

## **The Conceptual Analysis of the Doctrine of Proportionality and, its Role in Democratic Constitutionalism; A Case Study of UK**

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### **Abstract**

*For the last few decades, the doctrine of proportionality has demonstrated and corroborated that it is the most effective legal standard used around Europe for the adjudication of constitutional rights. From its German origins, proportionality has migrated across jurisdictions and areas of law and has become one of the most successful legal transplants. However, there is some confusion as to whether there is any justification for the intervention of this in the UK's legal system, as the UK's legal system is based on common law, and did not welcome this doctrine very much. Therefore, it is essential to analyze the basic principles of this doctrine and check its compatibility with the common law system, which is based on democratic norms. To test the similarity, this article would also reflect on the underlying characteristics of the theory of proportionality and equate it with the standards of a democratic society. To begin with, this article first endeavors to analyze the legal sources of the doctrine of proportionality and then examines its affinity with the democratic norms of the common law system to investigate the compatibility level with each other in protecting the constitutional rights of the people.*

**Keywords:** Doctrine of Proportionality, Democratic Constitutionalism, Wednesbury Unreasonableness, Common Law System

### **The legal sources of proportionality**

As we recognize, Proportionality as a concept for the understanding of fundamental rights and the need for constitutional consolidation is inevitable. In this fashion, any legal scheme must provide a legal underpinning for using proportionality as a standard for imposing constraints on constitutional rights via sub-constitutional law. It is not enough to outline proportionality merely as an ideal or to solely recognize its advantage over other restricting criteria, such as Wednesbury's irrationality. It would also be insufficient for the common law to recognize it, or even for statutory provisions to do so. Instead, the lawful foundation for implementing proportionality as a standard for the restriction of constitutional rights by sub-constitutional law must be derived principally from the constitution. Certainly, the law enforcing the restriction on a constitutional law via sub-constitutional law must rely on a constitutional basis. (Gilani, (2020)) A review of the literature and judicial opinions relating to proportionality suggests that proportionality's constitutional basis may be explained by the following.

### **Proportionality and democracy**

To proceed further and addressing the main question on the compatibility and relationship between democracy which is the main component of the common law system with proportionality, is to see how these concepts are closely interconnected with each other. The provision that fundamental rights be proportionately restricted by sub-constitutional legislation (e.g. by legislation or common law) is drawn from the interpretation of the principle of democracy itself. The argument is based on five presumptions. First, the very notion of democracy is of a constitutional status. Second, the constitutional notion of democracy is an element of human rights. Third, the constitutional notion of democracy is based on a balance between human rights on the one hand and the principle that a representative democracy aims to achieve on the other. It is necessary, therefore, to prove that democracy is based upon a balance between human rights and their limitations. Fourth, that balance, required by the very nature of the notion of democracy, is performed through limitation clauses

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(general or specific, explicit or implicit), which renders the limitation of constitutional rights possible by sub-constitutional law. Fifth, these limitation clauses, to properly fulfill their role, are based on the principle of proportionality. To understand these features it is essential to further make their critical analyses.

**First assumption: Democracy is of constitutional status**

The view that proportionality is derived from the notion of democracy assumes that the notion of democracy is of constitutional status. This is because, if the notion of democracy is merely a reflection of sub-constitutional reality, then it would not suffice to serve as a basis for a norm or criterion operating at the constitutional level. On the question of whether democracy has a constitutional status, it can be judged that some constitutions explicitly commend that the state is democratic. The German Basic Law states that the Federal Republic of Germany is a representative country. This stance is also reflected in other constitutions, including Spain. (The constitution of Spain, Art 1 (1); Constitution of Italy, Art .1; Constitution of Ireland, Art 5, the constitution of Portugal, Art 2.). The Charter of Rights and Freedoms used in Canada outlines that it Guarantees the rights and freedoms laid down in its subject-matter only within the limits specified by legislation that can be shown to be justified in a free and democratic society.

The question of whether the rights mentioned in a constitution can be limited and in a manner "justified by a democracy" is interpretative. The term 'democracy', as it appears in a constitutional text, must be properly interpreted. Naturally, this interpretation may vary from one legal system to another and from one constitution to the next. Still, the judiciaries in most constitutional democracies have adopted the view that the term 'democratic' as it appears in the constitution is not merely of a declaratory nature; rather, it has a constitutional operative meaning as well. For example, it imposes obligations on the three branches of the government. It also serves as an interpretive rule. Therefore, for example, it may be helpful when the question at issue is whether a referendum (which is not mentioned by the constituent) is an institution that is congruent with the constitution. Similarly, it may be helpful when the question presented is: what are the circumstances under which a state belonging to a federation may withdraw from it? (Re Secession of Quebec [1998] 2 SCR 217). Therefore, the notion of democracy is a constitutional operative notion; hence, it is possible to derive from this notion the concept of proportionality. Hence, "The principle of proportionality is used as a measure of equity and justice in judicial implementation systems, in particular in civil law, as a rational way of trying to achieve the best balance between the penalty or sentence levied and the seriousness of the forbidden act.". (Cohen- (2014).

**Second assumption: Democracy includes Human Rights**

In this section I would like to start my arguments by stating that democracy has many features, as there are several perspectives on democracy, from popular democracy to Western democracy; from formal democracy to substantive democracy; and, within substantive democracy, there is a common interpretation of the substance of democracy. (Roux, 2008), (Gargarella, 2005). One of the key distinctions in that context is that between formal democracy and substantive democracy, which means that the notion of formal democracy focuses on the sovereignty of the people, which is demonstrated mainly through free elections as "representative democracy", which grant, in turn, the right to both vote and be elected to all, equally. The notion of substantive democracy emphasizes those special features that make democracy unique, like the principles of separation of powers, the rule of law, the independence of the judiciary, and the recognition of Human Rights. Every constitution provides the notion of democracy with a meaning that best captures its purpose as appearing in that legal system. Most democratic constitutions today tend to interpret the notion of democracy expansively, in a fashion that entails both the formal and the substantive aspects of democracy. Thus, for example, the German Constitutional Court emphasized that the Basic Law for the Federal Republic of Germany is based upon the fundamental concept of free democracy, defined as follows:

The regime governed by the rule of law and based on the self-declaration of all members of society following the majority rule, and on the notions of equality and liberty, which prevent any possibility of either rule by force or an arbitrary and capricious tyranny (Donald Kommers & Miller, 2012, p. 178).

I endorse what Comella has stated that "If we wish to advance the dialogue and interest of human rights, it is important to find a consensus, on a massive level, on what the true goal is: whether it is to promote peace, dignity, equity, whether it is to provide the conditions for an independent life and democracy, or whether it is to optimize benefits at the cost of human lives"? (Comella, 2014) Indeed, the link between democracy and Human Rights is inexorable. Democracy is based on the notion that each individual may enjoy certain rights, and that those rights may not be revoked by the majority despite having the alleged power to do so following the majority rule (Van der Schyff, 2005) (i.e. right not to be tortured, etc.) This link between democracy and human rights exists at the constitutional level, and it manifests itself in the interpretation given to the term "democracy" in various constitutions. The requirement that democracy be given not only its formal meaning but also its substantive meaning is, therefore, a constitutional requirement.

To create the relation between democracy and proportionality, it is important to examine how the theory of proportionality sees "any" judgment as posing issues of equity in the allocation of power and to propose proportionality as a superior option, even if one merely wants to make sense of prevailing practices and values. To explore how the concept of proportionality could be integrated into the fundamental philosophy of democracy and expressed in the basic principles of justice. I argue that the procedural fairness approach to democracy is assisted by institutional principles of respect for human dignity and their autonomy, and also by retributive considerations of maximizing the principle of prioritization. It radically lowers the conflict between government and justice by integrating the appraisal of human desires and social goals into its structure. Thus, the concept of proportionality may be applied to the concepts of these philosophies of justice. (Sweet, A.; Mathews, J. (2008)

**Third premise: democracy is founded on a balancing between civil liberties and the national interest.**

As we have conceived from the previous sections that the doctrine of proportionality can also be derived from the notion of democracy, provided that the term is understood to encompass human rights, and is considered to have a constitutional status, while these are necessary conditions. The same constitutional rights that form the notion of democracy can also be limited – in other words, these rights are relevant and not absolute. As in modern constitutional rights, doctrines distinguish between the scope of the rights and the extent of their realization. Accordingly, the fundamental protections are relative. This relativity means that statutory permission to curtail such rights is issued where a certain restriction can be required in protecting the public safety or the interests of the citizen. When the constitutional rights are relative, both the right and the license to limit it are found in the constitution, and sometimes the limitations themselves are also found in the constitution. Therefore, the theory of human rights takes precedence over all other codes of conduct and also over the interdependency of individual rights, and within the framework of human rights, the interaction is the balance between the fulfillment of one right at a certain cost of another (Maydanyk, 2016).

There will still be a matter of interest in the framework of enforcement of rights, as in all democratic systems. It also does not mean that 'one or more rights have precedence as such; nor would it mean that the fulfillment of one right involves the infringement of other rights or the formation of a continuum of rights. The theory of the rule of law is that all rights must be accorded equal status, however the fact including its enforcement process requires a certain type of preference. An exception to that is the so-called "universal rights": rights which, as stated, must be exercised in their entirety. They are indeed the rights to life, to torture and inhuman or degrading and bondage, and to equity well before law. Here, the crucial argument would be that the understanding of a right is often interpretive where it is to be enforced, and the understanding of a right also will differ a significant amount from circumstance to circumstance. (Macfarlane, 1985).

The enforcement of one right should also rely on the enforcement of yet another right. It is necessary to note that certain fundamental human rights are also not unconditional. The argument that there is still a fundamental right to take action may not mean that action is always allowed, but that the restriction of the right to take action must be proportionate. (Borowski, 2013). We may also claim that the 'Principle of Proportionality' is a series of laws regulating the requirements for the restriction of legitimately covered rights. This theory applies to a series of laws that set down the required and proper requirements for the restriction of a constitutional right to be legally valid. (Craig, P. (2010). This principle is thus focused on a basic distinction between the extent and defense of human rights, within the context of democracy.

**Fourth assumption: balancing through limitation clauses**

The key concept of constitutional democracy is to achieve a balance between the formal and substantive aspects of democracy. It is pertinent to mention here that this balance is usually considered the third element of a proportionality analysis. Such balancing presupposes the simultaneous co-existence of both aspects while determining the proper relationship between them. That balancing reflects the relative social value of each competing aspect when considered in proper context. When the relevant context is the tension between the formal aspect of democracy and constitutional rights, the balancing issue is resolved using limitation clauses (either general or specific, express or implied), which determine the required conditions under which a sub-constitutional law may limit a constitutional right.

Chief Justice Dickson's words were taken into consideration at the time of drafting the general limitation clause appearing in the South African Constitution, the privileges in the Constitution can be restricted only by statute of general interpretation to the degree that the restriction is fair and legitimate in a fair and transparent community founded on individual dignity, justice, and democracy. It means that proportionality analysis specific, the third balancing test-requires an evaluation of the right in question to equate and align it with the value of fulfilling the government purpose. On either hand, the analysis of the discriminatory factors would not have the same impact (Oakes, 1986).

**Fifth assumption: limitations clauses are based on proportionality.**

To develop and interpret the criterion for an adequate equilibrium between the two areas of democracy, which aids in stabilizing the advantageous rule with human rights and creates an instrument needed by a democratic civilization to place restrictions on a constitutional right by a sub-constitutional law, the principle of proportionality is a well-equipped solution. For example, when a law restricts a constitutional right, it is only regarded as constitutional if it is proportional. (Weinrib, 2001). Proportionality is only achieved if it is destined to serve a proper function, if the steps taken to accomplish the objective are connected to the reason and are required and if the constraint on the constitutional right is proportional (*stricto sensu*). Every person in a society contributes an equal and vital part in a democratic society. That society, in turn, is justified in limiting the rights of each of its members if such a limitation is imposed for a proper purpose, through proper means, and while limiting the right proportionally. Indeed, if a law limits a constitutional right for an improper purpose, or while using irrational or unnecessary means, or means that are not of general application, as others would not impair the right as much (or that the social importance of preventing the harm to the right is greater than the social importance of the benefit to the public interest), when this is the result of the law, the limitation is not justified in a democracy.

I agree and further argue that the principle of constitutional democracy Necessitates that government action which constrains rights be judged in due process litigation. Proportionality analysis as Barak stated It is the best way of deciding the justification for the restriction of rights, particularly when contrasting these with the doctrine of irrationality. The Courts are especially well qualified to perform a proportionality review and do not defer to other levels of government. Judicial evaluation is democratic and the independence of the judiciary really shouldn't be a matter of interest. (Barak, A. (2010).

**Proportionality is essential to the conflict between legal principles**

The next argument regarding proportionality focuses on the fact that The majority of human rights are constitutionally defined as standards rather than codes. (Dobner & Loughlin, 2010) Similarly, the legal structure of many of the considerations justifying limitations on those rights, such as the public interest and the rights of others, is also that of principles. Hence, we are facing a state of conflict between several constitutional principles. The solution to such a conflict is not through the declaration of one principle as the "Victor" while excluding the other forms of the constitutional framework. (A. Barak, 2006) Rather, the solution lies in achieving a proper balance between the conflicting principles. Such balancing is the very foundation of the rules of proportionality. I can argue that when the conflicting principles are constitutional in status, the concept of proportionality, which balances them, is of constitutional status as well. This argument can further be elaborated by stating that the principles are a norm which requires that, considering the factual and legal implications, everything is to be understood to the fullest degree possible. Doctrines are 'optimization conditions, defined by the assumption that they can be met to different degrees and that the required positive relationship relies not only on what is currently possible but also on what is reasonably permissible. (Alexy, 2009)

It means that the balancing conducted at the precise point of conflict between principles is based on the rules of proportionality and each of the three components of proportionality (rational connection, necessary means, proportionality (*stricto sensu*)) are essential to an understanding of the constitutional principle, and, therefore, to the solution to the conflict between the several principles. It is pertinent to mention here and keeping in view the essence of this article the principle of rule of law and democracy are having similar codes.

### **Proportionality and Democratic Constitutionalism**

This section critically analyses the compatibility between the principles of democratic constitutionalism with the principles of the doctrine of proportionality. As the literature and implementation of proportionality has become more mainstream, it has been outlined as part of a larger "culture of justification. (Etienne Mureinik 1994). Within this culture, all governmental conducts and the basic arrangement of society must be permissible concerning public reasons and all those affected by them. To apply this in public justification, proportionality is used as an analysis technique. This exemplifies the strength of proportionality in providing a second set of constraints on government activities, as well as providing a solution for the equality required by the democratic reasoning within politics. Thus, it is seen that proportionality represents an essential "second pillar" of justification on constitutional legitimacy and that democracy is not enough (Kumm, 2009).

While the culture of justification interprets proportionality as being additive through independent autonomy of constitutional legitimacy, there are three modes of support that demonstrate proportionality as enhancing democratic ideals within constitutionalized rights. First, it creates equilibrium between the demands of the politically responsible legislative policymaking as the preferred inference of democracy's governmental equality, and second, it confines constitutional rights in terms of executive decision-making. There remains the question of a constitutional right and the degree to which it can apply constraints on politically accountable actions. The only question that remains is that of the sort of constraint indicated. The creation of constitutional rights as constrained by few limits, which hold binding constitutional entitlements, renders decision-making from a politically responsible standpoint redundant. Interpretively, more limits can be implemented, and the opinion from democracy depicts the creation of constitutional rights that are less affected by common self-government.

A constitutional right as a safeguard reflects this notion – Balance, proportionality, and restricted overriding – as the unique characteristics of this definition represent a less drastic restriction of publicly rational decision. (Kumm, 2009) In the face of a clear constitutionally protected right, as decided by the judiciary, the state institutions are neither completely impaired nor entirely empowered. Rather, they are hindered by logic that limits both the goals sought and the means of controlling them, and cannot be fulfilled with a common tendency not to maintain the right. It is unreasonably constraining both the role of constitutional rights and the democratic policy-making measures for the former to possess a completely immobilizing effect. Proportionality enriches democratic values in a second sense, by reducing the intertemporal friction from the rights founded by a previous majority and the consequent constraining of today's citizens from having to resolve many of the ethical-political problems they encounter (i.e. proportionality can be applied/ interpreted evaluative). The restricted overrule control provides people with a thought-through part, through the contemplation of whether they desire to and can summon it, that gives a middle-ground substitute for the two choices of either total outcast from today's citizenry or officially altering rights via the amendment procedures. (Alexy, 2009)

To conclude, the debate presently relates correspondingly to both indeterminate and determinate constitutional rights: (1) The restrictions that impede on democratic actions should not be unconditional; and (2) Recognising the therefore diminished democratic discord between the present and preceding people. As explained by Michael Perry: Democracy demands that the rational judgment of electoral success accountable government leaders, such as what an undetermined human right forbids, should dominate the opposing, reasonable judgment of politically neutral judges. (Perry, 2003) I argue and further enhance this concept to the level that first it should be democratic constitutionalism and should also consist of a combination of ideas, behaviors, and behavioral trends, based on the premise that a body of constitutional law arises from and is constrained by the power of government. That is, to this extent, the statement that "proportionality may not rely on the presence of a rational discussion such as what rights there are though what they include within and between

judges, legislators, and citizens." Rather, it concerns the authority to restrict or circumvent a right as perceived or defined in the face of contradictory non-rights statements.

### **The centrality of the distinction**

One of the objectives of this article is to argue why the doctrine of proportionality is more intimate with the common law system than the unreasonableness. This is because the "For many factors, the modern differentiation between the nature of constitutional law and the degree of its defense at the sub-constitutional level is of major importance". (A, 2012) There are several reasons however, the First, is it emphasizes the considerable weight granted by the legal system to the individual's right and the need to respect it. It demonstrates the need for justification each time a limitation is imposed upon that right through statute or common law. (A, 2012) The burden of proof of such a justification falls on the state. Second, the distinction highlights the difference between the constitutional level, where rights are determined and their scope is prescribed, and the sub-constitutional level, in which the scope of the enforcement (application) of the right is decided and its limits are defined, this distinction between the legislative body (which decides the constitutional essence of the right) and the legislative body (which determines the means to enforce certain constitutional rights) is of the greatest priority. (A, 2012) In a constitutional democracy, this dichotomy provides the individual or the minority with a shield to be used against the possible tyranny of rights by the majority, this distinction can also help to better form public debate on fundamental rights and to place constraints on places in which day-to-day politics should interfere. (Den Otter, 2009)

Third, the distinction between the scope of the constitutional right and the extent of its protection properly exemplifies the two-fold role of the modern constitutional judge as an interpreter of the constitutional rights and as an adherent of the constitutional rule where limitations of such rights may not exceed those prescribed by the limitation clause (which is also a part of the constitution). Fourth, the distinction correctly sets the parameters for the dialogue between the legislative and judicial branches. (Barak, 2016) Finally, the distinction sets forth an analytical framework to describe the scope of constitutional rights and provides a structured and transparent way of thinking regarding the justification in limiting the realization of those constitutional rights through sub-constitutional law. In the context of the above-mentioned discussion, I can argue that the application of the doctrine of proportionality is timely important at the time of making discrepancy among the legal and statutory rights.

### **Conclusion**

The objective of this article is to critically analyze the compatibility of doctrine of proportionality with the common law system and the arguments in this research has demonstrated that there is an obligatory conceptual relation between democratic norms, the constitutional rights, and principles of proportionality, such that proportionality must be used whenever and wherever constitutional rights adjudication exists.

In my opinion, there are two basic reasons related to the relationship between the study of rights and freedoms and the theory of proportionality, first one argues that there is still a sufficient correlation between constitutional protections and proportionality, as well as the second argues that the matter as to whether fundamental rights and proportionality are related relies on what has been determined, i.e. substantive legislation, by the statutory authority.

This research paper has also revealed that to have a rational justification and a structured discretion, the importance and significance of proportionality becomes more evident. The legal source of proportionality is found directly or indirectly in the constitution of the common law system. (A, 2012) As proportionality possesses both qualities, democracy is founded on human liberties, and any restriction to individual rights demands judicial reasoning. (Kavanagh, 2009) Proportionality is also based on the notion of structured discretion. (Craig, 1999) A person applying this principle must think in stages. (Michael Fordham, 2002) This principle also has implications, such as its transparency. This transparency is important in a democratic system. It allows for understanding of the decision's foundation. This demonstrates the thought process behind the decision, eliminating any notion of a "mechanical" approach in reaching it. All of these aspects enhance the public's trust in the courts as well as in democracy itself.

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