utilities*’. The building plan in *Ville Nouvelle Est*⁶³ was for higher education buildings that required the destruction of 100 housing units. The court decided to introduce this control in order not to answer only Yes or No (substituting the judgment), but to take the cost and benefit of this kind of polycentric decision into account. The court weighed the advantages for national education against the financial and social cost of breaching private property rights. When considering the importance of the project as a whole, the fact that it necessitated the disappearance of one hundred houses did not detract from its character of public utility; therefore, it was decided that the project was lawful.

Another example for the second type of maximum control is *Soc. civ. Ste Marie de l’Assomption*⁶⁴, where the court had to analyse the cost and benefit between an infrastructure motorway building project and the effect on a hospital. The Conseil d’État considered that the hospital was the only establishment with psychiatric expertise available to respond to the needs of the whole of the Maritime Alps. The existence of a road accessing this section of the motorway with the secondary road N19 would cause grave damage to the condition of hospitalisation, which would implicitly affect the individuals’ right to health. In listing all of these costs, the Conseil d’État held that the project would damage the public interest; thus, it was illegal.⁶⁵

The Conseil d’État does not use the exact same terminology as ‘*proportionality*’ to define these two types of maximum control because they are not exactly the same as the proportionality in EU law.⁶⁶ Namely, the court does not examine all the three steps of sufficiency, necessity and the narrow sense of proportionality. For instance, it went straight to the third step of weighing the burden of an individual and fulfilling the public administration in *Soc. civ. Ste Marie de l’Assomption*. Also, as

⁶³ CE 28 May 1971, ‘Ville nouvelle-est’, 409 concl. Braibant.

⁶⁴ CE 20 October 1972 Soc. Civ. Ste Marie de l’ Assomption, 657 concl. Morissot.

⁶⁵ Neville L. Brown and John Bell, *supra* note 10, p.265.

⁶⁶ See Yoan Sanchez, “Proportionality in French Administrative Law,” in Sofia Ranchordás, and Boudewijn Willem Nicolaas de Waard (eds), The Judge and the Proportionate Use of Discretion: A Comparative Study, (Oxford: Routledge, 2016).



clearly stated, not only they include the process of weighing and substituting, but also the provision of some suggestions from the courts to the decision-makers. This allows the court to examine the details in depth and obtain more concrete control in some polycentric issues by giving a message or suggestion to the public administration. At the same time, the court can choose to defer to the decision-makers by substituting the judgment only when there is a manifest error on the ground of the characterisation of the facts in the internal legality.⁶⁷

To answer the main question of this article, it can be seen that this French approach would face the same problem of expediency as analysed in the English law because the system provides no clear criteria as to the cases to which the court should apply the maximum control, while EU law applies proportionality to all kinds of cases. Importantly, proportionality is preferred because when the decisions are overturned it requires the court to explain its decision in the same reasoned and structured inquiry form as the decision-makers.

5. Summary and Thoughts

It is argued that, based on the above analysis, proportionality as general head of judicial review in EU law is advantageous in many aspects. Although the English law modifies its rationality test by various intensities of merit review and the French system applies the maximum control, which provides for intrusive merit control and a way for the courts to give suggestions to public authorities, it is preferable for the well-structured form of inquiry of proportionality to be applied to all kinds of cases in the interests of equality, an effective judicial process and the allocation of powers. It is also the answer to judicial expediency. Consequently, it is incorrect to argue that nothing (at all) is lost in the English and French systems by not having proportionality as a general head of judicial review.

Although there are copious issues related to the application of proportionality as a ground of judicial review that could be further analysed,⁶⁸ the discussion in this

⁶⁷ Neville L. Brown and John Bell, *supra* note 10, pp.261-267.

⁶⁸ For example, the extent to which proportionality is applied to different types of administrative action in diverse jurisdictions is intriguing. For example, rather than merely applying the proportionality test to determine individuals' rights, the European Court of Justice also uses it to balance economic rights and the public interest, in order to pursue market harmonisation and the removal of trade barriers. See Paul

article has made three contributions to highlighting the importance of comparative law. The first is that the discussion of the relevant similarities and differences in applying proportionality as a general head of judicial review between English, EU and French law enables us to understand the depth of the legal doctrine regarding the substantive review of discretion in these legal systems.⁶⁹

Secondly, the comparative study facilitates the legal systems' choice of application of doctrines,⁷⁰ and this can lead to the adaptation of proportionality from one legal system to another. For example, further attention can be drawn to Thai law, where proportionality has become increasingly applied in recent administrative cases.⁷¹ This kind of comparative legal enquiry on the application, mechanism and advantages and disadvantages of the ground in an extended way will be necessary for an improvement of the law in this field.

Thirdly, this article is intended to point out that the different doctrines between diverse legal systems can be understood by examining the constitutional foundation of those systems. As mentioned earlier, my doctoral project is based on arguing that these different approaches are products of the legal culture in different legal systems.⁷² The constitutional framework, how values are understood, and the mentality of the different legal systems can have an impact on legal doctrines. For example, in terms of proportionality as analysed in this article, the French system does not have a problem with the courts providing suggestions to the administration, because the judges see themselves as part of public administration. Although proportionality is better structured in the academic analysis, how the separation of powers is explained in the mentality of the French court reduces the problem. As for English law, I argue that its constitutional orders, namely the nature of the balance between parliamentary sovereignty and the rule of law, leads the courts to flexibly determine the grounds of judicial review. The choice between rationality and

Craig, *supra* note 9, pp.670-676; W Sauter, "Proportionality in EU law: a balancing act?," Cambridge yearbook of European legal studies, Vol. 15, 439, pp.439-466 (2013).

⁶⁹ Gerhard Dannemann, "Comparative Law: Study of Similarities or Differences?," in Mathias Reimann and Reinhard Zimmermann (eds) The Oxford Handbook of Comparative Law, (Oxford: Oxford University Press, 2006) p.405.

⁷⁰ *Ibid*, pp.404-405.

⁷¹ For example, Administrative Court Decision No. พ.33/2553; อ.78/2554; อ.117/2561.

⁷² *Supra* note 4; see also Moshe Cohen-Eliya and Iddo Porat, Proportionality and Constitutional Culture, (Cambridge: Cambridge University Press, 2013).



proportionality is an example of this flexibility. The connection between the doctrine and its legal culture has not been discussed in detail in this article, since it is the subject of another project. However, it has been pointed out that all of these issues are connected in the fascinating world of comparative law.