Proportionality and invariable baseline intensity of review*

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One of the most contested issues in UK public law is the appropriate intensity of review, or degree of deference, in human rights adjudication. The challenge is to formulate a theory of intensity of review that can both fit the constitutional framework brought about by the Human Rights Act 1998 (‘HRA’) and accommodate the court’s relative institutional competence in different contexts. This article attempts to sketch such a theory in two steps. First, it argues that to fulfil the constitutional expectations brought about by the HRA, a certain minimum intensity of review must be observed. This baseline consists of courts requiring the government to prove by cogent and sufficient evidence that the rights-infringing measure on balance satisfies the distinct stages of the proportionality analysis. It transpires from this analysis that many courts have been relaxing the intensity of review to such an extent that the new constitutional expectations have been flouted. Secondly, it highlights the ways in which an application of proportionality consistent with this baseline can remain sensitive to context. In particular, courts can vary the intensity of review above the baseline in accordance with the seriousness of the violation of rights, and can accommodate concerns about their relative competence in judging particular issues through adjusting the nature of evidence required from the government.

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