

Human Rights and their Limitations: The Role of Proportionality

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A. Human Rights and Democracy

1. Human Rights and Society

Human Rights are rights of humans as a member of society. They are rights vis-à-vis other persons, whether collectively or individually. The concept of a “right” is derived from the concept of a society; without a society, the idea of a right has no meaning.

However we conceive of a “right” in a pre-societal situation, upon formation of a society we must acknowledge its authority to prevent its members from acting solely according to their will or interest. All societies confront the dilemma: which limitations should be placed on an individual’s will or interest? Of course, totalitarian governments impose limitations that differ dramatically from those in democratic societies. In my lecture I will concentrate on democracies.

Human Rights (H.R.) are central to the modern democracy, built on the ruins of the Second World War and the Holocaust. A democracy has no *raison d’être* without

H.R.; extracting H.R. from a democracy would leave it soulless, an empty vessel. H.R. are the jewels in a democracy's crown.

2. Limitations on H.R.

Democracy cannot exist solely on the basis of Human Rights. Democracy requires the possibility of imposing limitations on H.R. These limitations are of two types. The first includes limitations on one person's rights that are necessary to allow other people to exercise their rights. Recognition of the rights of other people is an appropriate rationale for a democracy to limit a person's rights. As early as 1789 in France, this concept was expressed in the Declaration of the Rights of Man and the Citizen.

A second type of limitation includes limitations on H.R. that are necessary for the public to achieve its goals. Democracies may restrict an individual's rights in order to ensure the continued existence of the state itself, preserve its democratic nature, maintain public health and order, and provide public education, among other national objectives. To achieve those goals, the state may limit H.R.; it also may impose duties on people, including the ultimate duty of sacrificing one's life to protect the country. The special nature of the democratic political system, which is based on cooperation between the public and the individual, is thereby realized: the state protects the individual's rights, and the individual protects the state, its security and its peace.

Democracy is based on a proper relationship between the interests of society and H.R.. Both society's interests and H.R. are part of a unified legal structure that both determines H.R. and allows for their limitation.

3. Proper Relationship between the Public's Needs and H.R.

What is the proper relationship between H.R. and between H.R. and public aims? When is the state justified in restricting a person's rights vis-à-vis the state itself, or vis-à-vis other people? There is no universally accepted answer to these questions; rather, the responses vary from society to society, from era to era. It seems as if the only universally accepted answer is that the proper relationship between the public's needs and individual rights is that which is deemed proper from the perspective of the democratic society

Each democratic society gives meaning to these principles according to its own circumstances, reflecting that society's problems, challenges, history, and self-perception. Accordingly, we find that post-WWII Germany, after the Nazi atrocities and the Holocaust, views human dignity as the central component of its democracy; not surprisingly, the primary values in the post-apartheid South African democracy are equality, human life and dignity; nor is it surprising that Israel strives for the proper relationship between the public's needs and individual rights in realizing its values not only as a democratic state but also as a Jewish state.

H.R. are a central feature of all democracies. However, the degree of their centrality varies from one democracy to another. As a result, various democracies disagree on the issues pertaining to the proper relationship between H.R. and the public interest or other right. This is where the concept of P comes in.

B. The Role of Proportionality

1. The Meaning of P.

P formulates a conceptual framework for defining the appropriate relationship between H.R. and considerations that may justify their limitation in a democracy. P is an analytical, methodological doctrine. It is a legal construction applicable in a democracy. In and of itself it does not provide a substantive solution as to the appropriate relationship between H.R. and the justifications for their limitation. It is neither liberal nor communitarian. It is sustained by data external to it. This is both its strength and weakness.

The point of departure for understanding P is the basic distinction between the scope of the right on a constitutional level and the limitations imposed on it at a sub-constitutional level, which prevent the realization of its full scope. Determining the scope of a constitutional right requires a constitutional interpretation of the right. It endeavors to interpret the wording of the right in a manner that realizes its underlying purpose. My view is that this scope does not vary as a result of conflicting constitutional ideals, such as the public good (security, public peace) or other conflicting constitutional rights. The clash between conflicting ideals need not be expressed in the scope of the right on the constitutional level, but rather in the answer to the question of how to exercise and to realize it on the sub-constitutional level. The sub - constitutional level is the level at which proportionality operates.

Proportionality in the broad sense as a constitutional norm is based on two principle components: The first is the component of legality, which is concerned with the requirement for a chain of authorization between the sub-constitutional norm which limits the constitutional right, and the constitution. The second component is of legitimacy, a requirement fulfilled by compliance with the requirement of proportionality in the regular

sense. Its concern is with the conditions that justify the violation of a constitutional norm by a sub-constitutional norm. There are two main justificatory conditions: an appropriate goal and proportionate means. An appropriate goal is a threshold requirement. In determining the appropriateness of the goal no consideration is given to the means utilized by the sub-constitutional norm for attaining the goal, and a goal may be appropriate even if the means of attaining it are inappropriate. The proportionate means must comply with three secondary criteria (a) there must be a rational connection between the appropriate goal and the means utilized by the sub-constitutional norm for its attainment; (b) the legislative goal cannot be achieved by means that are less restrictive of the constitutional right; (c) there must be a proportionate balance between the social benefit of realizing the appropriate goal, and the damage caused to the constitutional right (proportionality *stricto sensu* = P.S.S.).

P therefore fulfills two substantive functions. On the one hand, it prohibits the limitation of basic rights in the form of a sub-constitutional norm. On the other hand, subject to certain conditions, it permits a limitation of basic rights by a proportionate sub-constitutional norm. P reflects the idea that the constitutional right and its limitations on a sub – constitutional level are flip sides of the same constitutional concept. P expresses the idea of the relativity of human rights. It does so by conferring constitutional stature both to the protection of the human right and to its limitation by way of a sub-constitutional norm. The unique importance of P is that these limitations themselves also have their limits. From among the components of P described above, in this lecture I will focus on P.S.S., because in my mind it is the most important component of proportionality. What then are the basic requirements of this criterion?

2. The Principled Basis of the Criterion

P.S.S is a consequential test. Its fundamental requirement is for an appropriate relationship between the benefit gained by the law that limits a human right and the

damage caused to the right. The key word here is "relationship". The requirement is for a balance. PSS does not examine the relationship between the goal of the law and the means adopted for its achievement. Rather, it examines the relationship between the legislative goal and the constitutional right. It focuses on the relationship between the benefit gained by the law's realization in comparison to its affect on the constitutional right. It is based on striking a balance. On a constitutional level it enables the continued existence of conflicting principles, in cognizance of the inbuilt constitutional conflict. On the sub-constitutional level the balance provides a solution that mirrors the principles of the society and which establishes the limitations which it imposes upon the power to limit the rights of the individual and of the minority. The balancing doctrine must establish criteria for realizing this balance within the framework of P.S.S. How are we to conduct this balance? This is the key question to be answered by the balancing doctrine.

3. Balancing based on the importance of the benefit and the importance of preventing damage

(a) Relative Societal Importance

Balancing assumes a scale. On one side of the scale there are the goals to be achieved. On the other side there are the limits to the right. The criterion for determining the weight of each side on the scales is that of the relative social importance attaching to each of the conflicting principles at the point of conflict. This criterion simultaneously enables a comparison between the principles being weighed. It 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 the constitutional right.

The key question is how to determine the relative importance of the benefit in terms of

its contribution to society, as opposed to the relative importance of preventing the limitation of the constitutional right in terms of the damage caused to it. This determination is neither scientific, nor precise. Striking a balance between conflicting principles is not done with scientific tools. The legal system must be viewed as a whole. Consideration must be had for the constitutional status of the conflicting principles. Prima facie, the relative importance of constitutionally anchored principles is greater than that which attaches to principles that are not constitutionally based. This however is not sufficient. The importance of principles and the importance attaching to their non-limitation cannot be determined purely on the basis of their position in the normative hierarchy. Even principles of identical normative status may vary in terms of their social importance.

Clearly, the task of comparing benefit to damage is an arduous and daunting one. How can one compare benefit in terms of state security to damage to freedom of speech? Bearing these difficulties in mind, at the very outset it seems appropriate to clarify its scope. This clarification takes place at two levels: Firstly, the comparison is not between the advantage of realizing the legislative goal as opposed to the damage brought by limiting the right. It is not between security and H.R. The comparison is between the marginal benefit to security and the marginal damage to the right caused by the adoption of the law. As such, the comparison is concerned with the marginal increment.

Secondly, we must also take into consideration the existence of a proportionate alternative which achieves only part of the goals and effects only partly on the right. If indeed, a proportionate alternative exists, then the comparison between the marginal benefit and the marginal damage is conducted having consideration for, and in comparison with the proportionate alternative.

This dual clarification does not transform the balance into a factual problem. It cannot eliminate the value-based discretionary nature of the balancing. Even after restricting the scope of the balancing, it still retains its character as a legal, value-based problem, but the dimensions of the legal problems are diminished, as is the complexity of the principles under discussion. This clarification shows that the value-laden question confronted by the decision maker (the legislator, the judge, the executor) is not the "large" balance between general principles, such as security or freedom, life or quality of life, privacy of freedom of speech. Rather, the decision maker is actually confronting a balance of "smaller" dimensions - namely the need to balance between the marginal advantage to the law's goal (apart from the proportionate alternative) and the importance of preventing the damage to the constitutional right deriving there from. How is this balance conducted?

(b) Assessing the importance of the Realization of the Goal

On the one hand, there is the goal which the law purports to realize. This goal is deemed appropriate if it satisfies the threshold requirements pertaining to an appropriate goal, both in terms of its substance and in terms of its urgency. This goal belongs to the categories recognized (expressly or impliedly) as justifying the limitation of a constitutional right. By the same token, this goal also reaches the levels of urgency required by the constitution in order for goal to be considered as appropriate. In this context different tests have been adopted different countries. In Israel, the level urgency required for realizing a goal derives from the importance of the constitutional right being limited. When the constitutional right being limited is high on the level of importance, then the criterion for evaluating the urgency of the limitation will be that of a pressing or substantive social interest. Where the rights are of less importance, the level of urgency will likewise be lower.

In order to answer the question of whether the importance of the benefit attained by the realization of a certain goal justifies the limitation of a constitutional right, the examination of the degree of urgency of its realization must be supplemented by an examination of the probability (chances) of realizing the goal if the law remains in effect. These are dependent on factual data and a prognosis regarding the possibility of realizing the appropriate goal.

(c) The importance attaching to the limitation of the right

The importance attaching to the limitation of the right is determined by the importance of the affected right and the importance of preventing that limitation. Here too, the importance is determined by the principle constituting the basis of the right and the social importance of preventing that limitation. The weight attaching to the limited right cannot be determined in the abstract, and its determination must be in the context of the actual limitation of the right. An assessment of the limitation of the right must be based primarily on the constitutional right itself. The significance of the limitation of the right derives from the importance of the right and the extent of the limitation, and the chances that the limitation will actually materialize.

Are all constitutional rights of equal importance? Do rights differ in their levels of importance? Couldn't it be argued that their normative equivalence means that they are of equal importance? The answer is that a distinction must be drawn between the question of constitutional status and the question of social weight. The constitutional status of a right is determined according to the interpretation of the constitution. Absent any constitutional guideline to the contrary, the assumption is that all constitutionally anchored rights enjoy identical constitutional status. But, rights on the same normative level are not necessarily of the same social importance. The social importance of a right - and by extension its weight in relation to conflicting principles - is derived from its underlying rationale and its importance in the framework of the society's fundamental

conceptions.

In comparative law one may find support for the idea that not all constitutional rights are of the same importance. The distinction between various rights in terms of their relative importance provides the central basis for the distinction between the three levels of scrutiny accepted in American law. The South African constitution (of 1996) states that the constitutionality of a law that limits constitutional rights must *inter alia* take *the nature of the right* into consideration. The prevailing approach in South Africa is that the rights to dignity, equality and liberty and their derivative rights are all of central importance to South African society. Having said that, it is conceded that comparative law also evidences a conflicting approach, according to which all constitutional rights are of equal importance. This is the approach in German and Canadian constitutional law.

In my view, not all constitutional rights are of equal importance and they are not all equal in terms of the weight attaching to them. The importance attaching to a constitutional right and the importance of preventing its limitation are determined in accordance with a society's fundamental conceptions. They are influenced by each society's social history and its particular character. They are derived from the goals of the constitution. A right that constitutes a condition for the existence and exercising of another right should be regarded as being the more important of the two. From this we may infer the relative importance of the right to life, human dignity, equality and political expression, because all of them are conditions for the realization of many of the other rights. But the distinction with respect to the importance of a right is not limited to the context of comparison between different rights and is likewise applicable within the context of any given right. Accordingly, we can distinguish between freedom of political expression and freedom of commercial expression.

The weight attaching to the side of rights on the scale derives not only from the importance of the right but also from the extent of its limitation, its intensity, and its dimensions. A limitation of only one right differs from the limitation of additional rights. A limitation at the margins of the right differs from a limitation of its core. A temporary limitation is of less severity than a permanent limitation. Limiting the rights of a small number of rights holders is not the same as limiting the rights of a larger number. We thus see that the consequences of the limitation of a constitutional right and its effect on those entitled to the right affect the weight of the right itself.

Just as the probability of the actual materialization of the appropriate goal is an important factor in determining its relative weight, so too the probability of actual limitation of the constitutional right is an important factor in determining the weight attaching to the damage liable to be caused to it. Where the probability of the actual limitation of the right is high the weight attaching to the limitation itself will be greater than where the chances of an actual limitation are slight. This aspect of the limitation of the right has not been stressed in legal literature, because in most of the cases the actual limitation of the right is certain; when the infringing law is passed, the right is immediately limited. This is indeed true for most of the cases, but not always. In cases in which there is no certainty that the right will be limited then the degree of uncertainty, i.e. the likelihood of its materialization, will have an affect on the weight attaching to the right affected.

4. The Balance

(a) The Basic Balancing Rule

Bearing all the above in mind, the basic balancing rule can be expressed as follows: To the extent that greater importance attaches to preventing the marginal damage to the constitutional right, and to the extent that the probability of the right being limited is higher, the marginal benefit to the public interest caused by the limitation must be of greater importance, of greater urgency, and with a greater probability of materializing.

(b) The Concrete Balancing Rule (*ad hoc*)

The basic balancing rule establishes a general criterion for deciding between the marginal benefit to the public good or another right and the marginal damage caused to the constitutional right. This basic rule is applied to the particular circumstances of every concrete case. It is intended to guide the balancer (the legislator, the executor, the judge) in deciding cases of conflicting principles. Accordingly, in tandem with the basic balancing there is always the concrete balancing, which is sensitive to the facts of the case, This is "ad hoc balancing". The basic balancing rule balances between the benefit and the limit in "broad strokes". The concrete balancing rule balances in accordance with a criterion that is narrow. The basic balancing rule is based on a generalization on a very high level of abstraction, whereas the concrete balance is based on a very low level of abstraction.

(c) The Principled Balance

The transition from the high level of abstraction to the particular circumstances of the case at hand is a sharp and acute transition. Such a situation is undesirable, and in that

sense the basic balancing rule is too abstract. It fails to relate to the particular features that characterize the various human rights, whether as an object for limitation or an object for protection. It does not focus on the basic principles underlying the various human rights, providing the justification for protecting them or for limiting them. It fails to highlight the considerations that characterize the appropriate protection of the constitutional right. The concrete balancing rule is on the lowest level of abstraction. This prompts the question of the possibility of an intermediate level, between basic balancing and concrete balancing. Should there be a "principled balance" that translates the basic balancing rule into a number of principled balancing rules formulated at a lower level of abstraction than the basic balancing rule and at a higher level than that of the concrete balancing rule? This level of abstraction would give expression to the considerations of principle at the basis of the constitutional right and the justification for its violation. How would one formulate this intermediate level? What differentiates it from the concrete balancing, and what is its justification?

The principled balancing formula would translate the basic balancing rule into a principled formula that relates to the limited right on the one hand and the goal of the limiting law on the other hand. It would establish the conditions to be satisfied by the limiting law so that the limitation of the constitutional right would be P.S.S. The principled balance would reflect the normative considerations that justify marginal damage to one constitutional right in order to enable the marginal benefit to another right, or for the public good. The evaluation of the limited right would give expression to the importance of the right, the extent of the limitation and its probability. The evaluation of the goal would give expression to the importance of the goal against the background of its content, the urgency of its realization, to the damage that would be caused from the failure to realize the goal and the probability of that damage,

Let us take the example of a law that limits the right of political expression – a

right of great importance. Assume that the goal of the limitation is the protection of public peace in the face of hate speech. The principled balancing formula might determine that it is only permissible to limit the freedom of political speech when the goal of protecting the public peace from the consequences of hate speech is crucially important for the realization of an urgent social need, that is required to prevent extensive and immediate damage to the public peace. The principled balancing formula is thus characterized by a level of abstraction that gives expression to the reasons underlying the right and the justifications for its limitation.

There are many different human rights, each having its own particular aspects. Similarly, there are many considerations pertaining to the public good, each of them with its own particular features. This dictates the need for a number of rules for establishing a principled balance and a number of balancing formulae that give expression to the kaleidoscope of considerations, regarding both the limited right and the goal whose realization limits it. For example, the freedom of political expression differs from the freedom of commercial expression. An *a priori* restriction is not the same as a *post factum* restriction. A minor limitation is not the same as a major limitation.

The number of principled balancing formulae is far in excess of the number of constitutional rights. Each constitutional right has a variety of principled balancing formulae that reflect its importance, the scale of the damage it incurs in the event of the realization of a goal that limits it, and the likelihood of the right actually being limited. The balancing formulae will similarly give expression to the importance of the goal that limits a constitutional right, to the urgency of its realization, to the damage to another right or to the public good in the event of the goal not being realized, to the probability of actual damage to the public good if the goal is not realized and to the probability of actual benefit to the public good if the right is limited.

An examination of the comparative constitutional law shows that very few legal systems have formulated principled balancing formulae. The question is why? Possibly it may reflect an approach shared by many of the legal systems, whereby all constitutional rights are considered to be of equal importance. According to that assumption, the only thing to be examined would be whether the limitation of the constitutional right is of minor, intermediate, or major significance. In accordance with the answer to that question there would be an examination of the degree of importance attaching to the realization of the goal. Arguably, the equivalence in the importance attaching to limiting rights prevents a normative abstraction from going beyond the contours of the concrete case. Now while it is true that consideration is always given to the importance of realizing the goal, it would seem that the legal systems have had difficulty in recognizing principled balancing formulae in which one component of the balancing – that of the limitation of the right- does not "rise" above the concrete case. Be it as it is. I think that the principled balance – as a derivative of the basic balancing rule, is desirable .It guides the balancer (legislator, administrator, judge). It restricts wide discretion in balancing. It makes the act of balance more open, more transparent, more structured and more foreseeable. This kind of balance differs from the principled balance endorsed in America. According to my approach the principled balance is based on a balance struck within the framework of a right of a given scope. In America the principled balance determines the parameters of the scope of the right; it does not operate within those parameters.

Criticism and Reply

Proportionality is central to the doctrine of rights. Just as we are currently living in an era of rights, we are also living in an era of proportionality. Most of the constitutional democracies have adopted proportionality as a central criterion for resolving the problems posed by the complex relations between the individual and society in modern democracies. This is a nice example of the "migration of constitutional laws". Proportionality is based on the concept of balance. Its role is not to determine the scope of the right but rather the justification for its protection or its limitation.

The advantages of PSS are several. It stresses the need to look always for a justification of a limit on a HR; It structures the mind of the balancer; it is transparent; it creates a proper dialog between the political brunches and the judiciary; It adds to the objectivity of judicial discretion .

PSS has it critics. It is said that PSS attempts to balance incommensurable items. My answer is that there is a common base for comparison, namely the social marginal importance. It is said that balancing is irrational. I tried to show that the balancing rules – basic, principled, concrete- supply a rational basis for balancing.

It is said that PSS protects rights less than its alternatives, like the American categorization. I don't agree. In the critical cases of strict scrutiny, where there is no possibility to prevent over- inclusiveness, PSS may protect basic right more than strict scrutiny.

Another line of attack is that PSS gives to wide discretion to judges. I do agree

that there is J.D. in PSS. I disagree that there is less J.D. in categorization, or the scope of J.D. in PSS is significantly broader than in categorization. Furthermore, it is precisely in the area of security that there is a need for an independent authority which is not elected by the people, and which is capable of telling the people's representatives that an appropriate end cannot justify all means used, and that there are certain red lines of P. that the state is forbidden to cross. In this context I would like to cite a case which we ruled that a statute that prohibited family unification between Israel Arabs and their spouse's from the West Bank is unconstitutional as it limits unproportionality the right to dignity. In my judgment I wrote:

Examination of the test of proportionality (in the narrow sense) returns us to first principles that are the foundation of our constitutional democracy and the human rights that are enjoyed by Israelis. These principles are that the end does not justify the means; the security is not above all else; that the proper purpose of increasing security does not justify serious harm to the lives of many thousands of Israeli citizens. Our democracy is characterized by the fact that it imposes limits on the ability to violate human rights; that it is based on the recognition that surrounding the individual there is a wall protecting his rights, which cannot be breached even by the majority.

I do agree that in this lecture I did not devote too much attention to important considerations pertaining to the relations between the political branches (legislative and executive) and the judicial branch. I presented a balancing model that is applicable to any body conducting a balance. Accordingly, my position regarding P would remain intact even in the total absence of judicial review. It would be of course applicable within the framework of judicial review under the Human Rights Act. An examination of the P doctrine shows that the relative extent of discretion exercised by the legislator or administrator and the judge will vary in accordance with the components of P. In the

decision of whether to act, legislative or administrator discretion is extremely broad and judicial discretion is extremely limited. In determining the goals and the prognosis of their effect, the legislator or administrator has broad discretion and judicial discretion is narrow. However, to the extent that we delve deeper into the analysis of the components of P, the scope of legislative or administrator discretion decreases. Upon reaching P.S.S. judicial discretion is broad and legislative discretion is narrow. I made this point in one of the cases, which dealt with the construction of the separation fence.

"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".

Many may disagree with me on that crucial point. To the critics on that point my only answer is: I am aware of your criticism, but I have not found a better system. It is my view – a view I expressed in many cases dealing with HR generally and the battle on terror specifically – that if we take HR seriously we should accept PSS and judicial discursions in it. Let me finish my lecture by sighting a comment I made in a judgment the court ruled that the government has no authority to authorized torture:

"We are aware that this judgment of ours does not make

confronting that reality any easier. That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties".