

ARTICLE

# TIPPING THE SCALES IN THE REASONABLENESS-PROPORTIONALITY DEBATE IN CANADIAN ADMINISTRATIVE LAW

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CITED: (2016) 21 Appeal 125

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## INTRODUCTION

In recent years, there has been considerable debate on the appropriate intensity of, and the proper analytical framework for, judicial review of discretionary administrative decisions<sup>1</sup> that invoke the *Canadian Charter of Rights and Freedoms* (“*Charter*”).<sup>2,3</sup> While the proportionality analysis set out in *R v Oakes* (“*Oakes*”)<sup>4</sup> is a well-established standard in constitutional adjudication, its embracement in administrative law has not been without practical and theoretical difficulties, nor has it been free of criticism. While many perceived the reviewing courts as having to decide between the administrative law standard of reasonableness and the constitutional law framework of proportionality, in *Doré v Barreau du Québec* (“*Doré*”),<sup>5</sup> the Supreme Court of Canada (the “*SCC*”) has unexpectedly propounded a middle ground and opted for what it called “the reasonableness analysis [...] that centres on proportionality”.<sup>6</sup>

The question is whether this merging of two normatively distinct standards of review into one is a tenable approach to the review of administrative decisions under the *Charter*. Indeed, can administrative law accommodate such a doctrine? Moreover, are there viable distinctions between reasonableness, proportionality, and “reasonable proportionality”? If so, where does the difference lie? If not, is this proliferation of standards of review anything but just rhetorical flourish?

These are not idle questions. Even a cursory look at case law reveals scant agreement by judges as to which standard of review—reasonableness or proportionality—should be applied to constitutional issues that arise in the administrative context and what the differences between the two are.<sup>7</sup> According to Audrey Macklin, “[t]he rules of the road keep changing, pointing us in one direction (follow the *Oakes* test! says *Multani*) then another (go toward administrative law! says *Doré*)”.<sup>8</sup> Post-*Doré*, the *SCC* remains divided on the appropriate methodology, particularly regarding the scope of *Charter*

1 Pursuant to the approach adopted in *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 [*Slaight*], and further affirmed in *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*], there is a distinction to be made between a *discretionary* administrative decision that engages *Charter* rights (that is, *imprecisely* authorized decisions) and administrative decisions that are *expressly* authorized by a statute to infringe the *Charter* (see e.g. *Slaight*). In the latter scenario, the empowering statute itself must satisfy the requirements of section 1 of the *Charter*; whereas in the case of broad or imprecise grant of discretion, it is the discretionary decision that ought to be tested. This article will focus on the inconsistent judicial treatment of imprecise grants of discretion, as opposed to express grants of authority to infringe *Charter* rights.

2 See e.g. Hoi L Kong, “*Doré*, Proportionality and the Virtues of Judicial Craft” (2013) 63 SCLR 501; Audrey Macklin, “Charter Right or Charter Lite? Administrative Discretion and the Charter” (2014) 67 SCLR 561 [Macklin]. Joseph Arvay, Sean Hern & Alison Latimer, “Proportionality and the Public Law” (2015) 28 Can J Admin L & Prac 23.

3 *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

4 *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

5 *Doré*, *supra* note 1.

6 *Ibid.*, at para 7.

7 See e.g. the decisions in *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483; *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6; and *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, where the *SCC* applied a section 1 analysis.

*Cf. Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, where the *SCC* performed a judicial review on a reasonableness standard.

8 Macklin, *supra* note 2 at 561 (citations omitted).

issues.<sup>9</sup> Although scholarly literature points out the rampant inconsistency in the SCC's approach, most papers do little to explain *why* the SCC ought to adopt reasonableness, proportionality, or some combination of the two.

The purpose of this paper is to fill this gap in the existing literature. By making a case for eliminating the untenable dualism of reasonableness and proportionality in *Charter*-related review, because such dualism contravenes the *Charter*'s requirement of legitimacy, I argue that for administrative decisions involving *Charter* rights, the courts ought to adopt the proportionality framework from *Oakes*. Not only would this afford sufficient protection to *Charter* rights—a standard that reasonableness fails to meet—it would also eschew the current model, whereby the approach to determining the constitutionality of government action arbitrarily depends on whether the action is expressly authorized by legislation.<sup>10</sup>

There is nothing in administrative law except the unfortunate resistance of judges that would be unwelcoming to such a doctrinal shift. Furthermore, as Canadian commentators often forget, the origins of proportionality as a structured legal template can be traced to Prussian administrative law, aspects of which have inspired constitutional tribunals worldwide.<sup>11</sup> Conversely, the current reasonableness approach, even with the proportionality twist, does not withstand scrutiny as a legitimate standard of review for *Charter*-related issues in light of the so-called new “strand of political legitimacy”<sup>12</sup> that is predicated on what David Dyzenhaus, drawing on Etienne Mureinik, terms “the culture of justification”.<sup>13</sup>

My argument will be presented in four parts. In Part I, I will outline the current judicial treatment of administrative actions implicating *Charter* rights and briefly canvass the Court's struggle of navigating between reasonableness and proportionality. In Part II, I will explain that underneath their obvious similarities, reasonableness and proportionality are actually fairly distinct standards of review, not only in terms of their institutional

9 Van Harten et al, *Administrative Law, Cases, Text and Materials*, 7th Ed. (Toronto: Emond Montgomery, 2015) at 890 [Harten et al].

10 Evan-Fox Decent & Alexander Pless rightly observe: “If the correct reading of *Doré* is that express authority to infringe a *Charter* right requires the *Oakes* analysis, but imprecise authority does not, one can legitimately question why, when the Constitution is the supreme law of Canada, there would be two different approaches to determining the constitutionality of government action depending on whether it is expressly authorized by legislation or not.” From “The Charter and Administrative Law: Cross-Fertilization or Inconstancy?” in LM Sossin & CM Flood, eds, *Administrative Law in Context* (Toronto: Edmond Montgomery, 2012) at 431.

11 See e.g. Alec Stone Sweet & Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) 47:1 Colum J Transnat'l L 72 at 72 [Sweet & Mathews]; Moshe Cohen-Eliya & Iddo Porat, “American Balancing and German Proportionality: The Historical Origins” (2010) 8:2 Int'l J Const L 263 [Cohen-Eliya & Porat Historical Origins]; Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence” (2007) 57 UTLJ 383 [Grimm]; Amir Attaran, “A Wobbly Balance? The Comparison of Proportionality Testing in Canada, the United States, the European Union and World Trade Organization” (2007) 56 UNBLJ 260 [Attaran]; Margaret de Merieux, “Establishing the Democratic Credentials of Legislation: *R. v. Oakes* and the Section 4 of the Human Rights Act (1998) (UK)” (2001) 30 Comm World L Rev 193 [de Merieux].

12 Stephen Gardbaum, “Proportionality and Democratic Constitutionalism”, in Grant Huscroft, Bradley Miller, & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 259 at 263 [Gardbaum].

13 See, generally, David Dyzenhaus, “Law as Justification: Etienne Mureinik's Conception of Legal Culture” (1998) 14 S Afr J Hum Rts 11 [Dyzenhaus]. See also Moshe Cohen-Eliya & Iddo Porat, “Proportionality and Justification” (2014) 64 UTLJ 458 at 463 [Cohen-Eliya & Porat Justification]; Moshe Cohen-Eliya & Iddo Porat, “Proportionality and the Culture of Justification” (2011) 59 Am J Comp L 463 [Cohen-Eliya & Porat Culture]; Mattias Kumm, “The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review” (2010) 4:2 L & Ethics of Hum Rts 141 [Kumm].

and doctrinal effects, but also in terms of the implicit normative assumptions on which they operate. While the standard of reasonableness is anchored in what Mureinik calls “the culture of authority”, whereby legitimacy of the act depends on whether a putative government body is *authorized*, or has jurisdiction, to act, regardless of whether it can justify its decisions or not,<sup>14</sup> proportionality, on the other hand, is grounded in “the culture of justification”, which imposes substantive—not only procedural or jurisdictional<sup>15</sup>—constraints on government action.<sup>16</sup> After elucidating the normative and theoretical foundations of the culture of justification in Part III, I will contend in Part IV that only the sequenced and stringent four-pronged proportionality test can provide a sustainable analytical framework for satisfying the requirement of justification. This leads me to the conclusion that if the legitimacy of government action that involves constitutional rights is predicated on the government’s ability to demonstrably justify its choices as proportionate to the right infringement, it follows that any administrative body exercising statutory authority is also bound by the same requirements and restrictions. Since the amorphous nature of the reasonableness standard, in contrast to the sequenced and structured proportionality test, does not satisfy this requirement of constitutional legitimacy, it should be seen as an unacceptable standard of review not only in constitutional law, but also in the review of administrative decisions that invoke *Charter* rights. Arguing otherwise would be tantamount to arguing against the rule of law principle.

## I. CHARTING THE DIVERSE LANDSCAPE OF REVIEW OF DISCRETIONARY DECISIONS UNDER THE CHARTER

As Macklin highlights, vexing questions about the application of the *Charter* to administrative discretion lurked beneath the SCC judgments well before its pronouncement in *Doré*.<sup>17</sup> Even though the decision in *Dunsmuir v New Brunswick* (“*Dunsmuir*”)<sup>18</sup> to reduce the number of standards of review from three to two aspired to provide a coherent and workable framework for judicial review *as a whole*,<sup>19</sup> it became clear that certain questions—especially those concerning the relationship between the

14 Gardbaum, *supra* note 12 at 260.

15 See Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978) at 26. Max Weber argues that the existence of law that abides to certain formal and procedural criteria is sufficient for a government action to be considered legitimate.

16 *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], does side with David Dyzenhaus’ proposition that the concept of “deference as respect” requires of the courts “a respectful attention to the reasons offered” (at para 48). The court further acknowledges that “reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” (at para 47). It can be argued, however, that in practice, the court rarely demonstrates any meaningful engagement with the concept of justification, consistently diluting what was supposed to be the requirement of providing reasons. See e.g. *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61, where the court endorsed the approach first introduced in *Dunsmuir* that the administrative decision can be upheld in light of reasons that “could be offered” (at paras 53-55).

17 Macklin, *supra* note 2 at 566.

18 *Dunsmuir*, *supra* note 16.

19 Van Harten et al, *supra* note 9 at 890.

*Charter* and administrative discretion—could not easily be subsumed under the headings of either reasonableness or correctness.<sup>20</sup>

The consequence is that judicial treatment of the impugned discretionary decisions has undergone a peculiar evolutionary trajectory. As stated by Justice Abella in *Doré*, while some courts relied on the section 1 *Oakes* test,<sup>21</sup> others have deployed a standard of correctness, or even a classic administrative law reasonableness analysis to determine whether *Charter* values were properly taken into consideration.<sup>22</sup> Furthermore, as the appropriate number of standards evolved, so did the standards themselves, even though the courts typically refuse to acknowledge that the current single standard of reasonableness might evolve into a spectrum of deference.<sup>23</sup> For instance, the traditional standard of review has moved from the reasonableness end of the methodological spectrum towards the correctness end.<sup>24</sup> Reasonableness with a proportionality twist as enunciated in *Doré* and all subsequent cases citing its approach,<sup>25</sup> demonstrates this shift.

The most evident attempt to tread a fine line between reasonableness, correctness, and proportionality for *Charter* decisions<sup>26</sup> has appeared in *Doré*. The court here held that an administrative law framework with quasi-proportionality modifications was in order. Where a discretionary administrative decision engages *Charter* protection—both the *Charter*'s guarantees and the foundational values they reflect—the decision-maker is required to proportionately balance the *Charter* protections with the applicable statutory objectives to ensure that they are limited no more than is necessary.<sup>27</sup> Justice Abella, writing for a unanimous Court, explained that “while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its

20 In *Dunsmuir*, *supra* note 16, the SCC merged patent unreasonableness with the so-called standard of *reasonableness simpliciter*, thereby reducing the number of standards of review in Canadian judicial review from three to two: reasonableness and correctness. As summarized by the Court (at para 34): “The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of *reasonableness simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review—correctness and reasonableness.”

21 *Doré*, *supra* note 1 at para 23.

22 See e.g. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31; *Canada (Prime Minister) v Khadr*, 2010 SCC 3.

23 This is not to be confused with the SCC's understanding of “spectrum”, where a court, having decided to defer, would then need to determine more precisely how much deference should be given. This view of reasonableness as a spectrum was rejected and, as later mentioned by the SCC in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59: “[r]easonableness is a single standard that takes its colour from the context.”

24 The true correctness standard—the most intrusive standard of review that will give no deference at all to the decision-maker—would require that the proportionality analysis of the *Oakes* test apply in assessing justifiability of the *Charter* right infringement. See e.g. Van Harten, Heckman, Mullan & Promislow, 7th ed, *Administrative Law, Cases, Text and Materials* (Toronto: Emond Montgomery, 2015) at 874. The standard of reasonableness, on the other hand, would instruct the reviewing court to give considerable weight to the decision-maker. The current methodology for the review of discretionary decisions that affect *Charter* rights, from *Doré*, lies somewhere between the reasonableness and correctness standards, and is now adjusted to incorporate proportionality into the reasonableness standard.

25 See e.g. *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47.

26 Admittedly, in *Doré*, the reviewing court employed the notion of *Charter* “values” instead of rights. However, I side with those commentators who treat *Charter* rights and values as analogous and do not welcome the Court's attempt at distinguishing the two. See e.g. Macklin, *supra* note 2.

27 *Ibid* at para 4.

essence works the same justificatory muscles: balance and proportionality”.<sup>28</sup> She applied the following test:

How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. [...]

Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. [...]

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. [...]

If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.<sup>29</sup>

It bears noting that while the *Doré* approach sought to bring clarity, in practice it brought more confusion. The Court has never drawn a clear line between reasonableness, proportionality, and a newly adopted reasonableness approach *that centers on proportionality*. What is the “conceptual harmony”<sup>30</sup> between the *Oakes* test and a reasonableness review? Moreover, could the Court fulfill its promise that the new approach would continue to ensure “rigorous *Charter* protection”<sup>31</sup> given that *Doré* did not mandate “demonstrable justification” as enshrined in section 1 of the *Charter*?

Recently in *Loyola High School v Quebec (Attorney General)* (“*Loyola*”),<sup>32</sup> the Court refined the *Doré* analysis to find a ministerial decision unreasonable because it “did not strike a proportionate balance between the *Charter* protection and statutory objectives at stake in this case”.<sup>33</sup> The Court drew heavily on *Doré*. Among other things, the Court retained the orthodox two-stage model of *Charter* adjudication, contending that as a “preliminary issue”,<sup>34</sup> the reviewing court must determine whether the decision engages the *Charter* by limiting its protections and, if answered in the affirmative, whether proportionate balancing<sup>35</sup> has been achieved:

The first issue is whether *Loyola*’s freedom of religion was infringed by the Minister’s decision. The second issue is whether the Minister’s decision—that only a purely secular course of study may serve as an equivalent to the ERC Program—limits *Loyola*’s freedom of religion more than reasonably necessary to achieve the goals of the program. However one describes the precise analytic approach taken, the essential question raised

28 *Doré*, *supra* note 1 at para 5.

29 *Ibid* at paras 55-58.

30 *Ibid* at para 57.

31 *Ibid* at para 4.

32 *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*].

33 *Ibid* at para 79.

34 *Ibid* at para 39.

35 *Ibid*.

by this appeal is whether the Minister’s decision limited Loyola’s right to religious freedom proportionately—that is, no more than was reasonably necessary?<sup>36</sup>

However, in *Loyola*, the SCC makes two novel assertions. Firstly, it clarifies the nature of “conceptual harmony” between reasonableness and proportionality alluded to in *Doré* by contending that:

A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under section 1: minimal impairment and balancing.<sup>37</sup>

As the SCC sees it, both *Oakes* and *Doré* require that *Charter* protections be limited as little as reasonably possible in light of the state’s particular objectives. As such, *Doré*’s proportionality analysis is robust, and “works the same justificatory muscles as the *Oakes* test”.<sup>38</sup>

Secondly, it is asserted that, in the right light, reasonableness can be seen as analogous to proportionality. In coming to this conclusion, the SCC makes a reference to Aharon Barak who, in turn, noted that “[r]easonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality”.<sup>39</sup> Against this backdrop, the question necessarily arises—and on this I side with Paul Daly—“why not simply call a proportionality test a proportionality test?”<sup>40</sup>

It is my position that proportionality as an analytical framework carries different normative and institutional implications for the protection of *Charter* rights and values than the administrative law standard of reasonableness. With respect, I believe that the Court’s misguided assessment, whereby it confounds these standards, might have a deleterious effect on *Charter* rights. As I shall explain in the next section, there are crucial distinctions between reasonableness (even in the strong, quasi-proportionality sense) and proportionality as standards of review.<sup>41</sup> These differences have a direct bearing on the justifiability and legitimacy of the outcome of the case.

## II. REASONABLENESS VS PROPORTIONALITY: AN UNNECESSARY CONFUSION

As mentioned, the SCC appears to treat *Doré*-like reasonableness and *Oakes*’ proportionality to be, if not identical, then at least methodologically substitutable standards of review in administrative law. On this account, proportionality is simply

36 *Ibid* at para 114.

37 *Ibid* at para 40.

38 *Ibid* at para 5.

39 Aharon Barak, “Proportionality”, in Michel Rosenfeld and Andrés Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 738 at 743.

40 Paul Daly, “Reasonableness, Proportionality and Religious Freedom: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12”, *Administrative Law Matters*, online: <<http://www.administrativelawmatters.com/blog/2015/03/19/reasonableness-proportionality-and-religious-freedom-loyola-high-school-v-quebec-attorney-general-2015-scc-12/>> archived at <<https://perma.cc/TD3Z-VNQU>>.

41 For a similar view, see Paul Daly, who maintained that “my own view, explained in chapter 5 of *A Theory of Deference in Administrative Law*, is that reasonableness and proportionality are distinct and should be kept apart. I am also dubious about the sliding scale metaphor”, in “You Say ‘Tomato’, I Say ‘Reasonableness’: *Pham v Secretary of State for the Home Department* [2015] UKSC 19”, *Administrative Law Matters*, online: <<http://www.administrativelawmatters.com/blog/2015/04/07/you-say-tomato-i-say-reasonableness-pham-v-secretary-of-state-for-the-home-department-2015-uksc-19/>> archived at <<https://perma.cc/5P3R-RES3>>.

an aspect of the standard of reasonableness—just more “formulaic”.<sup>42</sup> As Daly observes, it is difficult to discern how the standard of reasonableness as propounded by Justice Abella in *Loyola* is more deferential than, or analytically distinct from, proportionality as enunciated in *Oakes*.<sup>43</sup> Admittedly, Canadian commentators are not alone in their confusion.<sup>44</sup> On the one hand, as David Feldman highlights, there is certainly a relationship between the doctrines: “Both of them are designed to allow a court to review the balance struck by a public authority between competing interests, while placing limits on the scope of such review”.<sup>45</sup> On the other hand, beneath the most general and abstract similarities, there are plenty of drastic differences to be found.

In the following sections, I will not attempt to survey all of the similarities and differences between reasonableness and proportionality. It is neither feasible nor desirable here to capture all conceivable arguments. Instead, I will focus on what I consider to be the three key distinctions between the two standards regarding doctrinal and institutional implications: (i) the intensity of review (or the degree of deference afforded to the decision-maker), (ii) the structure of review, and (iii) what I will call the “weight/scales dilemma”.

### A. Differences in the Intensity of Review

Before I proceed with my analysis, there are two cursory observations that bear noting. First and foremost, it is sound to refer to reasonableness as a “set of standards” instead of an independent standard of review because, as will quickly become clear, there is no reasonable consensus among judges or academics regarding what this concept actually means or how the single standard should work.<sup>46</sup> Reviewing courts, both domestically and abroad, are still struggling on the intrusiveness of review under the reasonableness standard, which exists on a spectrum,<sup>47</sup> ranging from a very deferential approach (reasonableness in the “weak” sense, that is, reminiscent of the “rational connection” of the proportionality test or rational basis review in American constitutional law) to a quite rigorous and searching examination (what Wojciech Sadurski calls “reasonableness in the strong sense”).<sup>48</sup> As Aharon Barak highlights, “[t]he notion of reasonableness has many varieties in several contexts, even within administrative law”.<sup>49</sup>

Secondly, it bears noting that the standard of reasonableness always presumes a balancing act. I believe that conceptualizing reasonableness as a balancing standard is important because, as Paul Craig rightly points out, “[t]here is the argument that proportionality is problematic because it involves judicial weighing of incommensurables, but that reasonableness review does not suffer from this infirmity because it does not entail

42 *Doré*, *supra* note 1 at para 5.

43 Daly, *supra* note 40.

44 Cf. the arguments advanced by British commentators regarding the analytical similarities between reasonableness and proportionality (in The Rt Hon Lord Hoffmann, “The Influence of the European Principle of Proportionality upon UK Law” in Evelyn Ellis, ed, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) at 107-117. See also *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [*Pham*]).

45 David Feldman, “Proportionality and the Human Rights Act” in Evelyn Ellis, ed, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) at 127.

46 See e.g. Thomas Hickman, “The Reasonableness Principle: Reassessing Its Place in the Public Sphere” (2004) 63 Cambridge LJ 166.

47 See note 23 and accompanying text.

48 Wojciech Sadurski, “‘Reasonableness’ and Value Pluralism in Law and Politics”, in Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini, eds, *Reasonableness and Law* (Dordrecht: Springer, 2009) at 129.

49 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (New York: Cambridge University Press, 2012) at 374 [Barak].



consideration of weight and balance”.<sup>50</sup> However, reasonableness does not prompt the reviewing court to follow a set of steps that would determine an outcome. Quite the contrary, it is a normative concept that is achieved through an evaluative process, rather than a descriptive one. To say that an action is reasonable, as Aharon Barak submits, is to establish the relationships among all relevant factors and assign them proper weight.<sup>51</sup> As Neil MacCormick maintains:

What justifies resort to the requirement of reasonableness is the existence of a plurality of factors that must be evaluated in respect of their relevance to a common focus of concern (in this case a decision to be made by a public body for public purposes). [...] Even though different people can come to different evaluations in such questions of *balance*, and a variety of evaluations could be accepted as falling within the range of reasonable opinions about that balance, the range has some limits.<sup>52</sup>

Reminiscent of the above is Paul Craig’s submission that “[t]he reality is that in making the determination as to whether the contested decision was within the range of reasonable decisions the court is assessing the balance struck by the decision-maker, in the manner exemplified by the preceding cases”.<sup>53</sup>

I believe that it is in this balancing exercise or “weight assignment” that the major difference between proportionality and reasonableness lies. Even for reasonableness in the strong sense, the standard still proceeds on the assumption that the scales are always tipped in the state’s favour.<sup>54</sup> In other words, it appears that the whole rationale for the reasonableness standard is the notion that, as a general rule, the decision-maker is a reasonable actor and his or her decisions can be quashed only if they are unreasonable. Guy Regimbald goes even further to suggest that the deference to decision makers under

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50 Paul Craig, “The Nature of Reasonableness Review” (2013) CLP 1 at 1 [Craig]. See also, Paul Craig, “Unreasonableness and Proportionality in UK Law” in Evelyn Ellis, ed, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) at 85 [Craig UK].

51 Barak, *supra* note 49 at 374.

52 Neil MacCormick, “Reasonableness and Objectivity” (1999) 74 *Notre Dame L Rev* 1575 at 1586-1587.

53 Craig UK, *supra* note 50 at 19.

54 Although the standard of reasonableness gives broad deference to an expert’s statutory authority and, as such, appears *prima facie* to be much less intrusive than proportionality, the *Doré* approach seeks to bring the two closer together (*Doré, supra* note 1 at para 57):

Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a “margin of appreciation”, or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives.

Is there a tangible difference between the two standards? I believe there is and the devil is in the details. As mentioned above, reasonableness appears to be operating on the assumption that the scales are always tipped in favour of the state, whereas proportionality’s default mode (and I am jumping ahead here) is to always side with the individual and their *Charter* rights. I believe the following excerpt from *Doré* exemplifies this nuanced difference (*Doré, supra* note 1 at para 6):

If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

standard of reasonableness is, by and large, “the right to be wrong”.<sup>55</sup> Essentially, the crucial determination is not whether a decision-maker erred, “but more whether or not it is permitted to err. If a tribunal does not have the right to be wrong, the standard of review will be correctness”.<sup>56</sup> An argument could be made that the standard of reasonableness is anchored in what Etienne Mureinik calls “the culture of authority”, where an action is legitimate because the government body was *authorized* to act, regardless of whether it can justify its decision.<sup>57</sup>

Proportionality, on the other hand, operates on the assumption that the scales are always tipped in favour of protecting constitutional rights.<sup>58</sup> Contrary to the reasonableness standard, proportionality, as Justice McLachlin (as she then was) points out in her dissent in *Cooper v Canada (Human Rights Commission)*, “is about much more than what is usual or ‘normal’. The usual practice may be unjustifiable, having regard to the egregiousness of the infringement or the insubstantiality of the objective alleged to support it”.<sup>59</sup> Sujit Choudhry emphasizes that in *Oakes*, “rights are of presumptive importance, and limitations... are only acceptable if governments meet a demanding test of justification”.<sup>60</sup>

How should we account for these distinctions between reasonableness and proportionality? As I will explain, reasonableness and proportionality should be seen as coming from two opposing ends of the institutional spectrum.

As mentioned, the standard of reasonableness does share certain core elements with the framework of proportionality. An argument could be made that reasonableness is embedded in proportionality given that something that is proportionate cannot be unreasonable.<sup>61</sup> Aharon Barak also points out that “in many common law countries, reasonableness was recognized long before proportionality”.<sup>62</sup> In the words of Michael Taggart, when proportionality “knocked at the door” of those legal systems, it was met

55 Guy Regimbald, “Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review” (2005) 31 MLJ 239 at 254 [Regimbald].

56 *Ibid.*

57 See, generally, Dyzenhaus, *supra* note 13; Cohen-Eliya & Porat Culture, *supra* note 13; Gardbaum, *supra* note 12.

58 According to most German commentators today, it was Carl Gottlieb Svarez (1746-1798) who significantly contributed to the development of proportionality. Svarez notes, as per the principal tenets of Enlightenment, that the state may only deprive the liberty of one subject in order to guarantee the freedom and safety of another or others. Alec Stone Sweet and Jud Mathews provide the translation of his treatise, *Lectures on the State and Law*, where Svarez not only describes the balancing exercise, but also insists that it should proceed with *a thumb on the scale in favor of rights*:

Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail. . . . The [social] hardship, which is to be averted through the restriction of the freedom of the individual, has to be more substantial by a wide margin than the disadvantage to the individual or the whole that results from the infringement.

Sweet & Mathews, *supra* note 11 at 91, quoting Carl Gottlieb Svarez, Hermann Conrad & Gerd Kleinheyser, eds, *Vorträge über Recht und Staat* (Wiesbaden: Springer Fachmedien Wiesbaden, 1960) at 40.

59 *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 106.

60 Sujit Choudhry, “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1” (2006) 34:2 SCLR 501 at 501-502 [Choudhry].

61 Recent jurisprudence of the SCC appears to approve this assumption. For instance, in *Loyola*, *supra* note 32, at para 38, quoting *Doré*, “in contexts where Charter rights are engaged, reasonableness requires proportionality”.

62 Barak, *supra* note 49 at 371.

by the concept of reasonableness.<sup>63</sup> As mentioned, the precise contours of reasonableness have generated debate in both legal practice and academia. The major difficulty stems from the idea behind this standard of review—that “an action is reasonable if it was done by a reasonable person”—is a circular one and, as such, does not advance the discussion. Julius Stone has famously argued that reasonableness belongs to “categories of illusory reference”.<sup>64</sup>

Initially, the English courts developed the *Wednesbury* test<sup>65</sup> to facilitate the assessment of proper boundaries of reasonableness within administrative law. As has been summarized by Lord Diplock in this connection:

By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’... It applies to 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.<sup>66</sup>

As evident from the above, the court was unwilling to intervene unless the unreasonableness was “outrageous”. When would “simple” unreasonableness become “outrageous” unreasonableness?<sup>67</sup> The *Wednesbury* test did not provide any guidance, particularly in the human rights context. Admittedly, this approach has recently changed, especially with regard to legislation involving constitutional rights.<sup>68</sup> As Guy Regimbald points out, the *Wednesbury* unreasonableness test in English law has implicitly given way to an application of the proportionality test.<sup>69</sup> For instance, in the decision in *Pham v Secretary of State for the Home Department*, Lord Sumption noted that in recent decades, English courts have expanded “the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality”.<sup>70</sup> Although some laudable changes are discernible, the principle of proportionality in English law, as Tom Hickman observes, still remains “unelaborated, uncertain and its application unstructured”.<sup>71</sup>

Turning to historical observations, proportionality, in contrast to reasonableness, has undergone a drastically different evolutionary trajectory. Hailing from German

63 Michael Taggart, “Proportionality, Deference, *Wednesbury*” (2008) NZ L Rev 423 at 423.

64 Julius Stone, *Legal System and Lawyers’ Reasoning* (Stanford: Stanford University Press, 1968) at 263.

65 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, [1948] 1 KB 223.

66 *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374 at 410.

67 Barak, *supra* note 49 at 373.

68 The position of the courts since *R v Secretary of State for the Home Department: ex parte Brind* [1991] 1 AC 969 was that discretionary decisions in English law were not subject to review on the basis of proportionality. However, this changed following enactment of the *Human Rights Act*, RSC 1985, c H-6 that introduced rights-based judicial review into English law. With this, the courts struggled to apply abstract norms to concrete cases that were often politically charged. One mechanism of great assistance though was the principle of proportionality. See Alan DP Brady, *Proportionality and Deference under the UK Human Rights Act* (New York: Cambridge University Press, 2012) at 4. In 2001, in *R (Daly) v Secretary of State for the Home Department*, [2001] UKHL 26, proportionality was accepted by the House of Lords as a principle applicable in English law. Drawing on Canadian case law, the Privy Council accepted and adopted a three-step analysis similar to *Oakes*.

69 Regimbald, *supra* note 55 at 262.

70 *Pham*, *supra* note 44 at para 105.

71 Tom Hickman, “Proportionality: Comparative Law Lessons” (2007) 12 JR 31 at 31.

administrative law of the 19th century,<sup>72</sup> proportionality emerged as a judicial curb on otherwise untrammelled government or police power. In the constitutional law context, it was first invoked by the Federal Constitutional Court of Germany as an unwritten constitutional principle. In a series of constitutional cases, the Court held that the principle of proportionality “was a consequence of the rule of law and derived essentially from the nature of the basic rights, which as an expression of the demand of the individual for freedom vis-a-vis state power could be restricted only to the extent that is indispensable for the protection of the public interest”.<sup>73</sup> Following World War II, proportionality was further developed in what Lorraine Weinrib calls the “Postwar Paradigm” of constitutional rights adjudication,<sup>74</sup> or what Sujit Choudhry calls the “shared constitutional discourse”.<sup>75</sup>

In addition to the normatively distinct assumptions on which reasonableness and proportionality operate, an argument may be advanced that proportionality is a more intrusive standard of review simply by the fact that it contains three times as many prongs (this argument is further elaborated in Part II, section B of this paper). Practically speaking, this means it would be considerably more difficult for the government to limit an individual’s rights than for a rights holder to prove their case. Once the onus is on the government, failure to pass any step of the test means that the court automatically sides with the rights holder. This multi-pronged framework is absent under the reasonableness standard.

## B. Difference in Terms of the Structure of Review

The most conspicuous distinction between reasonableness and proportionality is what Paul Craig calls the “architecture of review”—or the structure and refinement of the analysis for administrative decisions.<sup>76</sup> Although the author submits that “both reasonableness review and proportionality involve considerations of weight and balance”,<sup>77</sup> reasonableness, unlike proportionality, is not composed of sequenced analytical steps. Chief Justice Dickson (as he then was) in *Slaight Communications Inc v Davidson* notes that patent unreasonableness (which is now part of the general standard of reasonableness),<sup>78</sup> “[i]n contrast to section 1... rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis”.<sup>79</sup> While many arguments in favour of a more structured review (in contrast to a more open and relaxed balancing) have been advanced in this paper, some chief propositions deserve reiteration. In the words of Lord Mance:

The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such

72 For development of the proportionality principle, see Sweet & Mathews, *supra* note 11; Cohen-Eliya & Porat Historical Origins, *supra* note 11; Grimm, *supra* note 11; Attaran, *supra* note 11; de Merieux, *supra* note 11. For an alternate view, see Bernard Hovius, “The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?” (1985) 17 *Ottawa L Rev* 213.

73 Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (London: Kluwer Law International, 1996) at 42.

74 Lorraine E Weinrib, “The Postwar Paradigm and American Exceptionalism” in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (New York: Cambridge University Press, 2006) at 84.

75 Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (New York: Cambridge University Press, 2006).

76 Craig, *supra* note 50 at 5.

77 *Ibid.*

78 It is worthwhile to mention that although patent unreasonableness is now an obsolete common law standard of review post-*Dunsmuir*, it still lives on in certain provinces by virtue of the statutes that directly enshrine it (see e.g. *BC Administrative Tribunal Act*, SBC 2004, c 45, ss 58, 59).

79 *Slaight*, *supra* note 1 at 1074.

as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law.<sup>80</sup>

Even if we are to accept the SCC's argument that the standard of reasonableness is analogous to the last two components of *Oakes* (which I believe it is not, and the Court's elaboration on its submission offers certain insights),<sup>81</sup> the question arises as to what difference the other two sub-inquiries of *Oakes* have. In my opinion, they are an indispensable part of the reasoning because, ultimately, what the reviewing court weighs is the furtherance of government objectives and the effects of intruding on *Charter* rights.<sup>82</sup> As the Court has repeatedly pointed out, the way this objective is framed has a profound bearing on the way a case may be decided. There is a danger that judges may identify the purposes of the right-infringing measure too generally by abstracting particulars of the impugned statute. For instance, if the declared goal of a right-limiting enactment is to combat terrorism—a goal that most certainly may override constitutional freedoms—then just about every statute adopting the foregoing objective would be capable of passing the constitutional muster of section 1. That is exactly why the rational connection component of *Oakes* is necessary. Put bluntly, if the law in question says it is going to combat terrorism, it ought to do so. For instance, the prohibition of religious clothing that covers one's face, which may contribute to alleviating the risks of the terrorist's attacks, in no way offers a complete cure to extremist movement. As such, if the government has a compelling interest in the legislative scheme, it should substantially scale down the law's stated objective, thereby tailoring it to the actual effects of the impugned action.

The same holds true when it comes to the relationship between the pressing and substantial component of the *Oakes* test and its minimal impairment inquiry. In *Alberta v Hutterian*

80 *Kennedy v The Charity Commission* [2014] UKSC 20 at para 54.

In short, according to Gertrude Lübbe-Wolff ("The Principle of Proportionality in the case-law of the German Federal Constitutional Court" (2014) 34 HRLJ 12 at 16-17), proportionality is "a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction... just a rationalizing heuristic tool".

81 I believe the following excerpt from *Doré* exemplifies this nuanced difference (*Doré*, *supra* note 1 at para 6): "If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under section 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited."

82 Per Robert Alexy, whenever the reviewing court applies the proportionality analysis, what it does is optimize two constitutional principles at opposing ends of a spectrum. He calls this "Law of Balancing". He provides as follows:

The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other... Come to think of it, there is just no other way to administer this balancing other than to evaluate, one-by-one, the degree of non-satisfaction of two principles and then weigh them against each other. This inevitably leaves us with minimum of three consecutive sub-inquires. [...] The Law of Balancing shows that balancing can be broken down into three stages. The first stage is a matter of establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage, in which the importance of satisfying the competing principle is established. Finally, the third stage answers the question of whether or not the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first.

Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16 *Ratio Juris* 131 at 136.

*Brethren of Wilson Colony* (“*Hutterian*”),<sup>83</sup> Chief Justice McLachlin emphasized that the government’s pressing and substantial objective should not be altered, that is, it should not be read down when effectuating a minimal impairment analysis.<sup>84</sup> Per her submission, it is the legislative goal—the goal identified in the first stage of *Oakes*—that “grounds the minimum impairment analysis.”<sup>85</sup> She further quotes Aharon Barak, who asserts that “the rational connection test and the least harmful measure [minimum impairment] test are essentially determined against the background of the proper objective, and are derived from the need to realize it.”<sup>86</sup> Barak describes this as the “internal limitation” in the minimum impairment test, which “prevents it... from granting proper protection to human rights.”<sup>87</sup> The decision in *Hutterian* reinforces the importance of formal ascertainment of the objective at the proper level of generality from the very beginning and the negative effects of trying to shift it down the road.<sup>88</sup>

Reminiscent of the above observations regarding the proportionality test as one inseparable whole (that is, as unity of all its sub-inquiries) is a submission by Paul Craig:

[T]he three-part proportionality inquiry structures and facilitates such reasoned evaluation. It is mistaken to evaluate proportionality solely in terms of the third stage, proportionality *stricto sensu*. This is to misunderstand the nature of the three-part test, which is an integral whole, and the manner of its operation. The three-part proportionality inquiry focuses the attention of the agency being reviewed, and the court undertaking the review. The agency has to justify its behaviour in the terms demanded by this inquiry. It has to explain why it thought that the challenged action was necessary and suitable to reach the desired end, and why the action did not impose an excessive burden on the applicant.<sup>89</sup>

Craig further adds that “[t]his more structured analysis”, referring to proportionality, “has a beneficial effect in that it requires administration to justify its policy choice more specifically than under the traditional *Wednesbury* approach.”<sup>90</sup> By carefully scrutinizing the pros and cons of proportionality analysis, as well as canvassing some of its alternatives, Craig concludes, albeit not without certain limitations, that proportionality should be adopted as a standard of review in its own right because “rendering government accountable for its actions is worth the difficulties that [adopting proportionality analysis] might entail.”<sup>91</sup>

Although the requirement of justification merits special consideration (which will be undertaken in the next part of this paper), some general observations regarding a structured proportionality review are worth noting. As Aharon Barak maintains, the test “stresses the need to always justify limitation on human rights; it structures the mind of the balancer; it is transparent; it creates a proper dialog between the political branches and the judiciary; and it adds to the objectivity of judicial discretion.”<sup>92</sup> For Vlad Perju,

83 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian*].

84 *Ibid* at para 76.

85 *Ibid* at para 54.

86 Aharon Barak, “Proportional Effect: The Israeli Experience” (2007), 57 UTLJ 369, at 374.

87 *Ibid* at 373.

88 Not to be confused with the “shifting purpose” doctrine the court refers to in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295.

89 Craig, *supra* note 50 at 34.

90 Craig UK, *supra* note 50 at 100.

91 *Ibid* at 106.

92 Aharon Barak, “Proportionality and Principled Balancing” (2010) 4:1 Law & Ethics of Human Rights 1 at 14-15.

the algorithmic structure of the proportionality test provides an objective common metric necessary to solve the conflict of norms within any constitutional structure.<sup>93</sup> It would be impossible for courts, as Perju emphatically argues, to adjudicate the validity of myriad governmental limitations on rights without such a common metric. According to Vicki Jackson, one of the most ardent proponents of proportionality on the American side, “structured proportionality review provides a stable framework for persuasive reasoning, thereby enhancing the transparency of decisions, unlike more opaque forms of balancing.”<sup>94</sup> Indeed, by making the procedure transparent and intelligible to decision makers, proportionality would receive praise from even those individuals unsatisfied with a case’s outcome. In the metaphorical words of Alec Stone Sweet and Jud Mathews: “In situations where the judges cannot avoid declaring a winner, they can at least make a series of ritual bows to the losing party.”<sup>95</sup> Reminiscent of this last point is yet another submission by Vlad Perju that the sequenced, detailed steps in a proportionality analysis help to promote a sense of procedural justice for those who lose, but who can nonetheless see that their positions were taken seriously.<sup>96</sup>

In addition to these benefits, proportionality also creates a sense of coherence in judicial reasoning. According to Alec Stone Sweet and Jud Mathews:

Under conditions of supremacy (given a steady caseload), fidelity on the part of the court to a particular framework will entrench that mode of argumentation as constitutional doctrine. To the extent that arguing outside of the framework is ineffective, skilled legal actors will use the framework, thereby reproducing and legitimizing it.<sup>97</sup>

Meanwhile, Joel Bakan submits with respect to Canadian constitutional adjudication:

The translation by the Court of section 1’s ambiguous and general language into a neat, four-step test was clearly an attempt to avoid case-by-case evaluation of legislation under vague standards such as “reasonable” and “demonstrably justified in a free and democratic society,” which unavoidably would appear to require questioning the wisdom and political desirability of particular laws.<sup>98</sup>

This approach will also foster public appreciation of reasons provided by administrative decision-makers. A structured review, as Vicki Jackson asserts, may increase the persuasive value of the decisions not only to both the parties, but also to the broader public.<sup>99</sup> It is this sociological acceptance of the legal order by the general public that is one of the most agreed-upon preconditions of the order’s legitimacy.

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93 Vlad Perju, “Positional Objectivity the Case for Proportionality Analysis” (2009) Comparative Law Work-in-Progress Workshop (Princeton).

94 Vicki Jackson, “Constitutional Law in an Age of Proportionality” (2015) 124 Yale LJ 3094 [Jackson].

95 Sweet & Mathews, *supra* note 11 at 89. C.f. Jackson, *supra* note 94: “The stability of the methodology, and its widespread acceptance, enables the Canadian justices’ disagreements to focus on matters that are understandable by the parties as substantively relevant to the contested issue; such opinions also make accessible to readers the nature of the justices’ disagreement, and the divergent evaluations they may give to the same factors.”

96 Vlad Perju, “Proportionality and Freedom—An Essay on Method in Constitutional Law” (2012) 1 Global Constitutionalism 334.

97 Sweet & Mathews, *supra* note 11 at 88.

98 Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 27.

99 Jackson, *supra* note 94 at 4023.

Last, but not least, Jackson observes that structured proportionality analysis “can reveal process failures, including departures from impartial governance, warranting heightened judicial scrutiny”.<sup>100</sup> Jackson’s argument echoes the submission of Brannon Denning and Michael Kent, who argue that doctrinally complex methodological frameworks, such as proportionality, “attempt to optimize enforcement of constitutional principles by preventing their easy circumvention”.<sup>101</sup> Following the literature on risk regulation, the authors maintain that such “anti-evasion doctrines... reflect a ‘mature position’ in the enforcement of constitutional principles”.<sup>102</sup>

### C. The Weight/Scales Dilemma

The third sizable difference between reasonableness and proportionality lies in what I should call the “weight/scales dilemma”. Distilled to its pith, this distinction refers to the ways in which both standards deal with the task of operationalizing deference accorded to the original decision-maker. Under the proportionality test (at least as originally enunciated by then Chief Justice Dickson), the level of scrutiny ought to be *unified*—and it ought to be high.<sup>103</sup> Reasonableness, on the other hand, is a sliding scale. It is “a single standard that takes its colour from the context”.<sup>104</sup> As pointed out by Chief Justice McLachlin in *Catalyst Paper*, “reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry”.<sup>105</sup>

Simply put, under proportionality, where the Court weighs private and public interests at hand, it does not readjust the scales. Rather, it reassesses the relative, contextual weight of the interests to be balanced.<sup>106</sup> Under the standard of reasonableness, the Court readjusts the scales every time in weighing the contextual factors of a particular case.

Regarding the fact that the intensity of review in proportionality analysis always remains the same in, Justice Bastarache in *Thomson Newspapers Co v Canada (Attorney General)*, observes:

The degree of constitutional protection may vary depending on the nature of the expression at issue. This is *not because a lower standard is applied*, but because the low value of the expression may be more easily outweighed by the government objective.<sup>107</sup>

Within the traditional model of adjudicating rights-based constitutional claims—whereby the court first determines whether the impugned provisions infringe *Charter* rights and, if the answer is in the affirmative, decides whether the infringement can be saved under section 1—there should be no causal relationship between the weight, or value, of the right and the stringency of judicial scrutiny or standard of review. Since

100 *Ibid.*

101 Brannon Denning & Michael Kent, “Anti-Evasion Doctrines in Constitutional Law” (2012) 4 Utah L Rev 1 at 7.

102 *Ibid.* at 6.

103 Some argue that the SCC’s shift from a more deferential approach to the *Oakes* test since *Edward Books* “has no foundation in the language or structure of the Charter” (see e.g. Sara Weinrib, “The Emergence of the Third Step of the *Oakes* Test in *Alberta v Hutterian Brethren of Wilson Colony*” (2010) 68 UT Fac L Rev 77 at 91).

104 *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59.

105 *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 18.

106 It is worth noting that there is currently a profound methodological confusion in the Court’s reasoning regarding the standard of deference in constitutional adjudication, nicely captured by Choudhry, *supra* note 60.

107 *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877, at para 91 (*per* Justice Bastarache) (citations omitted) [emphasis added].



“there is no hierarchy of rights in the *Charter*”,<sup>108</sup> I think it is methodologically sound to abstain from differentiating between “more valuable” and “less valuable” rights (or parts of the rights) and, as a corollary of this, subjecting them to different standards of review. Much to my chagrin, this initial approach to *Charter* adjudication did not live long. As Sujit Choudhry observes, the Court almost immediately retreated from *Oakes* in *Edwards Books*,<sup>109</sup> and acknowledged and consolidated its stance soon thereafter in *Irwin Toy Ltd v Quebec (Attorney General)*:<sup>110</sup>

In the decade following *Oakes*, the Court searched for criteria of deference, to reliably and predictably *categorize* cases where deference was warranted and those where it was not. These categories were not applied consistently by the Court, and, indeed, produced disagreement within the Court over how they should be applied in specific cases. Underlying both trends were concerns regarding the cogency of the distinctions employed by the Court to delineate the boundaries of these categories.<sup>111</sup>

Yet, Jeremy McBride observes:

The danger that faces the Court, particularly if it allows the margin of appreciation to weaken the test of proportionality without at least articulating more fully the rationale for the differential approaches pursued, is that its own ruling might be seen less as principled evaluation and more as its own arbitrary preference for the balance to be achieved between different rights and interests.<sup>112</sup>

Reminiscent of McBride is an emphatic argument of Justice McLachlin (as she then was), who, dissenting in part in *R v Lucas*, cautioned that: “To allow the perceived low value of the expression to lower the bar of justification from the outset of the section 1 analysis is to run the risk that a judge’s subjective conclusion that the expression at issue is of little worth may undermine the intellectual rigour of the *Oakes* test.”<sup>113</sup>

She further explains:

Instead of insisting that limiting the right is justified due to a pressing concern that is rationally connected to the objective, and thus appropriately restrained, the judge might instead reason that any defects on these points should be resolved in favour of justification by the low value of a *Charter* protected activity such as expression. The initial conclusion that it is of low value may thus dictate the conclusion of the subsequent steps in a circular fashion.<sup>114</sup>

108 The SCC’s jurisprudence has repeatedly affirmed its commitments to the principles that “no Charter right is absolute” and that “there is no hierarchy of rights in the Charter”. Frank Iacobucci, “Reconciling Rights: The Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) 20 SCLR (2d) 137 at 141.

109 *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713. *Inter alia*, the court held that “[l]egislative choices regarding alternative forms of business regulation ... need not be tuned with great precision in order to withstand judicial scrutiny”, since “[s]implicity and administrative convenience are legitimate concerns” (at para 130).

110 *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927. In *Irwin Toy*, the SCC aspired to carve out a category of cases where greater deference towards the legislator was warranted and the categories wherein it was not.

111 Choudhry, *supra* note 60 at 503 [emphasis added].

112 Jeremy McBride, “Proportionality and the European Court of Human Rights” in Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) at 35.

113 *R v Lucas*, [1998] 1 SCR 439 at 115.

114 *Ibid.*

### III. THE CULTURE OF JUSTIFICATION

One of the most laudable effects of a proportionality review is that it constantly pushes the government to justify its policy choices as well as “render government accountable for its actions”.<sup>115</sup> The proposition that the government must provide ample justification for its actions underpins the shift from a culture of authority to a culture of justification in the global legitimacy discourse. Stephen Gardbaum states:

[This] strand of political legitimacy [...] is more onerous than the conventional one in modern liberal political theory, because it applies a test of reasonable public *justification* not merely to the basic or constitutional structure of society, but to each and every action of government operating within that structure.<sup>116</sup>

Essentially, this requirement for justification “represents a profound shift in constitutional law on a global level”<sup>117</sup> and according to Etienne Mureinik, signals a shift from what he calls a culture of authority to a culture of justification:

If the new constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification—a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defense of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.<sup>118</sup>

David Dyzenhaus maintains that Mureinik succeeds in creating “his own vision of law as justification,” that is “both different and more fruitful than the notion of integrity”, largely propagated by Dworkin.<sup>119</sup> Mureinik’s new paradigm of legitimacy, which imposes substantive—not only procedural or jurisdictional—constraints on government action,<sup>120</sup> gains currency in a modern proportionality discourse<sup>121</sup> and beyond. Its proponents claim that the sequenced and stringent four-pronged proportionality test provides the analytical framework for operationalizing the requirement of justification. The requirement of offering substantial justifications for all actions in terms of rationality and reasonableness is reminiscent of what Habermas would call the force of the better argument. For Habermas, the test for legitimacy, among other things, is the discourse principle, which presupposes people’s participation in deliberative process of justification.<sup>122</sup> In his own words: “Deliberative politics acquires its legitimating force from the discursive structure of an opinion- and will-formation that can fulfill its socially integrative function only because citizens expect its results to have a reasonable quality.”<sup>123</sup> It is fair to infer that proportionality fits nicely into this conceptual paradigm as the analytical framework that structures deliberative processes (though it bears notice that Habermas himself was an ardent critic of proportionality with balancing at its core, arguing that it leads to the collapse of the “fire wall”, “depriving human rights of their normative power”).

115 Craig UK, *supra* note 50 at 106.

116 Gardbaum, *supra* note 12 at 263 [emphasis added].

117 Cohen-Eliya & Porat Justification, *supra* note 13 at 463.

118 Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 S Afr J On Hum Rts 31 at 32 (quoted in Dyzenhaus, *supra* note 13 at 11).

119 Dyzenhaus, *supra* note 13 at 37.

120 Gardbaum, *supra* note 12 at 263.

121 See e.g. Cohen-Eliya & Porat Justification, *supra* note 13; Kumm, *supra* note 13.

122 Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996) at 304.

123 *Ibid.*

In a similar vein, Mattias Kumm argues that proportionality is justified by the concept of legal legitimacy, which is based on state's ability to demonstrate the justifications for its actions—a process which Kumm terms “Socratic Contestation”.<sup>124</sup> According to this conception, the courts, using proportionality, push the government to constantly provide a logical basis and coherent reasons for its actions, which are crucial for the legitimacy of those actions. Echoing Kumm's submission are Moshe Cohen-Eliya and Iddo Porat:

Proportionality, we believe, is essentially a requirement for justification, which represents a profound shift in constitutional law on a global level. [...] At its core, a culture of justification requires that governments should provide substantive justification for all their actions, by which we mean justification in terms of the rationality and reasonableness of every action and the trade-offs that every action necessarily involves, i.e., in terms of proportionality.<sup>125</sup>

In sum, to contrast with the old culture of authority and as Stephen Gardbaum maintains, the new constitutional culture treats authority to act as a necessary but not a sufficient condition for legitimacy.<sup>126</sup> An additional step is now required. To claim legitimacy, as Etienne Mureinik asserts, the state ought to fulfill the requirement substantial justifications in terms of rationality and reasonableness. This, in turn, signals the worldwide paradigm shift from the culture of authority to the culture of justification.

#### IV. REASONABLENESS OR PROPORTIONALITY?

Some curious inferences would emerge as part of this debate. First and foremost, it appears that in order to now satisfy the legitimacy requirement, not only should the standard of review be substantively analogous to proportionality (as, for instance, the *Doré* approach allegedly is), but it also should be framed as a rigorous multi-pronged inquiry that would push the government to constantly provide a logical basis and coherent reasons for its actions. Simply put, the form in which the judicial inquiry is cast also matters.<sup>127</sup>

Secondly, if the legitimacy of government actions that invokes constitutional rights is predicated on the government's ability to justify its choices (failing which the actions or legislative scheme would be deemed disproportionate and, hence, constitutionally invalid), it should follow that any body exercising statutory authority is also bound by the same justifiability requirements and restrictions. Sub-legislative actions can only take effect within the scope of the authority of the legislature itself—for no one can delegate to any one any power that they themselves do not also have. If not, this would defy the rule of law that provides that “[a] decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law”.<sup>128</sup> As Guy Regimbald elaborates, “the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions, and all other actions (whether legislative, administrative or judicial) which depends for its validity on statutory authority”.<sup>129</sup>

124 Kumm, *supra* note 13 at 142.

125 Cohen-Eliya & Porat Culture, *supra* note 13 at 463.

126 Gardbaum, *supra* note 12 at 264.

127 For a fuller discussion, see Duncan Kennedy, “Form and Substance in Private Law Adjudication” (1976) 89:8 Harvard L Rev 1685.

128 *Dunsmuir*, *supra* note 16 at para 29.

129 Regimbald, *supra* note 55 at 275.

From this, if constitutional validity requires that all government actions invoking *Charter* rights be “*demonstrably justified*”, the very same requirement should apply to all sub-legislative actions. Given the amorphous nature of the reasonableness standard, in contrast to the sequenced and structured proportionality test, it does not satisfy this requirement for constitutional legitimacy. It should be seen as an unacceptable standard not only in constitutional law, but also in the review of administrative decisions that allegedly violate *Charter* rights. Arguing otherwise is tantamount to arguing against the rule of law principle.<sup>130</sup>

## CONCLUSION

This paper began by recounting the current problem in the judicial review of discretionary administrative decisions that engage *Charter* rights and the rampant inconsistency in the SCC’s approach to the analytical framework through which to address *Charter*-related issues. While a *Doré* quasi-proportionality framework sought to bring clarity, in practice, it brought more confusion. The proposed reasonableness approach that centers on proportionality is an untenable standard of review in administrative law because, as explained in Part II, reasonableness and proportionality are distinct standards, not only in terms of their institutional and doctrinal effects, but also in terms of the implicit normative assumptions on which they operate.

Albeit signalling a doctrinal shift in the SCC’s reasoning, the amalgamation of the *Oakes* and administrative law approaches remains both unfortunate and illegitimate. Indeed, as argued in Part IV, the amorphous nature of the reasonableness standard, in contrast to the sequenced and structured proportionality test, does not satisfy the requirement of constitutional legitimacy premised on what has been alluded to above as “the culture of justification”. It appears that conceptual harmony between the *Oakes* and administrative frameworks remains an illusion and rather than relying on such amorphous standards in their decisions, judges ought to articulate the specific reasons for their conclusions. This can be done by engaging in a sequenced and structured proportionality analysis that requires the government to rigorously defend and justify its choices.

By setting the justificatory burden for the government so high, proportionality can claim institutional legitimacy no other analytical framework for rights adjudication can match. The imposition of a rigid, one-size-fits-all standard to approach *Charter* claims enhances the state’s democratic values and principles and, ultimately, affords the rights enshrined in the *Charter* the greatest protection.

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130 Apart from the foregoing, there is yet another dimension in which the current application of the standard of reasonableness trenches on the requirement of the rule of law. Specifically, in effectuating the analysis under the amorphous and unpredictable standard of reasonableness, the reviewing courts seriously impair Fuller’s desiderata of consistency, stability, and transparency of application. Conversely, proportionality offers an unparalleled discursive frame for norm-based reasoning that facilitates fulfillment of the foregoing requirements.