

Secondary Source: Journal Article

author, | 'title' | (year) | volume | journal
abbreviation | first page of article

Footnote:

e.g. Alison L Young, 'In Defence of Due
Deference' (2009) 72 MLR 554

Bibliography:

e.g. Young A L, 'In Defence of Due
Deference' (2009) 72 MLR 554

In Defence of Due Deference

Alison L. Young*

The doctrine of deference permeates human rights review. It plays a role in defining Convention rights, in determining the nature of the proportionality test applied when analysing non-absolute rights, as well as in deciding the stringency of its application. The role of deference has recently been subjected to both judicial and academic criticism, some of which advocates the demise of the doctrine. This article develops a contextual account of deference that is justified for epistemic reasons, rather than reasons of relative authority. This conception is able to withstand current criticism and is modest enough to play a role in a range of different justifications and understandings of judicial review under the Human Rights Act. The article then provides a more detailed account of deference, taking account of the relative institutional features of the legislature, executive and judiciary, without running the risk that the court fails to perform its constitutional function of protecting individual rights.

INTRODUCTION

Determining the extent to which courts can control the substance of actions and decisions of the administration has always required a delicate balancing act. Courts are required to control the substance of the decision, without determining the issue for themselves and substituting their account of the merits of the decision for that of the administration. To intrude too far poses a potential threat to the separation of powers; courts are accused of performing the function of the administration, as opposed to merely checking the manner in which the administration exercised its powers. But to intrude too little leaves courts open to the accusation of being powerless, failing to perform their constitutional function.

The Human Rights Act 1998 complicated this delicate balance further when courts are faced with decisions of public authorities that may have breached Convention rights. It is clear, post *R (Daly) v Secretary of State for the Home Department* (*Daly*), that courts are required to define Convention rights, applying a test of proportionality when defining positive obligations placed upon the State to protect absolute rights, as well as determining whether restrictions placed upon non-absolute rights are 'necessary in a democratic society'. The test of proportionality requires a greater intensity of review. The court does not merely determine whether the decision of the public authority was 'reasonable' or 'rational' but must also 'assess the balance which the decision maker has struck',² paying attention to

*Fellow and Tutor in Law, Hertford College, University of Oxford. The author would like to thank Paul Craig, Trevor Allan, Julian Rivers, Jeff King, Jan van Zyl Smit and the anonymous reviewers for comments on earlier drafts, as well as Aileen Kavanagh and contribution to the Constitutional Theory seminar on deference held at Trinity College, University of Oxford on 20 May 2008, which prompted this article. Responsibility for errors and opinions remains that of the author alone.

1 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 WLR 1622.

2 *Ibid.* at [65] (Lord Steyn).