The Principles of "Necessity" and "Balance": the most important elements of the Doctrine of Proportionality in the "Judicial Review Process": A Critical Analyses

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Abstract

The "doctrine of proportionality" envisages that "a public authority ought to maintain a sense of proportion between his particular goals and the means …… This means that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred". It is contended in this article that the doctrine of proportionality contains two very important elements and in the human rights context, this doctrine involves tests of balance and necessity. These analyses will further advance the argument by differentiating and giving the edge to the doctrine of proportionality from unreasonable which until now is the common norm in the UK judicial system to check the balance between the interest of the society and the right of individual. Furthermore, moving ahead and analyse the application of this doctrine in the UK judicial system it is important to know that how this principles work with the proportionality doctrine.

Keywords: Doctrine of proportionality, Doctrine of Necessity, Stricto Sensu, Judicial Review.

Introduction

The first two components of proportionality (Necessity and Balance) deal mainly with the connection between the purpose of the limiting law and the means to fulfil that purpose; this examination is conducted against the background of a claim that a constitutional right has been limited. However, the examination's focus is not the limited right, but rather the purpose and the means to achieve it. Accordingly, those tests are referred to as means end analyses and are not based on balance. The second questions what is a "balancing test" and how does it work in the judicial review process, as the fourth element of proportionality.

The second element is a "necessity test", how does it function when two important rights collide? What is the importance of least restrictive measurement in this test and parallel to unreasonableness doctrine how this test safeguards the fundamental rights against the unlimited use of legislative and administrative force when used in the doctrine of proportionality? These are the very important questions

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that are addressed in this article to understand the main objective of applying this doctrine and check the balance between the two rights.

The Nature of the Necessity Test

Coming to the first point the necessity test is based upon the assumption that the law's purpose is a proper one. Thus, while examining the requirements of necessity, there is no room for the examination of the constitutionality of the law's purpose. Similarly, there is no room to question the need behind establishing that purpose, or the very need to establish it. The necessity test "relates to the means chosen by the legislator to achieve the purposes and not to the need to achieve those purposes". (Sales & Hooper, 2003) We assume that the means chosen by the legislator is a rational one; if the means chosen is irrational, there is no necessity in it. The requirement established by the necessity test, therefore, is that, "in order to achieve the law's purpose, rational means should be chosen such that the intensity of the realization is no less than that of the limiting law and those means limit the constitutional right to a lesser extent". (Rivers, 2006). The main point of the "necessity test", which is an expression of the notion of efficiency or more specifically, of Pareto efficacy (Alexy, 2014) is that the law's purpose can be achieved through hypothetical means whose limitations of the protected right would be to a lesser extent. Accordingly, the necessity test does not require the use of means whose limitation is the smallest, or even of lesser extent, "if the means cannot achieve the proper purpose to the same extent as the means chosen by the law". (Eissen, 1993) The necessity test "does not require a minimal limitation of the constitutional right". (Cohn, 2010) It only requires the smallest limitation of the constitutional right; it also requires the smallest limitation to achieve the law's purpose.

In order to properly answer the question of whether alternative means which limit the right to a lesser extent advance the purpose equally to the means chosen by the legislator, "it is necessary to understand both the purpose and its probability of being achieved through the alternative means. An estimate is insufficient; the understanding should be of the concrete factual data, as well as of the probabilities and risks involved." (Cohn, 2010)

The "Elements of the Necessity Test"

The necessity test comprises two main elements. The first is that there is a "hypothetical alternative means to advance the objective of constraining the law, and the second states that the hypothetical alternative means limit the constitutional right to a lesser level than the means used by the limiting statute". (Huscroft et al., 2014) If these two requirements are met, we can conclude that there is no necessity in the limiting law. However, if a hypothetical alternative means that equally

advances the law's purpose does not exist, or if this alternative means exists but its limitation of the constitutional right is no less than that of the limiting law, then we can conclude that the limiting law itself is necessary. The necessity test is met, and in order to understand this notion in depth, each of these elements will be examined separately.

The Necessity Test and External Considerations

I will look at the necessity test to argue that this test presupposes both a law's given purpose and a given limitation of the constitutional right through the means that the laws determine. Based on these two assumptions, the necessity test determines that, if alternative means can be used to achieve the law's purpose while imposing a lesser limitation on the constitutional right, those less limiting means should be used. Thus, the necessity test functions within the framework of the law's purposes and not by virtue of other purposes.

The same is true regarding the means. The necessity test examines the question of whether the law's purpose can be fulfilled through means which limit the constitutional right less but not more. This test assumes that the less limiting means has an identical effect to that chosen by the law in every respect. Accordingly, the necessity test is not met when the constitutional right is lesser, but requires additional limitations or expenses. Those cases will be discussed thoroughly within the framework of proportionality *strict sensu* later in this article. Furthermore, a limiting law is necessary when the use of less limiting means leads to a limitation of the rights which were not limited by the means set out in the law. (Hayek, 2012) Similarly, the limiting law is necessary whenever the cost of the decrease in the limitation of the constitutional right must be borne by a new policy that the state does not favour, or is financed by a budget designed to advance other purposes. The necessity test cannot be used as a pretext for selecting a less limiting measure when the latter would lead to an expenditure of state funds, a re-ordering of the national budgetary priorities, or to further limitations on other rights of the same person or of the rights of others. Once Huscroft has stated that "The necessity test is based on the assumption that the only change that should be brought about by the alternative means is that the limitation on the constitutional right would be of a lesser extent". (Huscroft et al., 2014)

The Second Element: "The Hypothetical Alternative Means Which Limits the Constitutional Right to a Lesser Extent"

In order to understand this second element, of the doctrine of necessity the hypothetical alternative means which limits the constitutional right to a lesser extent can be further divided into four sections and make a critical analysis.

The Nature of the Second Element

The second element of the necessity test examines the question of whether the hypothetical alternative limits the constitutional right to a lesser extent than the limiting law. In order to examine the second element, we should compare the effect of the limiting law on the constitutional right in question and the effect of the hypothetical alternative on the same right. The requirement is that the alternative means limits that right to a lesser extent. This extent is determined, among others, "by examining the scope of the limitation, its effect, its duration, and the likelihood of its occurrence". (Cianciardo, 2010) Such a comparison may lead to a simple conclusion where each component of the alternative limitation limits the right less than the original law. But what happens when, by comparison, it becomes clear that in a number of parameters it limits the constitutional right more than the original limiting law and in other parameters it limits the constitutional right less? The conclusion, therefore, is that the law is considered necessary and the *necessity* test met. The decision will be made in the framework of proportionality *stricto sensu.* In these cases, we cannot say that the alternative limits the constitutional right in question to a lesser extent.

"Limitation to a Lesser Extent": An Objective Test

In order to determine whether the means chosen by the legislator is the less limiting one or whether the test should be of a subjective or an objective nature, and moreover to determine the constitutionality of the law, the comparison must be made between two types of limitation of the right as viewed by a typical right holder. Any special circumstances, unique to the right holder who brought the case before the court, should play no more role in the determination of the issue of the lesser extent. Personal circumstances should not be a factor in determining the constitutionality of a legislative act. Rather, this determination must be based upon objective observations of a typical right holder.

It is for the court to answer the objective question of whether the limitation imposed by the alternative means is of a lesser extent, as this is a determination of law rather than fact. (A, 2012) p 412. The legislator's belief that the limitation of the means chosen by the constitutional right is of a lesser extent than the limitation of a different means is not determinative. The court, in making its determination as to the objective question, should refrain from considering trivial (*de-minis)* differences between the means. Whenever the court reaches the conclusion that a number of alternatives, including that determined by the law, satisfy the need to limit the constitutional right in a less restricted fashion, it should leave the legislative choice intact. (A, 2012) p 67 However, that choice will be examined further in the

framework of the next stage of the examination; that of proportionality *stricto sensu.*

The Elements of the Basic Balancing Rule

The basic balancing rule seeks to determine a legal rule that reflects all the elements of balancing between a law limiting a constitutional right and its effect on the constitutional right. It should reflect both ends of the scale as well as their relationship. It should apply in cases where both of the scales carry constitutional rights (such as a law limiting the freedom of expression in order to better protects the right of privacy), as well as in cases where the societal benefit scale carries public interest considerations (such as a law limiting the freedom of expression in order to better protect national security interests). Thus, such balancing rule should reflect the marginal social importance of the benefits created by the limiting law (either to the individuals involved or to the public at large) as well as the marginal social importance in preventing the harm caused to the limited right in question; it should also consider the probability of the occurrence of each. Such a basic balancing rule would be found within the constitutional limitation clause (either explicitly or implicitly).

Balancing approach and its underpinnings

Balancing is a symbol, "which adopts the shape of a scale": see Figure - 1 On one side are the goals to be attained, and on the other, the restrictions on the right. How can the weight of each side of the scale be determined? It is contended (Miller & Sabir, 2012) p 56 that "the criterion is that of the relative social importance attached to each of the conflicting principles or interests at the point of conflict, which assesses the importance to society of the benefit gained by realization of the law's goal as opposed to the importance to society of preventing the limitation of human rights". (Vadi, 2018) The central conundrum is how to establish the comparative communal significance of the advantages gained in relation to the contribution to civilisation, which differs from the comparative significance of prohibiting the restriction of the human right relative to the outcome inflicted onto the right. This verdict is ambiguous and inexact.

Figure No - 1

Undoubtedly, comparing a "limitation" to a "benefit" is an intimidating task. How can the benefit toward the state protection and the limitation on freedom of speech be compared? Taking these hurdles into account, at the inception it seems appropriate to draft two explanations: First, the relationship is not with the benefits attained by realizing the objective in comparison to the outcome attained by limiting the right. Neither is it concerned with the protection of the society and the freedom of the individual.

The comparison is amongst the marginal advantage to protection and the marginal harm to the right inflicted by the constraining law: (Grimm, 2007) hence, the comparison is focused on the marginal and incremental. Second, we must consider the existence of a proportionate *alternative* (Least Restrictive Measurements: *LRM*) that achieves only part of the goal and only partly limits the right. If, subsequently, a proportionate substitute is available, then the comparison concerning the marginal advantage and restriction is carried out with recognition for and in comparison with the proportionate alternative. (Heyman, 2008)

This twofold explanation does not convert the balance into a factual problem and cannot eradicate the value judgement in the system of balancing. It demonstrates, nevertheless, that the power-holding query presented by the decision maker (legislator, judiciary, or executor) is not the equating, writ large, among common values, including security of the state or freedoms and rights etc. Instead, the authority challenges the balancing approach, writ small, and specifically the necessity to balance between the marginal advantage of the laws' objective (excluding the proportionate substitute) and the significance of preventing the restrictions to the right from which it stems. From this the query rises: how can this offsetting be attained? The following portions of this thesis are directed at outlining the significance of the completion of the objective and leading on to tackle the problem at hand, which is to apply the balancing assessment.

Balancing and validity

The conversation relating to balancing, and the consequential discussion of weight, is a metaphor. (Porat, 2005) This gauge does not actually exist. The contemplation related to balancing is mainly normative in character. Balancing presumes the presence of opposing values and seeks to resolve those conflicts. The solution is not achieved by providing a permanent label of "weight" to each conflicting principle, but rather through shaping legal rules. The rules of balancing "determine under which circumstances we may fulfil one principle which may limit other. Those balancing rules reflect the relation between the conflicting considerations at the foundation of the realization of each conflicting principle". (Alexy, 2014) They are

evaluated according to their relative weight at the point of conflict. The solution to such conflict is not "through upholding the validity of one principle while denying any validity to the other; rather, the balancing approach reflects the notion that the legal validity of all of the conflicting principles are kept intact". (Barak 2012) Their scope is preserved, and the result of the conflict is not a change in the principles; it is in the possibility of the realization of the principle at the sub-constitutional level.

Conclusions

In this article, I looked at the main elements of doctrine of proportionality and their function, which indeed transformed the doctrine of proportionality into a unique and advance tool of judicial review. The findings of this article also clarified that both elements can work well and compatible with the UK's common law system. Moreover, the doctrine of proportionality is a mode that restricts the administrative action from being drastic when it is used for obtaining desired results.

Taking into account the principle of necessity, my analysis suggests that the higher the purpose's level of abstraction, the more likely it is that alternative means can be found which limit the right to a lesser extent and which can fulfil the goal at the same level of efficiency. In contrast, the lower the level of abstraction, the harder it would be to render the means chosen by the legislator unnecessary. This also indicates that in the *necessity* test, the level of abstraction in which law has one purpose or several purposes at the same level of abstraction should be determined in accordance with the actual (real) purpose which underlines the law. Here, I should mention that the question is not whether one can theoretically attribute a certain purpose to the law, but rather what was the actual purpose designated by the law. The court does not choose the law's purpose; however, the court may examine the constitutionality of the means chosen by the law to achieve that purpose. When the law has several purposes, such an examination would be carried out in respect of the law's predominant purpose.

This article further reveals that with regard to balance in the proportionality doctrine, this approach is often under scrutiny. The argument that it tries to balance items that cannot be measured, (Frantz, 1963) I disagree and found that the most rational answer that in balance, there is always a common base for contrasts, explicitly the social marginal significance. Further the argument that balancing is nonsensical. (Palti, 1998) Here, my proclaim while making a critical analysis on balance is that the balancing rules *basic*, *principled*, and *concrete* supply a rational basis for balancing, particularly when proportionality *stricto sensu* is met, and in reaching balance, judicial

discretion is broad and legislative discretion is narrow. It is because there is a threshold for judicial intervention that can clearly be stated from the balancing test? e.g. in EU law, there is a notion of the substance or core of a right that cannot be infringed. I agree with Aharon Barak's (Barak, 2010) statement that in the creation of a barrier, and argue that indeed the military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. This is his expertise. We examine whether this route's harm to the local residents is proportionate. This is our expertise.

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