

JUDICIAL DEFERENCE AND THE POSITION OF PLAINTIFFS IN HUMAN RIGHT CASES A COMPARISON AMONG IRISH, UK AND CANADIAN APPROACHES

Judicial Deference (Yargısal Geri Durma) ve İnsan Hakları Davalarında Davacıların Durumu Bakımından İrlanda, Birleşik Krallık ve Kanada Yaklaşımlarının Karşılaştırılması

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ABSTRACT

It is clear that Parliaments, executives, administrative bodies and judiciary have to have certain roles in this human right realization process. However, the extent of their role and their cooperation is a subject for discussion. It is also clear that Judicial Deference does not have unique definition. There are some objections and nuances among commentators. It is necessary to discuss here what those differences are to understand plaintiffs' position. Because proposal effects of judicial deference will change, depending on what is understood from judicial deference. There are various definitions and formulas to make it understandable and beneficial. I will focus three jurisprudences' legal structures, namely Ireland, UK and Canada. I will specifically look into the effects of judicial deference on plaintiffs from the perspective of whether this approach has any negative effect on their position. My goal is to make clear different definitions' effects on plaintiffs rather than making crystal definition of judicial deference.

Keywords: human rights review, plaintiff, chilling effect, margin of appreciation, judicial deference, competency, expertise, parliament, administrative bodies, executives,

ÖZET

İnsan haklarının realizasyonu bakımından parlamento, yürütme, idare ve mahkemelerin rollerinin belirgin olması bir zorunluluktur. Bununla birlikte bu rollerin kapsamı ve birbirleri ile olan etkileşimi tartışma konusudur. Yargının kendi dışındaki paydaşlara müdahale etmediği bir alan bırakması olan "judicial deference" kavramının açık bir tanımı bulunmamaktadır. Bu belirsizlik nedeniyle insan haklarına müdahale edildiğini iddia eden davacının durumunun tartışılması gerekmektedir. Çünkü bu kurumdan ne anlaşıldığına bağlı olarak davacının durumu da değişiklik gösterecektir. Kurumun anlaşılması ve yararlı olabilmesi için bir çok tanım ve formül ortaya atılmıştır. Makalemizde İrlanda, Birleşik Krallık ve Kanada sistemleri incelenecektir. Kurumun insan hakları davalarında davacıların hak aramaları üzerinde olumsuz bir etkisi bulunup bulunmadığı makalenin ana amacını teşkil edecektir. Kurumun temiz bir tanımının yapılmaya çalışılmasından ziyade kurumun hak arayanlar bakımından etkileri ortaya konulmaya çalışılacaktır.

Anahtar Kelimeler: insan hakları yargısı, yargısal geri durma, yeterlilik, uzmanlık, idare, parlamento, takdir hakkı, soğutma etkisi,

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1. Introduction:

There is a consensus on the importance of human rights in a democratic society. However there is no consensus on their concrete definitions and those can change depending on the context, the time and the institution. It means that a human right can be defined at the different time, in the different context by an institution differently. In this situation the roles of these institutions become important. The responsible institution will say the last word in case of the disagreement. In this process the responsible institution has to act according to its legal position in the democratic society. However, legal position of the legislative, executive or judiciary also is not all the time sharp. All of them have special features which make them important for the society. For instance, having expertise, being more accountable to electorate or independent are these important features.

It is clear that Parliaments, executives, administrative bodies and judiciary have to have certain roles in this human right realization process. However, the extent of their role and their cooperation is a subject for discussion.

Plaintiffs want to enjoy their human rights which are a subject of a human right case. For an individual mostly procedure is not important whereas its result is.

It is also clear that Judicial Deference does not have unique definition. There are some objections and nuances among commentators. It is necessary to discuss here what those differences are to understand plaintiffs' position. Because proposal effects of judicial deference will change, depending on what is understood from judicial deference. There are various definitions and formulas to make it understandable and beneficial.

I will focus three jurisprudences' legal structures, namely Ireland, UK and Canada. I will specifically look into the effects of judicial deference on plaintiffs from the perspective of whether this approach has any negative effect on their position.

In this essay, as a methodology, different commentators' opinions and definition on judicial deference from different jurisdiction will be explained independently to make them clear. This essay will show different reasons and offers in their part. Length of the essay will prevent the possible confusion.

My goal is to make clear different definitions' effects on plaintiffs rather than making crystal definition of judicial deference. Actually it will be seen that there is no unique definition even in the same jurisdiction. If it is reality then to bring another point of view which focuses on the possible effects of judicial deference might cause new look to this slippery subject.

2. Academic and Judicial Opinions about Judicial Deference

In this section opinions and proposal models of judicial deference will explain. There are lots of critics and offers in this area. By evaluating different opinions both against and in favor to judicial deference, problematic issues will be shown. Subsequently, these problematic areas will be evaluated for their effects on Plaintiffs of human right cases.

2.1 Discussions from UK

2.1.1 Allan's Objections Regarding Judicial Deference

Allan believe that judicial deference *"forsake fundamental values in favour of capitulation to legislative or executive fiat"*¹ it is also *"abandonment of impartiality between citizen and state"*² and *"it represents the conferral on either Parliament or the executive of a wholly unfettered power to strip the individual right in question of any practical effect"*³

2.1.2 Kavanagh's Definition of Judicial Deference

According to Kavanagh deference *"judicial deference occurs when judges assign varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy."*⁴ Kavanagh also states that deference will change from case to case according to weight which has been placed by the judge to the decision of the elected bodies. ⁵ In *Belmarsh Prison Case*⁶ This idea was explained and defined by Lord Bingham by saying that *"I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment"*⁷, however, *"While any decision made by a representative democratic body must of course command respect, the degree of respect will be conditioned by the nature of the decision"*⁸ Kavanagh further states that in certain circumstances a statute itself may provide some reasons to support the choices of the Parliament.⁹ This approach also has been explained by Lord Bingham of Cornhill in *R. v. Lichniak*¹⁰

¹ T.R.S. Allan, "Human Rights and Judicial Review: a Critique of 'Due Deference'" [2006] Cambridge Law Journal pp 674.

² ibid pp 676

³ ibid pp 692

⁴ Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 Law Quarterly Review (ns) 222 223

⁵ ibid pp 223

⁶ [2005] 2 AC 68

⁷ [2005] 2 A.C. 68 at [29]

⁸ A [2005] 2 A.C. 68 at [39]

⁹ Kavanagh (n 4) pp 223

¹⁰ [2003] 1 A.C. 903

“The fact that represents the settled will of the democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of the democratic assembly on how a social problem is best tackled.”¹¹

Kavanagh also explain that judicial deference is a partial situation than the absolute one the court just may give some weight to elective branches by retaining its duty to review legislative or executive decisions. In the *Wilson v First County Trust*¹² Lord Hope of Craighead said that:

“It does not follow from recognition that there is an area of judgment within which the judiciary will defer to the elected body on democratic grounds that the court is absolutely disabled from forming its own view in these cases as to whether or not the legislation is compatible.”¹³

Also in *International Transport Roth GmbH v Secretary of State for the Home Department*¹⁴ and *Belmarsh Prison Case* although court gave weight to elective branch in two cases, still Anti-Terrorism Crime and Security Act 2001 and Pt II of Immigration and Asylum Act 1999 were found incompatible with Convention rights. Regarding these approaches of the Court Kavanagh states that:

“It is simply that in scrutinising the justification for the legislation or executive decision, the courts must be sensitive to the limits of their constitutional role, as well as the limits of the adjudicative function of the courts. An appreciation of these limits should lead them to give appropriate but not unquestioning weight to the decisions of primary decision-makers”¹⁵

Kavanagh states that judicial deference does not mean that the court should automatically accept elected bodies decisions in pre-ordained areas because of their expertise or legitimacy. Court’s duty in all cases is to take into account all contextual factors like severity of the rights violation and limits of their expertise and legitimacy. As a result, variable degree of intensity should be taken into consideration by the court even in a very important situation like national security.¹⁶ In *A v Secretary of State for the Home Department*¹⁷ Case Lord Bingham stated *“While any decision made by a representative democratic body must of course command respect, the degree of respect will be conditioned by the nature of the decision.”¹⁸*

¹¹ 2003] 1 A.C. 903 at [14]

¹² [2004] 1 A.C. 816

¹³ [2004] 1 A.C. 816 at [116]

¹⁴ [2003] QB 728

¹⁵ Kavanagh (n 4), pp 225

¹⁶ ibid pp 226

¹⁷ [2005] 2 AC 68

¹⁸ [2005] 2 AC 68 at [39]

Simon Brown LJ in *International Transport Roth GmbH v Secretary of State for the Home Department*

*"..... the court's role under the 1998 Act is as the guardian of human rights. It cannot abdicate this responsibility."*¹⁹

*"But judges nowadays have no alternative but to apply the Human Rights Act 1998. Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts."*²⁰

Kavanagh argues on the limits of judicial deference that:

*"The doctrine of deference certainly demands that the courts should be sensitive to their institutional limitations, but such sensitivity does not require them to kow-tow to the decisions of the elected branches simply because they have the imprimatur of democratic approval."*²¹

Kavanagh said that judicial deference should be in ranges between minimal deference to substantial deference. Minimal deference should be used for all legislative and executive decisions, whereas, substantial deference should be used in cases where the courts have less competence or legitimacy to decide on the legislative or executive decisions, than their decision maker.²² Kavanagh concludes that acting in this range of deference is the constitutional duty of the court rather than abdicating its constitutional duty.²³

2.1.2.1 What the judges should do whether they agree with the decision makers or not?

Kavanagh compared with impact of precedent to deference and said if judge find a legislative or executive decisions agreeable on substantive grounds, then there is no need for deference and the situation is simply being agreed. On the other hand, in case of disagreement on substantive issues or having been dubious regarding the right answer of the case, court may prefer to provide deference to the first level decision makers.²⁴

2.1.2.2 What Are the Basis of Deference and Non-Justiciability

Kavanagh said that even though both deference and non-justiciability are similar because of the fact that they are born from the limits in separation of power concerning competence, expertise and democratic legitimacy of the

¹⁹ [2003] QB 728 at [27]

²⁰ [2003] QB 728 at [54]

²¹ Kavanagh (n 4) pp 227

²² ibid pp 228

²³ ibid pp 229

²⁴ ibid pp233

elected branches there are very significant differences, as well. Although the degree of deference and its subject may change case to case as a result of evaluation of the court by balancing all the relevant factors in the particular case. In non justiciability there are certain areas which have been accepted out of the court's responsibility in advance. This future make un-justiciability more rigorous than judicial deference²⁵ Kavanagh evaluated the cases which have three main features, respect human rights, and elective branches' decisions, maintain its review jurisdiction²⁶ as such *R. v A*²⁷, *Lambert*²⁸, *Roth*²⁹ and the Belmarsh Prison as significant examples of judicial deference.

2.1.3 Young's Opinions about Judicial Deference

2.1.3.1 What Is Judicial Criticism Regarding Judicial Deference

Alison L Young gives *Huang v Secretary of State for the Home Department*³⁰ case as a strong example of the judicial critique to judicial deference.³¹

In *Huang*, Counsel had argued; in reliance on *Kay v Lambeth London Borough Council*³² Lord Bingham bring forward three critiques to judicial deference. First critique is related to its effects on courts performs.

"We think, with respect, that there has been a tendency, both in the arguments addressed to the courts and in the judgments of the courts, to complicate and mystify what is not, in principle, a hard task to define, however difficult the task is, in practice, to perform"³³

Second objection is related to the democratic factors:

Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented, as also the public interest in securing accommodation for the indigent, averting homelessness and making the best use of finite public resources. The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate in Parliament,

²⁵ *ibid* pp 241

²⁶ *ibid* pp 242

²⁷ *R. v A* (No.2) [2001] UKHL 25; [2002] 1 A.C. 45.

²⁸ *R. v Lambert* [2001] UKHL 37; [2002] 2 A.C. 545.

²⁹ *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] Q.B. 728.

³⁰ [2007] UKHL 11; [2007] 2 AC167.

³¹ Alison L Young, 'In defence of Due deference'(2010) 72 *Modern Law Review* (ns) 554 pp 567

³² [2006] UKHL 10; [2006] 2 AC 465.

³³ [2007] UKHL 11; [2007] 2 AC167. at 14

where non-nationals seeking leave to enter or remain, are not in any event represented.³⁴

Third critiques is that:

“The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.”³⁵

2.1.3.1 Minimal and Substantive Deference

Young summarizes Kavanagh’s minimal deference and substantive deference definitions. First, minimal deference is weaker and in this situation court just give respect to opinion of executive or the legislature during the evaluation of the situation. Second, substantive deference has been used in specific circumstances; whereas minimal deference is a general principle. Third, in the case of paying attention to the constitutional legitimacy, the role of minimal deference is lesser than substantial deference.³⁶⁻

2.1.3.1 Is There Any Difference among Institutions on Judicial Deference

The Courts can defer both legislative and executive, whilst adjudication of their decisions. In a manner of the implementation of Human Rights Act 1998, under section 3 and 4, high court and above can read primary and secondary legislation whether they are compatible with convention rights and can make the declaration of incompatibility, which does not have any effect on their power. Courts also can assess executive decisions whether they are compatible with conventional rights or not. However, in this case incompatible decisions and actions may be struck down. In two situation above Courts may defer to the decision makers.³⁷

2.1.3.2 Deference as Respect and Deference as Submission

Young explains deference as respect and submission and offers three models for judicial deference. When deference as respect happens, the courts show respect to decisions of the legislature or executive but still determines whether decisions contravene convention rights or not. On the other hand, in the case of deference as submission the courts simply accept the correctness of the decision of legislature or executive.³⁸

³⁴ [2007] UKHL 11; [2007] 2 AC167. at 17

³⁵ [2007] UKHL 11; [2007] 2 AC167. at 16

³⁶ Young, (n 31) pp 556

³⁷ ibid pp 557

³⁸ ibid pp 559

2.1.3.3 Deference Models

Young offers three models of deference. First model is “submission.” (Model I) In this model judiciary rests constitutional or institutional reasons to accept that legislative and executive can reach the correct answer regarding a Convention right by not defining convention right and not doing proportionality test.³⁹ Lord Hoffman the dictum in *Secretary of State for the Home Department v Rehman*⁴⁰ can easily explain this approach. “Decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.” According to Young, “this model would provide epistemic reasons for deference.”⁴¹

Model II is based on submission plus correction. In this model institutional features of courts, legislative and executive are kept in mind. For instance, legislative has more general approach to create common good. The Courts have good ability to correct errors. Although legislative or executive has expertise on their area, The Courts are still better placed to correct errors as to the principles to be applied.⁴²

Last but not least Model III is respect. In this model the courts still give weight to the decision of the executive or the legislature, however, they continue to determine whether they reached erroneous results in a wide range of circumstances or not. Whilst, Model I and II give an opportunity to intervene to executives decision just in the case of wrong implementation of general policy, “Model III” allow the court to assess both policy and implementation of it.⁴³ Young explains that:

When there are strong constitutional reasons to place authority for determining rights issues in the hands of the courts, whilst recognizing that the legislature or executive may be better placed to determine the right answer to a rights issue, it is legitimate to adopt model III.⁴⁴

2.1.3.4 Factors Influencing the Degree of Deference

Young evaluates spatial and non-spatial approaches and prefers non-spatial one in which courts focus on the issues in the existing case not generally but context specifically when they decide about the degree of deference.⁴⁵

³⁹ ibid pp 561

⁴⁰ Secretary of State for the Home Department v Rehman [2001] UKHL 47; [2003] 1AC153.at 50

⁴¹ Young, Young, (n 31) pp 564

⁴² ibid pp 562

⁴³ ibid pp 562

⁴⁴ ibid pp 564

⁴⁵ ibid pp 565

Additionally, he compares constitutional and institutional factors as another approach to decide the degree of deference. Constitutional factors are based on the understanding that executive or the legislature may decide more legitimately than the courts regarding the definition of Convention rights and its implementations. However, institutional factors focus on expertise and competency of the legislature and executive, and for those reasons, they are more likely to reach the right answer concerning the Convention rights and their implementation.⁴⁶

2.1.3.5 Which Model Has Been Offered By Young

Young offers Model III with the non-spatial approach and he prefers to use institutional factor instead of the constitutional factor. His offer is not based on relative authority of the legislature, executive and judiciary instead it is based on institutional features of the legislature or executive, which are better to be able to reach the right answer than judiciary. In case of lacking evidence regarding better ability of the legislature, executive or judiciary to evaluate the issues before the court, he still finds acceptable to defer to executive or legislative, by resting their determination process by which happens in more legitimately.⁴⁷

2.1.4 Lord Hoffman's Understanding of the Term of Deference

Lord Hoffman puts forward his understanding of term of deference in *R. (on the application of Pro-Life Alliance) v BBC*⁴⁸ (*Pro-Life Alliance*) as follows

"[75] My Lords, although the word "deference" is now very popular in describing the relationship between the judicial and other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. **In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.**

[76] This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which the decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive

⁴⁶ *ibid* pp 566

⁴⁷ *ibid* pp 567

⁴⁸ [2003] UKHL 23; [2003] 2 W.L.R. 1403.

are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. **The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle.** It is reflected in Art.6 ECHR. **On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.**⁴⁹

Jowell summarises Lord Hoffman's statement as follows

"a) That the question of whether the courts should concede competence to the legislature is one of law, upon which the courts are the ultimate decision-makers.

(b) That the legal principles upon which the courts decide whether to concede competence to the legislature are:

(i) that the independence of courts invests them with the power to decide questions such as whether individual human rights have been violated, and

(ii) that the "majority approval" attached to the commands of the legislature and other public bodies invests them with the power to decide questions of policy and the allocation of resources."

2.1.5 Jowell's Opinion on Judicial Deference

Jowell puts different approaches in House of Lord by evaluating Pro-Life Alliance case like Lord Hoffman's approach on the term of deference.⁵⁰ He explains his acceptance and Court's position under the provisions of HRA. He states that judicial review of legislation is new for UK courts and polity. This situation sometimes criticised by executive by stating that courts are trespassing their turf. On the other hand, HRA started a new era which limits customary position of legislative by reviewing its decision from the perspective of compatibility with the Convention Rights. HRA requires that Convention rights shall be respected by all branches of government. For these reasons, equating "democratic principle" with "majority approval" and arrogating the monopoly of legitimacy to elected bodies decisions is not acceptable because of their this feature. However, significant but limited rights will be protected

⁴⁹ [2003] UKHL 23; [2003] 2 W.L.R. 1403.

⁵⁰ Jeffrey Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) Public Law (ns) 592 pp 592 [Emphases added]

against the popular will⁵¹ With HRA courts are become responsible to draw limits of rights-oriented democracy. Thus courts neither have to prefer the authority of legislative nor other bodies wherefore they represent the popular will and they are accountable to the electorate.⁵²

Jowell gives different weight to institutional capacity than democratic principle by stating that:

“[I]t is quite appropriate for courts modestly to acknowledge a practical appreciation of their own institutional limitations. There will be occasions where other bodies, whether Parliament, the executive or a non-departmental public body containing specialist expertise, will be better equipped to decide certain questions.”⁵³

2.1.6 Jowell's Models

Jowell says that *“the extent and the degree of concession of course depends upon context and the right and interest involved.”*⁵⁴ And he offers a model to evaluate the case. When national security argument used to justify a limitation on freedom of speech in a given case, he offers to evaluate the existence of the threat beforehand. In this stage the court may accept expertise of executive. Then the court is going to determine negative effects if this right freely utilize. In the following step the court will focus on whether there are other options, and which are less restrictive. Finally, the court will answer the question that whether this restriction is necessary, in existing circumstances, in a democratic society. Whilst this process is done the court may give some weight to the decision-maker by keeping in mind⁵⁵ *“relevant indication of modern democratic requirements decisions of European Court of Human Rights, in international instruments, and in the case law of other countries”*⁵⁶ All considerations stated above will be taken into account by the court to reach its own interpretation whether that limitation on the human rights is acceptable in countries democratic environment.⁵⁷

Jowell states that there is no reason to concede to other branches during this process explained above, neither as a matter of law *“nor based upon any legal principles as Lord Hoffmann contends.”*⁵⁸

⁵¹ Jeffrey Jowell, (n50) pp 597

⁵² ibid pp 597

⁵³ ibid pp 598

⁵⁴ ibid pp 598

⁵⁵ ibid pp 598

⁵⁶ ibid pp 598

⁵⁷ ibid pp 598

⁵⁸ ibid pp 599

2.1.7 Judicial definition of deference in Roth

In *International Transport Roth GmbH v Secretary of State for the Home Department*⁵⁹ Laws L.J he puts some principles regarding implementation of deference and Clayton summaries those as:

greater deference should be paid to an Act of Parliament than the decision of the executive or a subordinate measure ;

there is more scope for deference where the Convention itself requires a balance to be struck and much less so where rights are expressed in unqualified terms ;

greater deference will be due where the subject-matter is peculiarly within the constitutional responsibility of democratic government (such as the defence of the realm or immigration control) and less when it lies within the constitutional responsibility of the court (such as the field of criminal justice);

greater deference is due where the subject matter lies more readily within the actual or potential expertise of the democratic powers (such as governmental decisions in the area of macro-economic policy).⁶⁰

2.1.8 An objection to defer to administrative decision making

Clayton states that there is no reason to “concede to the executive’s views on the crunch constitutional question,” because voters do not have a direct effect on them. Additionally it is not understandable to accept courts interviewing less valuable than that initially made by a civil servant. “*Finally the separation of powers is not the cornerstone of the English Constitution*”⁶¹

2.2 Discussions from Ireland

2.2.1 Proportionality Test and Deference

Brady openly bring forwards that how and why the proportionality test can be used in administrative law cases in which administrative actions infringe both Conventional and Constitutional rights in the light of *Meadows v. Minister for Justice and Law Reform*⁶² case which was held by Irish Supreme Court.⁶³ He states that even though Supreme Court did not give crystal definition of the proportionality test and address to the question of deference, it can be shown by evaluating this and the decision in *Heaney v. Ireland*.^{64 65}

⁵⁹ [2003] QB 728

⁶⁰ Richard Clayton, ‘Judicial Deference and “Democratic Dialogue”: The Legitimacy of Judicial Intervention under the Human Rights Act 1998 ’ (2004) SPRING Public Law (ns) 33 pp 39

⁶¹ Clayton, ‘(n 60) pp 40

⁶² [2010] IESC 3.

⁶³ Alan DP Brady, ‘Proportionality Deference and Fundamental Rights in Irish Administrative Law: The Aftermath of Meadows’ (2010) 32 Dublin University Law Journal (ns) 136, pp 1 [1994] 3 IR 593(HC).

⁶⁵ Brady (n63 pp 1-4

He focuses on the fact that proportionality cases, which administrative decisions challenged because of effects on someone's constitutional and conventional rights.⁶⁶ He accepts that proportionality test is more appropriate in administrative cases than for challenges to legislation. Because legislative has more legitimacy than executive, and their decision making processes are more open. Additionally, administrative decisions seem to cause breaches on fundamental rights more frequently than legislation.⁶⁷

He accepts that four-parts proportionality test, in which set out in *Heaney* can be used, even if the majority judgment in *Meadows* did not expressly agree on this formulation. Brady thinks that this structure is acceptably wide, so it can be used by all decision makers and it seems flexible to survive institutional features. This kind of reasoning process would provide clearance to administrative decision reviewing, by comparing with abstract norms such as public interests objectives and fundamental rights.⁶⁸ "*... the abstract nature of the norms in a proportionality case is such that a structured and transparent reasoning process is required*"⁶⁹

He explains four-part proportionality test:

1. The objective of a measure limiting a fundamental right must be deemed to be legitimate (*legitimate objective*).

2. The measure must be rationally connected to the legitimate aim (*rational connection*).

3. Denham J expressly endorses the third element of *Heaney* that the measure must not limit the fundamental right any more than is necessary to achieve the legitimate objective (*minimal impairment*).

4. There must be an overall proportionality between the achievement of that legitimate objective and the impact on the fundamental right. (*overall balance*).⁷⁰

Four-part proportionality test focuses on the acceptability of the decision in first two stages, and the proportionality of a limitation of fundamental rights in second two stages. Additionally the first stage requires a normative assessment; second, third and fourth stages require epistemic assessments.⁷¹

⁶⁶ ibid pp 1

⁶⁷ ibid pp 2

⁶⁸ ibid pp 6

⁶⁹ ibid pp 6

⁷⁰ ibid pp 17

⁷¹ ibid pp 8

2.2.2 Should Judicial Deference Be in Proportionality Cases

Brady states that future usage of the proportionality test in administrative cases shall make necessary to create a doctrine of judicial deference by court.⁷² He supports his argue with the dictum of Murray CJ in *Meadows*:

In applying the principle of proportionality in this context I believe the Court may have regard to the degree of discretion conferred on the decision-maker. In having regard to the degree of discretion a margin of appreciation should be allowed to the decision-maker in choosing an effective means of fulfilling any legitimate policy objectives⁷³

However, the term of “margin of appreciation” is needs to be explained, and it is explained in *Pullen v Dublin City Council (No 1)*⁷⁴ by Irvin J.:

[T]he doctrine of the “margin of appreciation” is, principally, a tool which assists an international court in exercising a supervisory jurisdiction over a number of States who may have different pressures and different social needs and that it is not a technique which is available to this Court, it being a domestic court, to in some way ameliorate the obligations of an organ of the State from compliance with its Convention obligations.⁷⁵

2.2.3 Margin of appreciation

Rabinder Singh, explains the nature and character of the concept of margin of appreciation in three stages. First it is not the same with “Wednesbury unreasonableness in English public law. Its scope can vary with subject matter, it is often narrow.” Secondly, it is a result of subsidiary principle of Conventional EU system. Thirdly, Strasbourg court gives special place to the legislature and accepts that the legislature has the responsibility to solve social injustice.⁷⁶

Margin of appreciation firstly used in the Commission report in *Lawless v Ireland* in 1960 and explained that the primary obligation of implementation of the ECHR belong to state authorities and later in 1976 *Handyside v. UK*⁷⁷ this approach reiterated.⁷⁸ “The margin of appreciation then is more a matter of who takes the decisions, rather than what those decisions might be.”⁷⁹ Level of Margin of appreciation changes from subject to subject. Lowest level has seen on the subjects that there are consensuses among parties. If not then

⁷² ibid pp 9

⁷³ [2010] IESC 3, *per* Murray CJ.

⁷⁴ [2008] IEHC 379.

⁷⁵ [2008] IEHC 379., at 61

⁷⁶ Rabinder Singh, ‘Is There A Role For The “Margin Of Appreciation” In National Law After The Human Rights Act?’ (1999)1 EHRLR (ns) 638 pp 2

⁷⁷ 1 EHRR 737, [1976] ECHR 5493/72, (1976) 1 EHRR 737, (1979) 1 EHRR 737, [1976] ECHR 5

⁷⁸ Hans Van Houtte, ‘The Margin of Appreciation Doctrine in the E.Ct.H.R.’(1999) 48 International and Comparative Law Quarterly (ns) 638 pp 639

⁷⁹ Houtte, (n 78) pp 640

higher level margin of appreciation can be seen. Whilst freedom of expression challenges has the lower degree, property rights limitations have a higher degree.⁸⁰ Hans Van Houtte states that:

Reliance on the margin of appreciation is an announcement of deference, and not coherent jurisprudential principle. Indeed, as we have seen, the margin in fact makes the Court's decision-making processes more opaque than is necessary.⁸¹

By changing this approach, the courts will have more definite and predictable standard on human rights challenges.⁸²

2.2.4 Type of Deference Defined By Brady

Brady asks in which situation and to what extend the court will defer to administrative decision maker. He makes a distinction by comparing situations which the courts focus on the result of the proportionality test or just its existence. In "procedural proportionality" approach, the courts focus whether a proportionality test has been done during administrative decision making process or not. The courts, in this case just focus on process rather than its results. On the other hand, in "substantive proportionality" approach result of the proportionality test in administrative decision shall be evaluated by the court, by checking whether its result is permissible in the context of the proportionality test. Thus, the courts apply four-part proportionality test.⁸³

Brady states that, "procedural proportionality" has some weakness. First, administrative decision makers mostly do not have legal training, so making abstract form of fundamental

rights concrete by using the proportionality test does not seem true.⁸⁴ Putting them in this responsibility, in addition to other formal responsibilities, is not fair.⁸⁵

Brady argues that in Meadows case, Supreme Court held Keagan reasonableness test, and it seems to suggest a procedural proportionality standard. However, he thinks that even in this situation result would not change because when an intrusion on fundamental rights is proportionate then it will be reasonable. When outcome is disproportionate, doing box checking during the proportionality test, which was done during the administrative process, would not be enough to accept this decision as reasonable.⁸⁶

⁸⁰ ibid pp 640

⁸¹ ibid pp 649

⁸² ibid pp 649

⁸³ Brady (n63) pp 10

⁸⁴ ibid pp 11

⁸⁵ ibid pp 11

⁸⁶ ibid pp 12

Brady concludes that, even though procedural proportionality approach seems attractive because of its simplicity, it could not provide enough protection for fundamental rights, in which are the subjects of impugned decisions.⁸⁷ Because of the requirement of substantive proportionality, which focuses on proportionate results, especially when the primary decision maker is not the fitting authority to determine the issue, measuring the proportionality should be given up to courts.⁸⁸

Delaney and Donnelly evaluate that the court in *Meadows* case focused on European Convention on Human Rights and the proportionality test should just be used in the cases that are involving rights.⁸⁹

2.2.4.1 A Proposal Model of Deference by Brady

Brady offers a model of deference based co implementation of four-part *Heaney* proportionality test. Thus, courts will decide to defer by using the proportionality test, but not instead of it. Substantive proportionality approach has been preferred in this model. He rests to fact-sensitivity approach which implicitly stated in *Meadows*, although this approach openly has not been endorsed in it. This test will apply proportionality and deference simultaneously.⁹⁰

In every stage the court may agree with the decision maker, if may not totally but in some weight then the court may defer and pass to the next stage. However, the court does not have to defer every stage to the decision makers. The court may evaluate every stage separately within the structures of the *Heaney* model.⁹¹

Brady argues that The Courts by using substantive proportionality test can make their justification in a fact sensitive manner.⁹² Fennely J expresses in *Meadows* that “[t]he courts have always examined decisions in the context against their surrounding circumstances.”⁹³ Denham J’s comments on the implementation of O’Keeffe reasonableness in *Meadows* as follows:

In *O’Keeffe v. An Bord Pleanála*, there were three important matters for consideration and application:-

a) An analysis to determine if the decision in issue was fundamentally at variance with reason and common sense.

b) An analysis of the nature of the decision maker.

⁸⁷ ibid pp 13

⁸⁸ ibid pp 17

⁸⁹ Hilary Delaney and Catherine Donnelly, ‘Case Comment: The Irish Supreme Court Inches towards Proportionality Review’ (2011) January Public Law (ns) 9 11

⁹⁰ Brady (n63) pp 14

⁹¹ ibid pp 15

⁹² ibid pp 16

⁹³ [2010] IESC 3, at [67]

c) A recognition that the burden of proof rests upon the applicant for judicial review.

The skilled nature of the decision maker in issue required such a refined approach. However, the application of the strict nature of the test in *O’Keeffe v. An Bord Pleanála* is **limited to decisions of skilled or otherwise technically competent decision makers**. I am satisfied that **O’Keeffe v. An Bord Pleanála has been construed too narrowly and in that manner applied too broadly**. The decision in *O’Keeffe v. An Bord Pleanála* related to a specialised area of decision making where the decision maker has special technical or professional skill. A court should be slow to intervene in a decision made with special competence in an area of special knowledge. *The O’Keeffe v. An Bord Pleanála* decision is relevant to areas of special skill and knowledge, such as planning and development.⁹⁴

As a result, Brady seems to create a model, by not expressing any specific point of view regarding the level of deference to be allowed, however, putting the relationship of two main reasons for deference to the proportionality test and a structure for implementing the deference.⁹⁵ In contrast, he criticises procedural deference by which has been implemented without proportionality test, by evaluating “*too much of decision makers and too little to protect fundamental rights*”⁹⁶ Brady argues that his model will provide “a transparent and fact sensitive approach”⁹⁷

2.2.4.2 Brady’s Reasons for Deference

Brady accepts two main reasons to defer legislative or executive, institutional competence and democratic legitimacy, which are linked to empiricism and to normativity respectively. He gives high weight to legislative than others as it has more competency and democratic legitimacy than others. According to him deference is related with empirical uncertainty so in case of certainty deference cannot be accepted. If the courts have the same level of expertise, they will determine on these issues.⁹⁸

Democratic legitimacy is another reason for deference. Main idea is on this subject that having more responsible position to electorate than others. There are different democratic legitimacy levels. For instance the Oireachtas⁹⁹ has a higher level democratic legitimacy than a Ministry.¹⁰⁰

⁹⁴ [2010] IESC 3, at [7] ‘**Emphasis Added**’

⁹⁵ Brady (n63) pp 16

⁹⁶ *ibid* pp 17

⁹⁷ *ibid*, pp 17

⁹⁸ *ibid* pp 16

⁹⁹ Irish Parliament

¹⁰⁰ Brady (n63) pp 16

2.3 Discussions from Canada

Canadian scholars believe that “*charter rights may be trumped by the proportionality principle and by the fact that Parliament can legislate to derogate from Charter rights*” and by doing strict scrutiny the courts do not say the last word, however, make a contribution to “democratic dialogue.”¹⁰¹ Canadian charter has a different approach than American system, and there is no judicial supermacism.¹⁰²

2.3.1 When can the judicial deference be acceptable

Davidov state that judicial deference might be justified only in the cases where a faulty decision creates hazardous risk, which is not acceptable for society.¹⁰³ The main expectation, which is sought by citizens from constitution, is a protection from the legislature.¹⁰⁴ In general institutional incompetency and lack of democratic legitimacy of Judiciary have been used to explain the necessity of judicial deference¹⁰⁵

2.3.2 Actual Practice of the Supreme Court of Canada

The Supreme Court of Canada uses the test in which was developed the case *R. V. Oakes*¹⁰⁶ in case of evaluation of constitutional rights breach.¹⁰⁷ In this test, first of all plaintiff is required to prove that a breach of his right exists. Secondly, after passing this stage state has to show that limitation is “reasonable” and “demonstrably justified in a free and democratic society” as governed by the section one of the Charter. Furthermore, as defined in *Oakes*, the goals which infringe the right must at least have a sufficient importance. In addition, the means used should be rationally connected to objective, minimally impaired and proportionate in comparison to the negative effects of the right and proposal benefits of the law.¹⁰⁸

2.3.3 How the Court Changed This Approach

In *Irwin Toy Ltd. v. Quebec (A.G.)*¹⁰⁹, the court did not use Oakes test and used deference to support their decision in this stage, the court created two

¹⁰¹ Clayton (n 60), ‘pp 33

¹⁰² ibid pp 41

¹⁰³ Guy Davidov, ‘The Paradox of Judicial Deference’(2001) 12 February National Journal of Constitutional Law, (ns)133 pdf form (ns)1 <<http://ssrn.com/abstract=920607>> accessed 20 December 2013 pp 3

¹⁰⁴ Davidov (n103) pp 5

¹⁰⁵ ibid pp 2

¹⁰⁶ [1986] 1 SCR

¹⁰⁷ Davidov (n103) pp 5

¹⁰⁸ ibid pp .6

¹⁰⁹ [1989] 1 S.C.R. 927.

different main groups for the cases. Namely the cases which have effects on an individual and the cases which have effects on competing groups rights. In the first group of the cases, they continued to implement the Oakes test however, in the latter The court started to use a different test, which focuses on “reasonable basis” for means instead of “least intrusive means possible to achieve its objectives” additionally the court gave a weight to the legislature’s subjective point of views.¹¹⁰

Later, another approach was developed in *RJR-MacDonald Inc. v. Canada (A.G.)*¹¹¹ case. According to this decision the Oakes test should be applied with the various level of deference in the various cases by evaluating the nature of the legislation and the nature of the right infringed. As a result of this approach, the court decides the level of review at the preliminary stage.¹¹²

2.3.4 Does the Charter and Canadian Constitution Have Any Rule Regarding Deference

Neither the Charter nor the Canadian Constitution have any rule regarding deference. On the contrary both of them emphasizes the supremacy of the Constitution and regulates the judicial review as the duty of Judiciary.¹¹³ Davidov states that democracy is a system of “checks and balances” and the judicial branches have to have a role and power in that system. He further argues that providing some form of immunity from judicial review to the legislative or executive is not compatible with constitutional principles.¹¹⁴

2.3.5 Is Subjective Approach of Judges Dangerous For Democracy

*“There can be no law without interpretation, no interpretation without interpreters, no interpreters without politics”*¹¹⁵ Davidov argues that there will be a legitimacy problem for the Court in cases where they take a decision in a subjective and indeterminate way . According to him most of constitutional theories like “neutral principles” and “process-based” tried to limit subjectivity in decisions of the judges, and in this regard the test developed similar to *The Oakes* test can be evaluated as an attempt to prevent subjectivity of judges.

¹¹⁰ ibid pp .8: Irwin Toy, supra, note 9, at 994. This new approach has been explained “whether the government had a reasonable basis, on the evidence tendered, for concluding that impaired as little as possible given the government’s pressing and substantial objective”

¹¹¹ [1995] 3 S.C.R. 199

¹¹² Davidov (n103) pp .9

¹¹³ See section 52(1) of the Constitution Act, 1982 and section 24(1) of Charter (Atf kontrol edilmeli)

¹¹⁴ Davidov (n103) pp .17

¹¹⁵ ibid pp 19, see footnote 42, A. C. Hutchinson, “Waiting for CORAF”, (1991) 41 U.T.L.J. 332, 340

He offers that “[t]here are some situations, it is argued, in which a decision by the courts is bound to be especially subjective. It is in these situations that judges should avoid their own judgment and give preference to the judgment of legislature”¹¹⁶

2.3.6 Is There Any Clear Criteria for the Use of Judicial Deference in Canada

Davidov stated that although judicial deference can be useful to prevent to subjectivity in judges’ decisions, in the Canada courts, does not consistently follow the principles which has been created by itself with regard to the judicial deference. It causes ambiguity when the court invokes deference.¹¹⁷ The Court in *Eldridge v. British Columbia (A.G.)*,¹¹⁸ dealing with the funding of sign-language translators in hospital did not follow the approach was created in *Irwin Toy Ltd. v. Quebec (A.G.)*¹¹⁹, the court rejected to take deferential approach in scrutinizing a human rights code in *Vriend v. Alberta*¹²⁰ although it took this approach in *McKinney v. University of Guelph*¹²¹ regarding Ontario Human Rights Code.¹²² This gives us a good example of the subjective approach of the Courts.¹²³

2.3.7 Is There Any Different Implementation in Canada With Regard to Judicial Deference

There are various implementations about judicial deference in Canada according to the degree of deference. The first group is “end of story cases” in which has seen “Labour Trilogy”¹²⁴ and the court give deference by referring dispute area.¹²⁵ Second group is the cases that are evaluated by using “subjective reasonableness” test¹²⁶; third group is the cases in which “margin of appreciation” is allowed to the state.¹²⁷ In these cases burden of proof is shifted from the state to plaintiffs, Fourth group cases are “post-decision justification.” In this case the court just use the term of deference after

¹¹⁶ ibid pp .19

¹¹⁷ ibid pp .21

¹¹⁸ [1997] 3 S.C.R. 624.

¹¹⁹ [1989] 1 S.C.R. 927.

¹²⁰ [1998] 1 S.C.R. 493 .

¹²¹ [1990] 3 S.C.R. 230.

¹²² Ontario Human Rights Code, R.S.O. 1990 c. H 19

¹²³ Davidov (n103) pp .22

¹²⁴ ibid pp 11

¹²⁵ ibid pp 26

¹²⁶ ibid pp27

¹²⁷ ibid pp28

reaching the decision to strengthen the reasoning for an existing decision.¹²⁸
Fifth group the cases are the one that are actually decided by using strict scrutiny. However, the rhetoric of deference has been used in these decisions.

¹²⁹

3.How does the high court evaluate constitutional compatibility in Ireland.

According to Article 26 of Irish Constitution the High Court can review legislation whether compatible with Constitution and if it is not then The Court may declare it invalid or strike it down The Court created a test to evaluate constitutional consistency in *Heaney v. Ireland*¹³⁰called the proportionality test.

Irish Courts has the authority to review the validity of any law made by the legislature whether is compatible with Constitution. Irish Courts also use the proportionality test during constitutional compatibility review.¹³¹

4. Very Previous Deference Model by Rabinder Singh¹³²

Singh offers 7 stages evaluation to deference

(1) The importance of the right at stake, a question upon which there is the case law from Strasbourg to draw on.

(2) The seriousness of the interference with that right.

(3) The relative specialist knowledge or experience of the body under review on the one hand and the court on the other: for example, at one end of the spectrum the court is usually the arbiter of what is procedurally fair in a criminal trial, whereas at the other end the House of Commons has a special role in the field of public finance.

(4) Whether the body under review is elected or is otherwise accountable to the electorate.

(5) Whether the aim of the measure under review is to promote other human rights, including social and economic rights.

(6) Whether the applicants are likely to be particularly vulnerable or unpopular, for example minorities against whom there has been historic prejudice such as homosexuals, so that a heightened vigilance would be justified.

¹²⁸ ibid pp 28

¹²⁹ ibid pp 29

¹³⁰ [1994] 3 IR 593.

¹³¹ Hilary Delaney and Catherine Donnelly, 'Case Comment: The Irish Supreme Court Inches towards Proportionality Review' (2011) January Public Law (ns) 9 pp 9

¹³² Singh (n76) pp 15

(7) Whether the context is one in which there are fairly constant standards throughout democratic societies, especially in the states which are parties to the ECHR or whether no discernible standard has yet emerged.¹³³

5. General Assessment Regarding Judicial Deference

Judicial procedures can be updated as a result of the changing necessities of the society. So judicial deference approaches can change, as well. Giving some weight to the legislative and executive is a reality in common law system. Its reasons can be counted such as, democratic features and institutional expertise. Whilst some commentators give equity to both features, some prefers one to another. Some states that there is a no reason to defer to them, neither institutional nor democratic.

Also there are some definitions regarding implementation of deference however neither academic definitions nor judicial implementation is unique.

5.1 Ambiguity

When courts prefer to defer instead of to do scrutiny it is not good for plaintiff's position. Plaintiffs do not care about courts workload, institutional competency, and democratic feature of legislative or executive. They focus their rights, and they want to reach them. They just want to see that their rights definition and its limits. It is possible to be wrong in their own interpretation of their rights, but they just want to see justification. It is not important who shall decide about that right. Whereas who infringed their rights. They want to see real right based determination of their situations instead restraining to do so by resting some other things like position of the decision makers.

Brady's offer¹³⁴is seem to provide multi layered and composed system, which can prevent ambiguity and subjectivity. Davidov also offers¹³⁵ limitation of usage of judicial deference and reversing burden of proof for this kind of cases.

5.2 Chilling Effect

In a democratic society people normally trust to democratic bodies like the legislative, executive and judiciary. They support them they accept their authority. At least there is a general acceptance on it. The Judicial deference may affect people's opinion regarding judiciary. When they do not trust and believe in the judiciary it will affect the public opinion regarding the judiciary. If the judiciary lost their reputation in a society it may affect the society.

¹³³ ibid pp 21-22

¹³⁴ see supra 90

¹³⁵ see supra 103

For example if no one participates to election in the whole country can we say that this country has democracy? Reputation is very important factor, which shows supports of society. To some extent, it is very similar to votes, which show public supports to legislative. People have to trust judiciary it is one of the important feature of democracy.

5.3 Accesibility

The litigation costs, procedures or something like that may prevent to accessing to courts. These are material obstructs. However, if someone believes that it is ineffective to seeking the court's decision, then it will be a non-material obstruct.

When plaintiffs lose their cases just because of the judicial deference they will be responsible to pay litigation costs, as well. In my understanding, it does not seem fair if you lost your case just because of the court give some weight to legislative or executive decisions. Whereas you argued just about your right; however the court decided about you by taking account some other elements. It is not possible to guess about it. It is unnecessary risks for plaintiffs.

5.4 Subjectivity

Someone can argue that the courts prefer to defer instead of interpreting existing dispute with a conventional approach, just because of their personal preferences with which it is impossible to reach in law. In other words, judges just want to decide about this unlawful situation bypassing the rules under the mask of deference. Even if it is not so, It would seem so.

6. Conclusion:

Although proposal negative effects of judicial deference on human right cases plaintiffs, a complete rejection to judicial deference does not look very acceptable. There is a need for new approaches which seek to relief these effects on plaintiffs.

To prevent ambiguity and subjectivity Brady's offers will make plaintiffs position better. In this model the necessity and degree of deference shall be evaluated at the every stage with substantive proportionality approach. Proportionality and deference will implement at the same time simultaneously¹³⁶

Additionally it is possible to provide litigation costs immunity to plaintiffs when judicial deference has been given.

¹³⁶ supra 90

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