Appellate Standard of Review in Public Law Cases

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Administrative law; Appeals; Australia; Canada; Comparative law; Judicial review; Proportionality; Review grounds

The goal of this paper is to conduct a comparative discussion of the issue of the appellate standard of review in public law cases. On this issue, two common law apex courts have recently divided: the United Kingdom Supreme Court taking one view, the High Court of Australia a very different view. Three issues are relevant in explaining the divergence between these two apex courts: whether clear lines of demarcation can be maintained between questions of "law" on the one hand and questions of "discretion" on the other; whether the goal of proportionate dispute resolution should influence the rules relating to appellate standard of review; and, finally whether a legal system's culture is relatively legalistic or relatively contextual. In England and Wales, judicial and academic scepticism of the distinction between "law" and "discretion" has allowed proportionate dispute resolution to exercise significant influence over the appellate standard of review. This was previously the case in private law and has now come to be the case in public law too. In Australia, however, judicial adherence to the "law"/"discretion" distinction means that proportionate dispute resolution is less prominent in determining the appellate standard of review. I also discuss the Canadian approach, which is the same as the Australian. The current approach has been criticized and, indeed, the orientation of the Canadian legal system on the three issues which explain differing approaches to the appellate standard of review more resembles the English than the Australian. Accordingly, this is an area of Canadian law which seems ripe for judicial reform. I conclude with a critical assessment of the English position. While the new approach of the UK Supreme Court is unsurprising, as a descriptive matter, it remains to consider whether it is defensible in normative terms. In this regard there are good arguments for the Australian position in public law cases.