The Significance of the Doctrine of Proportionality in the context of Militant Democracy to protect the Freedom of Expression

A Thesis Submitted for the Degree of Doctor of Philosophy

By

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Abstract

This study is about the dilemma whether democratic societies are justified in employing militant and repressive actions in defence of their democratic futures. Anti-terrorism laws enacted by these societies have been roundly criticised for curtailing and even violating fundamental human rights and freedoms. The research argues that the concept of 'militant democracy' provides a justification for these anti-terrorism laws and the security of people in democratic societies. It suggests that the European Court of Human Rights (ECtHR) has adopted this concept by providing a latitude to State Parties to protect their citizens against terrorist threats, thereby allowing them to create laws to limit certain human rights and freedoms. In essence, the research sets out to examine if there is a way to ensure that anti-terrorism laws, legitimized by militant democracy, can continue to safeguard human rights and freedoms in democratic societies. It focuses on the application of 'militant democracy' and the application and utility of the 'doctrine of proportionality' in the UK judicial system. It views the doctrine of proportionality as a tool in the judicial review process, which checks the balance between "the interest of the society and the rights of individuals. In this respect, it examines some of the key components of proportionality to ascertain if it could alleviate the shortcomings of the UK legal system, which have been attributed to its long-term application of the Wednesbury "unreasonableness" principle. It is of vital importance since the ECtHR for human rights violations has on a number of occasions found the UK legal system liable. This research finally evaluates whether the doctrine of proportionality should be integrated into the UK legal system.

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Dedication

This thesis is dedicated to all those who believe and respect the Human Rights and work for its flourishment.

Declaration

I, Syed Raza Shah Gilani, declare that the thesis is written by me, and its contents, in full or in parts, have not been submitted to any other institution or university for the award of any degree. Moreover, the information mentioned from others work has been quoted and acknowledged through proper referencing."

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CHAPTER ONE: Introduction

1.1 Introduction

Unlimited tolerance must lead to the disappearance of tolerance.[1] Karl Popper, in his book *The Open Society and its Enemies*,[2] explains the "paradox of tolerance", which means that if unlimited tolerance is extended to those who are intolerant, "the tolerant will be destroyed and tolerance with them".[3] Hence, Popper recognised the right *not* to tolerate the intolerant, and asserted that society should not be averse to taking action in the name of tolerance. Fundamentally, for Popper, "any movement preaching intolerance places itself outside the law",[4] and for this reason incitement to intolerance should be criminalized in the same manner as incitement to murder. The question arises as to whether states are legitimate in acting in militant and repressive ways to combat threats to their democratic future. Chapter VII[5] of the United Nations Charter is very significant in this regard, and after the 9/11 attacks on the USA, its importance has increased exponentially. The chapter, titled "action with respect to threats to the peace, breaches of the peace, and acts of aggression," relates to the international peace and security of nations. Moreover, the United Nations Security Council Resolution No 1373,[6] which was passed a few weeks after 9/11 on 28 September 2001, stated that "threats to international peace and security caused by terrorist acts".[7] The resolution overwhelmingly emphasised to all member nations that terrorism and its financing is a serious crime,[8] and that respecting human rights whilst countering terrorism is of comparatively less importance. Resolution 1373 also imposed permanent and general obligations on all the states[9] to respond

[1] Karl Popper, 'The Open Society and Its Enemies (Princeton, 1950)' at 546.
[2] Ibid 79.
[3] Ibid at 547.
[4] Ibid.
[5] Chapter VII: Action With Respect To Threats To The Peace, Breaches Of The Peace, And Acts Of Aggression United Nations, 'CHAPTER VII: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION' <http://www.un.org/en/sections/un-charter/chapter-vii/index.html> accessed on 15th February 2016.
[6] Resolution 1373 (2001), Adopted by the Security Council at its 4385th meeting, on28 September 2001, see alsohttp://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf accessed on 15 February 2016.
[7] George W Bush, *The national security strategy of the United States of America*, 2002).
[8] National commission on terrorist attacks upon The USA, The 9/11 report (New York: St. Martin's press, 2004), at 5.4.
[9] Paul C Szasz, 'The security council starts legislating' (2002) 96 American Journal of International Law 901; Eric Rosand, 'The Security Council as 'global legislator'': ultra vires or ultra innovative' (2005) 28 Fordham International Law Journal 542; Matri Koskenniemi, "International Legislation Today: Limits and Possibilities" (2005) 23 Wisconsin International Law Journal 61. Alvarez JE, 'International Organisations and the Rule of Law.' (2016) 14(1) NZJPIL 3.

appropriately to remove any weaknesses and shortcomings from their domestic legislation to fully ensure that the security of their people is of paramount importance. Nevertheless, the resolution failed to provide guidance on how states should define terrorism. Whilst zero compromise on the security of people is vital, there were concerns associated with this stance, not least in relation to human rights. A failure to define terrorism could be used to justify repressive laws and could be deployed against any political opposition behind the curtain of counter-terrorism policies.[10] The resolution allowed states to refuse refugee status to any person suspected of being involved in terrorist activities. However, it did not provide any guidance on how to deal with such persons, who would be tortured if deported to countries such as Syria.[11]

As stated earlier, after the incident of 9/11 and the promulgation of Resolution 1373, the nations of the world responded in a manner that reflected their individual histories, legal frameworks, and political and social cultures. Many countries enacted new, tough and repressive anti-terrorism laws, paying little heed to the rights and the liberties of people.[12] Consequently, countries with poor human rights records were able to justify their use of indefinite detention and torture.[13] With respect to other nations, such as the United Kingdom, there was little hesitation in adopting security measures that would place human rights in jeopardy.[14] Advocating democracy, Joi stated, "If we destroy human rights and the rule of law in a response to terrorism, they (the terrorists) have won".[15] In many countries, counter-terrorism legislation has legitimised the use of torture and questionable surveillance practices (such as those employed by the National Security Agency in the USA).[16] Although, the majority of detainees at Guantanamo Bay have now been released without compensation and rehabilitation,[17] the USA still asserts the right to detain suspects indefinitely without trial. What all of this demonstrates is the profound impact of counter-terrorism laws and policies on human rights and freedom of expression. Furthermore, it suggests that counter-terrorism laws and policies

[10] Tasneem Khalil, Jalad death squads and state terror in South Asia (1st edn, Pluto press 2016)) at 76.
[11] Human Rights Watch Behind Closed Doors (A Middle East Watch Report, 1992) see also https://www.hrw.org/sites/default/files/reports/Egypt927.pdf accessed on 16 February 2016.
[12] Harsh legislation designed to impose large scale detentions. See also Darren A. Wheeler, 'Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism. By Bruce Ackerman. (Yale University Press, 2006.)' (2007) 69 The Journal of Politics 265
[13] Mark Tushnet, 'The possibilities of comparative constitutional law' (1999) 108 The Yale Law Journal 1225.
[14] See http://www.legislation.gov.uk/ukpga/2001/24/contents Albert J Jongman, *Political terrorism: A new guide to actors, authors, concepts, data bases, theories, and literature* (Routledge 2017).
[15] Paul Wilkinson, Terrorism versus democracy: The liberal state response (Routledge 2006) at 109.
[16] David Miller and Rizwaan Sabir, 'Counter-terrorism as counterinsurgency in the UK 'war on terror'' (2012) Counter-terrorism and state political violence 12 p 56.
[17] American ideals. Universla values. Human Rights First, 'Guantánamo by the Numbers' (*Human Rights First* FACT SHEET: FEBRUARY 2018) <https://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf> accessed 15th May 2018.

must be judged and evaluated with extreme care by the Courts, especially when intersecting with the freedom of expression in high profile cases.[18] (I have denoted this phrase to address the cases where two rights collide). Freedom of expression is one of the fundamental rights that are most threatened by laws such as anti-terrorism.

1.1.1 Freedom of Expression and its Importance

Freedom of expression has been referred to as the "lifeblood of democracy".[19] The right to obtain information, furnish opinions, and express thoughts allows the public to exchange and present their views and ideas. Freedom of expression has also been described as being "key to the development, dignity and fulfilment of every person.[20] It helps and encourages people to develop a better understanding of the world around them. It is a cornerstone of all other democratic rights and freedoms. Importantly, it enables the public to participate with the government in essential decision-making, and empowers people to exercise their right to vote and access information. Moreover, it promotes good governance, as media scrutiny can help to expose corruption or conflicts of interest that would undermine this. In recognition of the power and influence that exercising freedom of expression can also help to promote, Article 10(2) of the European Convention on Human Rights (ECHR) explicitly states that the exercise of freedom of expression carries with it duties and responsibilities.

On 21st July 2011, the United Nations Human Rights Committee adopted General Comment 34 on States parties' obligations under Article 19 of the International Covenant on Civil and Political Rights (ICCPR). The General Comment provides guidelines to the member states on what the freedoms of opinion and expression mean in practice, and therefore strengthens the protection provided by international law. In the European Convention of Human Rights (ECHR), among the four qualified rights, freedom of expression, as delineated in Article 10,[21]

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[18] Mawiyah Hooker and Elizabeth Lange, 'Limiting extrajudicial speech in high-profile cases: The duty of the prosecutor and defense attorney in their pre-trial communications with the media' (2002) 16 Geo J Legal Ethics 655.

[19]Dominic Martin, 'republic: Divided Democracy in the Age of Social Media, by Cass R. Sunstein. Princeton: Princeton University Press, 2017. 328 pp. ISBN: 978-0691175515' (2018) 28 Business Ethics Quarterly 360, Lord Steyn in R. v. Secretary of State for the Home Department, ex-parte Simms [2000] 2 AC 115, at 126.

[20] Jürgen Habermas, 'The concept of human dignity and the realistic utopia of human rights' (2010) 41 Metaphilosophy 464 and also stated by Article 19 of ECHR available at www.article19.org. accessed on 16 February 2017.

[21] Article 10 – Freedom of expression

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of

is arguably the most vulnerable.[22] In this context, counter-terrorism laws have severely restricted this fragile right, leaving it exposed to the risk of being undermined by abusive State actions.[23] Additionally, it is argued that the fact that the ECtHR entitles the member states to enjoy considerable latitude in restricting the freedoms when their national security is at stake has also been detrimental to this freedom. For example, the Federal Republic of Germany's Constitutional Court banned the successor to the Nazi Party, the Communist Party,[24] and adopted laws regulating the loyalty of its public servants. When approached by the ECtHR, it ignored all challenges to its loyalty laws,[25] preferring instead to give latitude to the state authorities and its legislation. It is noteworthy that the US similarly curtailed the freedoms of communists.[26] These examples are used to highlight that although governments have a duty to protect their people and provide them with adequate security, this obligation can be used to restrict legitimate forms of freedom of expression. This has proved true in recent years where laws introduced to prevent terrorism have been interpreted and deployed arbitrarily, with grave consequences.[27] Hence, it can be said that in certain cases, restrictions on freedom of expression might be justified, as mentioned under Article 10(2) and Article 17[28] of the ECHR. It is

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frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

[22] T. R. S. Allan, 'Constitutional Rights and Common Law' (1991) 11 Oxford Journal of Legal Studies 453, T.R.S. Allan, Common Law Constitution and Freedom of Speech, in Freedom of Expression and Freedom of Information 17 (Jack Beatson & Yvonne Cripps eds., Oxford Univ. Press 2000).

[23] Civil and political rights, including the question of freedom of expression -- Report of the Special Rapporteur Mr Ambeyi Ligabo pursuant to Commission resolution 2002/48 at para 58 Available electronically at http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/5c111c8bbfc8455d802568b9004ba0fc?Opendocument (February 2000) Accessed on 19 July 2016.

[24] Yigal Mersel, 'The dissolution of political parties: The problem of internal democracy' (2006) 4 International journal of constitutional law 84, Examples: Socialist Reich Party case [1952] BVerfGE 2, 1, found in Kommers, Constitutional Jurisprudence of the FRG; Communist Party case [1956] BverfGE 5, 85, found in Kommers, Constitutional Jurisprudence of the Federal Republic of Germany.

[25] Compare Kosiek v. Germany (1986) 9 EHRR 328 with Vogt v. Germany (1996) 21 EHRR 205. See Harvey, "Militant democracy and the ECHR" (2004) 29 (3) European Law Review 407, 413-414. Conor Gearty notes that the change in the Strasbourg Court's attitude coincided with the end of the Cold War: Conor Gearty, "Airy-Fairy: Human Rights and the End of Empire: Britain and the Genesis of the European Convention by A.W.B. Simpson." (2001) 23 London Review of Books, available at <http://www.lrb.co.uk/v23/n23/gear01_.html> last accessed on 22 March 2009.

[26] Dennis v. U.S. 341 U.S. 494 (1951).

[27] Jongman, *Political terrorism: A new guide to actors, authors, concepts, data bases, theories, and literature* page 187.

[28] This article describes and prevents the 'abuse of rights'. Also see, for example, Le Pen v. France. Application No. 18788/09, 20 April 2010; Feret v. Belgium. Application No. 15615/07, 16 July 2009. Judgments available in French only however, summary is available at https://globalfreedomofexpression.columbia.edu/cases/feret-v-belgium/ accessed on 17th June 2017.

pertinent to mention here that despite the fact that there are guiding principles for states to follow when imposing limitations on freedom of expression, numerous states have been found guilty of violating this fundamental freedom many times.[29] Now the Judiciary, as the custodian of the rights of the people, has a responsibility to check the actions of the state.

1.1.2 The Importance of Judicial Review in the Modern Judicial System

The "Principle of Judicial Review" has gained strength in the UK's judicial system since the promulgation of the Human Rights Act 1998 (HRA). It serves to check the actions of the government, which should be in the ambit of the constitution. HRA Article 4 (declaration of incompatibility) empowered the judiciary to review all the governmental orders, which are beyond their remit.[30] In the UK, the ECHR has played a vital role in enhancing the Rule of Law by increasing the courts' ability to scrutinize parliament's legislative powers and ensured that human rights are not to be violated without good reason. Here, it is worth analysing the notion of the Rule of Law and its underpinnings before addressing the importance of judicial review in protecting freedom of expression from exploitation. There are many debates surrounding the proper conceptualisation of whether the Rule of Law should be a formal or substantive conception and whether its requirement account should be thick(er) or thin(er).[31] Looking at the position of two interrelated distinctions, different understandings of the requirements tend to emerge. Through the combination of the two distinctions, the nature of the Rule of Law will develop multiple perceptions that are complementary rather than mutually exclusive. When the Rule of Law is identified as a principle of governance, it claims that all powers should abide by the fundamental principles within its society. This is, however, distinguishable from the Rule of Law as a principle of law, which claims that in order to meet the fundamental principle, it needs an authoritative system to qualify as a legal system.[32] The basis of the Rule of Law is seen in the requirement for the process through which the governance by law must proceed. Its requirement states that the process should be governed by

[29] Oljana Hoxhaj, 'Freedom of Expression' (2013) 3 JURIDICAL TRIB 168.
[30] Anthony Paul Lester, 'Parliamentary scrutiny of legislation under the Human Rights Act 1998' (2002) 33 Victoria University of Wellington Law Review 1.
[31] For an overview of the various alternatives, see Brian Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge: Cambridge University Press, 2004), pp. 91.
[32] Cf. N.W. Barber, who distinguishes between the Rule of Law as part of either legal theory or political theory: 'Conceptions within legal theory are presented as implied by, or flowing from, a full Understanding of the nature of law or legal system. Those conceptions that lie within political theory are presented as part of a grander theory of how power should be exerted over individuals' (N.W. Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?', Ratio Juris, 17(4) (2004): p. 476).

law. In order to meet the proper administrative requirements for the principle of law, the promulgation and administration should be designed to meet the standards.

Despite the debates on the Rule of Law's conceptualisation, its essential nature and basic requirements are widely agreed upon. Law should be general, prospective, open, clear, stable and non-contradictory. It should also be efficient as well as consistent, and should be enforceable by institutions. It could be argued that fundamental human rights are unquestionably the essential good-making property of the law and they also set an aspirational standard. Human rights are, as a result, inseparably linked to the Rule of Law. Hence, the courts can review the actions of primary decision-makers in light of the ECHR. According to the ECHR, as incorporated into UK law by the Human Rights Act 1998,[33] the domestic courts in the UK must interpret all legislation in accordance with the ECHR, regardless of the date of its enactment.[34] The courts are bound (as far as it is possible)[35] to check that the laws are compatible with the rights protected by ECHR 1950.[36]

The principle of proportionality a tool of judicial review ordains that administrative measures must not be any more drastic than is necessary to attain the desired result. . The doctrine is applied by both the ECtHR and the European Court of Justice (ECJ), and so it has tried to infiltrated UK law however, until now facing great resistance. Many may argue that a concept like 'proportionality' has long been operating covertly in English administrative law under the label of irrationality or Wednesbury unreasonableness. However, the truth is that although principles of proportionality and unreasonableness/irrationality cover a great deal of common ground, a clear difference has emerged between judicial decisions and theoretical analysis.[37] In discussing this topic, I will start with the emergence of proportionality as a unique tool of judicial review with a distinctive identity.

[33] Article 6 of ECHR safe-guards the "right of the fair trial".
[34] Human Rights Act 1998, s 3.
[35] Human Rights Act 1998, s 4.
[36] Keith D Ewing, 'The human rights act and parliamentary democracy' (1999) 62 The Modern Law Review 79.
[37] Michael Taggart, 'Proportionality, Deference, Wednesbury' (2008) NZL Rev 423, Tom Hickman, 'Proportionality: Comparative Law Lessons' (2007) 12 Judicial Review 31, Nicola Lacey, 'The Metaphor of Proportionality' (2016) 43 Journal of Law and Society 27, Ewan McKendrick, Contract law: text, cases, and materials (Oxford University Press (UK) 2014), P. Craig et al., EU Law: Text, Cases and Materials (5th Edition, Oxford University Press, Oxford, 2013), Aharon Barak, 'International humanitarian law and the Israeli supreme court' (2014) 47 Israel Law Review 181,Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012), Robert Alexy, A theory of constitutional rights (Oxford University Press, USA 2010), Hanna Wilberg and Mark Elliott, The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow (Bloomsbury Publishing 2015).

1.2 Scope and Purpose

The contemporary discussion on the doctrine of militant democracy reveals that it is a vitally important tool to protect and legitimise the laws for the protection of the society from terrorism. Anti-terrorism laws, which allow the state to derogate at the time of emergency, can only be justified in a militant democracy regime. It is pertinent to mention here that the principle of militant democracy has not been defined universally and it is an interpretative instrument, which means that every state is free to delineate this concept according to its need. Unfortunately, states having a poor human rights record tend to use this doctrine to achieve their ulterior motives. Furthermore, the United Nations Security Council's two resolutions (no. 1540 and 1376), which were issued just after the 9/11 terrorist attack on the USA, compel the member states to take harsh measures against terrorism and provide security to the society. Ironically, they are just guiding principles and do not contain any implementation mechanism for their execution. Once again, this decision is left to the discretion of the states to adopt the policy according to their own threshold of harm, and because of this, in recent years, a substantial increase in the violation of human rights has been reported.

Now the judiciary, which acts as the custodian of the rights of individuals, as enshrined in the constitution, has an essential duty to maintain justice in society. In the course of judicial review, the doctrine of proportionality is one of the essential tools, and I have taken this doctrine into consideration as a key component of my thesis in order to analyse its role, and to check the balance between the interest of the society (anti-terrorism laws) and the right of the individual (freedom of expression). Furthermore, in order to examine the essence of this doctrine, this study will endeavour to explore the following aspects: first, its composition, which is mainly based on knowing its legal history, sources and principles; second, a comparison of the principles of this doctrine with the principles of democratic society and the rule of law, which are the basic norms of the common law system; third, the application (*ratio decidendi*) of this doctrine in cases in which freedom of expression is limited by the anti-terrorism laws. I take freedom of expression as a right of the individual, which is one of the qualified rights and the most vulnerable one.[38] As we know, the UK's legal system is based on a common law system, and for the last couple of decades its judicial system has favoured the unreasonableness

[38] Annabelle Lever, 'Privacy, democracy and freedom of expression' (2015) Social dimensions of privacy: Interdisciplinary perspectives 162

doctrine established in 1949 in checking the *ultra-vires* actions of the government, and showed reluctance to use proportionality as a tool of judicial review.[39] "The UK courts are traditionally unwilling to apply proportionality as a general ground of judicial review and especially in cases which fall outside the scope of EU law or the ECHR."

1.3 Objective and Aims of the Research

This thesis argues that the doctrine of proportionality is compatible with the UK's legal system, and can be used as a common ground of judicial review in the UK's Judicial system. It is also essential to understand the structure and then the application of this tool. To achieve this aim, this doctrine will be thoroughly examined, taking into account the cases decided by the Supreme Court of the UK. In this context, I will only consider cases in which freedom of expression has been infringed by laws made in order to provide security. Critically, this research examines whether the doctrine of proportionality has overtaken subsidiarity, irrationality and unreasonableness in the UK's judicial system or whether it remains lost in them. Secondly, this research also identifies the recent obstacles against the use of the doctrine of proportionality as an effective tool in the UK's common law system. Thirdly, the thesis argues that the doctrine of proportionality could be utilised as an effective tool in the UK judicial review process to check the balance between the interests of society as a whole and the rights of individuals. To do this, the following research questions will be addressed:

> First, whether the doctrine of proportionality as a tool of judicial review is a more beneficial instrument than Wednesbury to ensure that the fundamental rights of individuals (freedom of expression) are protected.
>
> Second, whether the doctrine of proportionality is harmonious with the UK's legal system and whether the UK's judicial system should earnestly consider it as a basic norm at a time of judicial review.

Furthermore, this research also identifies and isolates the shortcomings in using the Wednesbury law. The arguments further pursued in the thesis draw more broadly from the

[39] Michael A Broyles, 'Hall v. Staha: Arkansas Courts Adopt the Business Juddment Rule as a Tool of Judicial Review and Analyze the Issue of Excessive Executive Compensation' (1994) 47 ARK L REV 959

discussion concerning the paradoxes of tolerance and the protection of fundamental rights in a democratic society.

1.4 Contribution to Knowledge

The thesis identifies and discusses the obstacles in the UK's legal system to the adoption of proportionality as a tool of judicial review. Importantly, this thesis fills the gap in the legal literature on the UK's common law system and the compatibility of the doctrine of proportionality. There is limited robust evidence to demonstrate that in parallel to doctrine of proportionality unreasonableness principle is effective in improving human rights protection in United Kingdom. The empirical evidence for the success and benefits of doctrine of proportionality in UK is piecemeal and inconsistent, because the common law system which is mainly based on the customs and traditions and past practises of the state has showed hesitation in adopting this doctrine until now as a common ground of judicial review. Some studies conclude that in reference to the adaptation of doctrine of proportionality the transitional justice mechanisms (Transitional justice consists of judicial and non-judicial measures implemented in order to redress legacies of human rights abuses such a truth commission etc) also act as a deterrent in adopting this doctrine, hence, there is a need to increase the accountability for human rights violations. Also there is a limited literature available, which demonstrate that whether the basic principles of doctrine of proportionality have the similarity with the basic norms of the common law system.

Hence, Moving forward I will demonstrate and argue on the principles of these two systems. First I take the doctrine of proportionality as a tool of judicial review in the UK judicial system as part of a wider issue, I analyse its application in various cases in the UK to see its significance, growth and application in the UK judicial system. Secondly, it is essential to see the compatibility of this doctrine with the UK's legal system, so I have analysed this doctrine by using a range of the latest national and international legal literature to thoroughly investigate the issue in hand, informed by sociological and legal approaches. I have chosen this doctrinal approach to the existing literature to highlight the strength, precision and reliability of the doctrine of proportionality, in the common law system as a custodian of the fundamental rights i.e freedom of expression.

Thirdly, the UK's legal system which is not inclined or willing to use doctrine of proportionality, has applied this doctrine in a very few cases. The court has used this doctrine in very rare cases and only where EU or ECHR laws are involved. Now, as I have identified in this thesis, the issue in hand is the application of this doctrine, as it is still has non-precedential status and the court has to define proportionality every time it intends to apply it to a case. This doctrine needs to be defined in the UK legal system as it is defined, distinguished and protected in many European countries, such as Germany.[40]

Fourthly, in the UK's legal system, there are many challenges in introducing a separate legislation for freedom of expression. Though the UK Human Rights Act, 1998, Article 10 protects freedom of expression, it also gives huge power to the state to derogate when its own security is under threat. In this thesis, I identify and explain the gap in the law in detail, including the method of derogation when the security is at high alert, which would be useful to apply at the time of limiting the freedom of expression.

In a nutshell I will demonstrate that in UK legal system there is a significant body of evidence which shows that the doctrine of proportionality like many other countries can have adequate statutory provision to mainly protect and promote human rights and fundamental freedom. The UK does have a developed system of administrative law. Where a statute confers discretionary powers upon a public official, judicial review of such powers is now commonplace (although that was not always so). The courts may and do strike down administrative action for breach of a number of requirements of good administration, under which we see the developing concept of proportionality. Furthermore, this research examines the efficacy of doctrine of proportionality to become "part and parcel" of the UK's legal system and can also be used in cases other than human rights.

[40] In German public law, the principle of proportionality (Verhahnismafiiykeit) is designed to measure the legitimacy for all the state organs. It is the most significant, principle in administrative law in relation to the judicial review of wrongful use of discretion. This principle is not expressly provided for in the Basic Law (Grundgesetz, or GG), but it constitutes an unwritten constitutional principle of general importance recognised by the Federal Constitutional Court (Bundesverjassungsgericht, BVerfG) (BVerfGE (Entscheidung des Bundesverjassungsgerichts) 7, 377).

1.5 Research methodology and significance

Principally, this study is based on the conceptual and doctrinal research; it relies on sources provided by international and national advocacy groups and draws from the government's statistics, such as the Supreme Court of the UK and the UK government's official websites.

Obstacles to preventing the violation of freedom of expression from the laws made to provide security to the society constitute not only a legal fact but also a phenomenon that is socially entrenched. This analysis has been carried out through the doctrinal methodology underpinning this thesis. Doctrinal methodology argues that the key answer to every legal problem may be obtainable in the fundamental logic and structure of rules that could be revealed by examining the relevant legal instruments. The doctrinal methodology evaluates and assesses the legal norms pertaining to each challenge mentioned above. Here, I also apply the doctrinal methodology in my evaluation of legal provisions, beginning with a broad review of the purpose and function of the notion of paradoxes of tolerance and the anti-terrorism laws in the framework of the notion of militant democracy, which result in limiting human rights. In this scenario, the importance of the doctrine of proportionality as a tool of judicial review is addressed. Hence, reliance is placed on scholastic publications for theoretical exploration and comparative analysis. Then, discussions are honed in on the principles of the doctrine of proportionality and its implications in recent cases related to freedom of expression (right of an individual) and the interest of the society (anti-terrorism laws) as a case study. The benefit of the case study approach in this research is to achieve robust and in-depth consideration of the anti-terrorism laws, which sometimes limit the qualified rights beyond the threshold of harm of the threat and seriously damage rights and freedoms.

An examination of case law (in this area, an empirical matter and implication of the theoretical conclusions) is then undertaken. As much is relevant to this study, a blend of some empirical data, relevant theories, the latest scholarly work and current commentary on relevant cases has been used. This is an explorative study using direct observation and reliance on primary and secondary sources, especially published materials from experts and outcomes of empirical research. The arguments pursued in this thesis are drawn from the debates concerning the paradoxes of tolerance and the protection of fundamental human rights in a democratic society more broadly. This research will assess the effect of anti-terrorism laws upon the freedom of expression. In so doing, it will examine the philosophical underpinnings of militant democracy, which supplies the legal framework and justification for anti-terrorism laws in the UK that

were ostensibly promulgated by many states around the world as being necessary for protection against terrorism.

This research also evaluates the principles of the doctrine of proportionality, which is a tool of judicial review to check the balance between the interest of the society and the right of individual. I have also made an analysis of the doctrine of proportionality on the basis of the two basic elements of the common law system: i.e. the principle of democracy and the principle of rule of law, and examined the compatibility between them. This analysis is vital because it will further help to investigate the relationship between the doctrine of proportionality and its use in the common law system. The UK's legal system, which is based on common law, has relied on Wednesbury unreasonableness for a very long time, and it is still in practice and remains a popular tool to be used in the course of judicial review, despite the fact that this tool is not adequate to address today's complex cases, especially those related to human rights.

I therefore aim to delineate the precise impact of the law in action on the role of policy of the UK in relation to its pledge under international law in order to conduct further analysis of the proportionality doctrine. Analysing the consistency between the language of the law and its application reveals the hurdles in adopting the said doctrine in the UK's legal system. This approach also provides a basis for recommending legal amendments and a transformation toward a more rights-based implementation of the law in concert with the international human rights approach. Hence, I have compared the principle of Wednesbury unreasonableness with the doctrine of proportionality to check their function when applied in a judicial review; I have also examined their compatibility with each other to draw their significance. This analysis is essential because it explores the claim of the UK's legal system, which considers the doctrine of proportionality as a part of the doctrine of unreasonableness.

Hence, first it is crucial to employ a doctrinal approach in order to clarify the nature of the law before proceeding to analyse its strengths and weaknesses.[41] Therefore, based on my research question, the doctrinal and conceptual approach is essential in analysing the 'object and purpose' of the current national and international laws and policies on the subject matter in order to provide better recommendations in pursuance of protecting the freedom of expression from laws such as anti-terrorism laws in the UK. These perspectives also help to better understand the scope of the doctrine of proportionality and its binary function: i.e. to safeguard

[41] Tamara Hervey, Robert Cryer, Bal Sokhi-Bulley, Alexandra Bohm, *Research methodology in EU and international law* (UK: Hart Publishing, 2011).

the rights of the individual and give adequate protection to the society from the threat of terrorism.

1.6 Advantageous and learning outcomes

I believe that this research will prove beneficial in providing greater understanding of the importance of the doctrine of proportionality in promoting an appropriate balance in cases between the laws to handle terrorism and the freedom of expression and further, to investigate whether restrictions on such an important democratic right are legitimate. In this thesis, I specifically investigate the application of the doctrine of proportionality the from the UK perspective, and provide a more general assessment of the application of this doctrine in the EU. This definitely adds new perspectives that benefit all those who are working on and examining the structure, composition and application of the doctrine of proportionality as a tool of judicial review.

Furthermore, examining these issues in the context of judicial review should also make this study of interest to those involved with constitutional law and theories, such as separation of powers. This may include the judiciary itself, as well as scholars, academics and researchers already working in the field. I have used doctrinal legal research, which includes analysis of legal concepts, principles, and doctrines, and provides researchers with practical tools for the analysis of legislation, case-law, statutory provisions, and judicial statements into a consistent body of doctrine.[42] Moreover, it provides an efficient understanding of law, legal concepts, and legal processes in a way that facilitates the exposure of (in) consistencies, loopholes, gaps, and ambiguities in substantive law.

In light of my analysis, the doctrine of proportionality has excellent compatibility with the UK's legal system. However, it is necessary to define it aptly in the English law. This research also establishes a solid foundation for revealing these gaps and proposes recommendations.

[42] Khushal Vibhute and Filipos Aynalem, *Legal Research Methods* (Justice and Legal System Research Institute, 2009) 81-82.

1.7 Hypothesis

The doctrine of proportionality in the UK legal system is an interpretive tool. Now, this research is based on the hypothesis that although the supreme court of the UK has used the "doctrine of proportionality" in very few cases, which fall under EU law, the prevailing culture and the norms of the common law system still constitute the main hindrances in accepting this doctrine as a general principle of judicial review, as well as the application of this doctrine in true spirit. The foremost intention of this thesis is to examine this hypothesis and proceed to make practical recommendations for the proper place of this doctrine in the UK judicial system.

1.8 Research Structure

Following this introductory chapter, the research will be structured as follows:

Chapter Two: This chapter examines the concept of militant democracy and its role in legitimizing the anti-terrorism laws. The conceptual approach of militant democracy, from theory to practice, will be considered in this chapter. Anti-terrorism laws, the Lawful Militancy Response and Paradoxes of Tolerance are analysed to test the validity of the claim that militant democracy improves the constitutional framework of the democratic society. This chapter also investigates the extent to which anti-terrorism laws are a threat to the freedom of expression and how far this concept may be abused. Lastly, this chapter seeks to understand the difference between the application of the National Crime and Prevention policy and the notion of militant democracy.

Chapter Three: Chapter Two established that states misuse the doctrine of militant democracy and have been found guilty of violating human rights a number of times by the European Court of Human Rights (ECtHR). The role of the doctrine of proportionality in the course of judicial review is to check the balance between the interest of the society and the right of the individual. The focus of this chapter is to identify the main features of this doctrine and its response to identify the gap in the law, which has limited the right beyond the threshold of harm. This chapter also provides the theoretical framework of the doctrine and establishes why it is a vital tool for adjudicating human rights cases before the British Supreme Court. Hence, first its function in the Europe Court of Human Rights is analysed, followed by its scope in the UK judicial system.

Chapter Four: This chapter contains a comprehensive examination of the doctrine of proportionality with an in-depth look at its legal sources and salient features. Three legal principles or constitutional doctrines are analysed in the chapter, namely democracy, the rule of law, and democratic constitutionalism. Included therein is a breakdown of the components that comprise each of these three legal sources to evaluate their compatibility with the fundamental principles of proportionality.

Chapter Five: This chapter addresses the "Principle of Necessity" and the "Principle of Balance," which are important elements of the doctrine of proportionality in the process of judicial review. This chapter focuses on these principles in order to understand first their mechanisms, and then their application in practice. The principle of balance or *stricto sensu* is analysed in this chapter. It is a principle which appraises whether or not the objectives of governments in restricting human rights, in the realisation of their aims, have in fact been accomplished and balance achieved.

Chapter Six: This chapter investigates the role of the doctrine of proportionality in the United Kingdom's judicial system. In the UK, the judicial review deals with public law wherein a judge reviews the decision or action of a public body and its lawfulness. Here the challenge is based on an allegation that the public body has made an unlawful decision and there is no adequate alternative remedy available. Thus, it is crucial to understand the basis wherein the decision can be termed unlawful, and the grounds of the same will be enumerated in the later sections of the thesis. Since the enactment of the Bill of Rights in 1688, parliamentary sovereignty in the UK has been regarded as the core and the most basic principle of the British constitution. However, following on from the UK's membership of the European Economic Community/European Council/European Union, and compounded by the enactment of the Human Rights Act 1998, incorporating the European Convention for the Protection of Human Rights and Fundamental Freedom into UK national law, a new era for judicial review has evolved.[43] Hence, this chapter identifies some of the efforts taken to recognize and promote judicial review and the utility of the doctrine of proportionality in the UK judicial system.

[43] See All Answers ltd, 'Judicial Review in United Kingdom' (Lawteacher.net, July 2018) <https://www.lawteacher.net/free-law-essays/constitutional-law/judicial-review-in-united-kingdom-law-essays.php?vref=1> accessed on 15 July 2017.

This chapter also examines the doctrine of proportionality and its relationship with Wednesbury unreasonableness.[44] Some scholars[45] have argued that "proportionality has long been operating covertly in English administrative law under the label of irrationality or Wednesbury unreasonableness. Nevertheless, the chapter explores how, although principles of proportionality and unreasonableness or irrationality cover a great deal of common ground, a clear difference has emerged in judicial decisions and theoretical analysis."

Lastly, this chapter analyses the application of the doctrine of proportionality in the UK administrative system. This doctrine ordains that administrative measures must not be more drastic than is necessary to attain the desired result. The doctrine is applied by both the ECHR and the UK Supreme Court, and so it has infiltrated into UK law to a significant extent, based on the threshold of harm."

Chapter Seven: This chapter draws on the analysis and discussion in the body of the thesis to present the conclusions and recommendations. The conclusions section reviews some of the key research findings based on the examination of the research questions, as detailed in this chapter, whilst the recommendations section offers a number of insights which emerged from them. As a study appraising whether the doctrine of proportionality could be a tool to strengthen the UK legal system against *ultra vires* actions which lead to human rights violations, the section focuses on the responsible use of anti-terrorism laws, consistency in defining and interpreting the doctrine of proportionality, and its role in protecting freedom of expression in the UK.

1.9 Limitations of the thesis

This thesis does not employ a quantitative method to identify and study the number of cases erroneously decided by the court using tools other than proportionality. The matter of obtaining correct statistics is not the main purpose of this research. Rather, the objective of this study is to analyse the efficiency of the doctrine of proportionality and its separate identity from unreasonableness in the UK's legal system.

[44] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1.
[45] Dean R Knight, 'Mapping the rainbow of review: Recognising variable intensity' (2010) 2010 New Zealand Law Review 393.

This research does not endeavour to make a comparison between the competing tools of judicial review; rather, the principle of unreasonableness and the doctrine of proportionality are critically analysed separately. It is also beyond the scope of this thesis to consider in depth the wealth of literature on the theoretical debates about militant democracy or the doctrine of proportionality and the role of the UN or the ECHR. Instead, the intention of this thesis rests on the assumption that if the Council of Europe and some Member States have adopted the doctrine of proportionality in their legal system, as a basic norm, then the UK should pay attention to this principle at times of limiting the rights and freedom of expression. It is noteworthy that most of the literature and the laws on the subject, including books, articles and cases, have fortunately been written in English.

CHAPTER TWO:
The Paradigm of Militant Democracy in the Contemporary World

2.1 Introduction

The 9/11 terrorist attack on the United States of America caused the nations of the world to reassess the dilemmas of such crimes. The scale of this attack, which took the lives of close to 3000 people, was unprecedented.[46] Terrorism dragged humanity into a more draconian era and forced states to enact tougher measures to counteract such crimes. At the beginning of the 21st century, many states (including those in Europe) once again found themselves evaluating an issue which Loewenstein addressed decades ago:

> If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles.[47]

The notion of "militant democracy" is a post-war response to a particular constitutional history: the vulnerability of the pre-War Weimar Republic and its collapse at the hands of a totalitarian political movement.[48] In today's world, this is not a new phenomenon: legal and political history have witnessed many occasions when this concept was adopted to protect the State's existence. Conversely, some states that failed to avail themselves of it have disappeared into the annals of history.[49] It is pertinent to mention here that the doctrine of militant democracy is an interpretive instrument and has not yet been defined as a precedent.

To begin, this chapter will critically analyse the notion of 'militant democracy'. It will also address the question of how it developed and became incorporated into the legal systems of many constitutions. The legality of militant democracy in democratic societies and

[46] Susan Faludi, The terror dream: Fear and fantasy in post-9/11 America (Macmillan 2007).
[47] Karl Loewenstein, 'Militant democracy and fundamental rights, I' (1937) 31 American Political Science Review 417.
[48] In various provisions, the German Basic Law requires protection of the "free democratic basic order" as a limitation on the exercise of stated freedoms. *See* Basic Law arts. 9(2), 21.
[49] Jan-Werner Müller, 'Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy' (2016) 19 Annual Review of Political Science 249.

international obligations to incorporate it into domestic legal systems will be appraised in the chapter, and its role in coping with the threat of terrorism will be further analysed. Moreover, the chapter also examines the normative approach of militant democracy that underpins the argument that it improves the constitutional framework on the "War on Terror". The importance and protection of Article 10 and Article 10(2) of ECHR, which is a qualified right and safeguards the freedom of expression of an individual, is discussed through the case law of ECtHR. The question of how the European Convention on Human Rights (ECHR) has strengthened its policies by adopting the principles of the doctrine of militant democracy is also addressed, as is the question of whether 'militant democracy' can be used to effectively tackle the ongoing problem of terrorism. In this light, Article 17, Article 11(2), Article 10 and 10(2) of ECHR are addressed and analysed. Emphasis will be placed on theoretical debates and the practical application of anti-terrorism policies from a militant democracy perspective. However, on the other hand, militant democracy measures are at variance with civil liberties[50] if not properly defined and applied. What are the threats from militant democracy to the rights of individuals, and if this doctrine is not properly used, how is Article 10 of ECHR threatened? Furthermore, the question on the role of UN and how it views militant democracy in the age of the War on Terror will be evaluated in this chapter. A number of international treaties have been signed that describe the militant actions that states can use when threatened: they will be duly appraised in this chapter.

The War on Terror spawned a plethora of Anti-Terrorism laws:[51] hence, lastly this chapter also aims to explore in detail the effect of militant democracy on the freedom of expression, which is an essential part of democracy. Any restrictions on political rights must be necessary in a *democratic* society. The theory of militant democracy is that a democratic state is entitled to take preventive steps against a political movement which uses undemocratic means (violence) or pursues anti-democratic goals. The legitimacy of such measures is questionable if the state is not itself committed to democratic means and goals and for this reason it is imperative that courts apply the human rights principles rigorously. Despite the historical merits of "militant democracy" as a response to the challenge of transition, demographic change and regional evolution may well imply the re-evaluation of prevailing rights-protection principles, both in relation to domestic constitutional practice and at the regional level.

[50] Erica Chenoweth, 'Democratic competition and terrorist activity' (2010) 72 The Journal of Politics 16.
[51] Jude Howell and Jeremy Lind, Counter-terrorism, aid and civil society: Before and after the war on terror (Springer 2009).

The acceptance today of a robust conception of the rule of law and the legitimacy of the judiciary offers the potential for the emergence of an alternative to post-war vigilance, with extreme militancy and strong "republicanism" replaced by a more nuanced approach to the balance of values where individual rights meet the public space. such a development would be important on the road to shaping European consensus in these vital areas of freedom and rights. Finally, to whatever extent Europe continues to deploy militant supervision, or a "rights balancing" approach, at the very least, minimal rule of law guarantees require that constitutional principles should be applied equally to diverse religions in the public sphere, certainly a threshold basis for guaranteeing the legitimacy of whatever ultimate European normative scheme here.

2.1.1 The Historical Background of Militant Democracy and its Underpinnings

"Militant democracy" refers to the idea that, under certain circumstances, democracies have to adopt measures against individual citizens or political organizations who threaten to undermine or outright destroy democracy, but who do not engage in violent or other forms of criminal activity. The term refers to the understanding of some rights protected in Germany's post-war constitution as capable of derogation or forfeit where they might threaten the democratic order. This approach was confirmed during the Cold War, when Germany's Constitutional Court invoked Article 21(2) of the Basic Law, which limits constitutional protection of … Parties that, by reason of their aims ... seek to undermine or abolish the free democratic basic order.[52] Interpreting this Article, the Court upheld a law allowing the dissolution of the Communist Party on the grounds that:

> …the Basic Law represents a conscious effort to achieve a synthesis between the principle of tolerance with respect to all political ideas and certain inalienable values of the political system... [the Basic Law] has in this sense created a 'militant democracy.[53]

[52] Germans *Basic Law* Art. 21(2).
[53] See Donald P. Kommers, the constitutional jurisprudence of the federal republic of Germany 217-38 (2d ed. 1997).

The concept of defending democracy against its enemies is one which is as old as the beginning of the notion of democracy.[54] In *The Republic*, Plato discusses in detail the reasons for transitioning from one government to another when difficulties exist related to government stability.[55] We have an example of this in ancient Greece; the Athenians allegedly denied civil and political rights[56] to offenders from previous regimes: i.e. during the transition period between 411 and 403 BC.[57] Montesquieu, in a later period, also wrote about the issues of stabilizing the moderate.[58] However, the concept of militant response only took shape after the First World War.

In the 1930, German Scholar Karl Loewenstein used the term 'militant democracy' in two papers, which he presented and published in the US in 1939.[59] Both papers addressed the issue of fascist Nazi movements in Europe. Loewenstein migrated to the US in 1933 as a result of the Nazi army's attack on the European mainland; his first paper dealt with the mechanism of tyranny which had dangerously begun to spread in many European states. Loewenstein's second paper supplied an analysis of different anti-fascist methods and techniques practised in various parts of the European continent. Loewenstein emphasised the need for militant democracy to stand up against and crush rebellious activities, and to protect the core of democracy. Many political and legal researchers have written and argued on the importance of Lowenstein's influential concept.[60] In *Militant Democracy and Fundamental Rights*, Loewenstein critically analysed the causes and reasons for the downfall of the Weimar Republic, which was tantamount to the destruction of democracy.[61] He criticised the one-party rule and referred to it as a political strategy to obtain power.[62] He revealed the secret behind the victory of the fascist movement when he stated that "the mechanism of democracy is the Trojan horse by which the enemy enters the city".[63] Essentially, democracy failed because there were no provisions in the constitution to stop the subversive movements of the Nazis. This

[54] Otto Pfersmann, 'Shaping Militant Democracy: Legal Limits to Democratic Stability' (2004) Militant Democracy 47.
[55] Ibid p 51.
[56] Hafen BC, 'Children's Liberation and the New Egalitarianism: Some Reservations about Abandoning Youth to Their Rights.' (1976) 1976(3) BYU L Rev 605.
[57] Pfersmann, 'Shaping Militant Democracy: Legal Limits to Democratic Stability' (N 67).
[58] András Sajó and Lorri Rutt Bentch, Militant democracy, vol 1 (Eleven International Publishing 2004).
[59] Pfersmann, 'Shaping Militant Democracy: Legal Limits to Democratic Stability' p 52.
[60] Ibid p 48.
[61] Paul Edward Gottfried, After liberalism: mass democracy in the managerial state (Princeton University Press 2001).
[62] Karl Loewenstein, 'Legislative control of political extremism in European democracies I' (1938) 38 Columbia Law Review 591.
[63] Ibid p 424.

deficiency was used as a tool to conquer major sections of Europe. Loewenstein also said that the reason for accessing national and communal representative bodies was facilitated by "that gravest mistake of the democratic ideology, proportional representation".[64]

According to Loewenstein, democratic fundamentalism and legalistic sightlessness led to a circumstance which caused the democracies to be legally bound.[65] This allowed for the rise of anti-parliamentarian and anti-democratic parties. His statement reads:

> If democracy is conceived that it has not yet fulfilled its destination, it must fight on its own plane a technique which serves only the purpose of power. Democracy must become militant.[66]

Moreover, on "democratic fundamentalism" and "legalistic blindness", Loewenstein argued:

> It could result in a situation where democracies are legally bound to allow the emergence and rise of anti-parliamentarian and anti-democratic parties as long as they conform formally to the principles of legality and free play of public opinion. The only remedy to this unfortunate situation is to turn democracy into a militant one.[67]

By militant democracy, Loewenstein's objective is to suggest that democratic fundamentalism may undermine democracy. He highlights the need to incorporate different measures, from criminal prohibition in shaping para-military groups to banning subversive movements and enforcing limits on the right to speak freely. In this way, the democracy has the ability to eliminate radicals who oppose its rules.[68] Ultimately, democracy must be redefined with this purpose in mind if its values are to be achieved.

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[64] Ibid.
[65] Svetlana Alexandrovna Tyulkina, 'Militant democracy', CEU, Budapest College 2011).
[66] Loewenstein, 'Legislative control of political extremism in European democracies I' p 610.
[67] Ibid p 613.
[68] Ibid p 425.

Loewenstein demonstrated in his work that militant democracy and fundamental rights can be compatible. Further, his two papers comprehensively explain the "legislative control of Political Extremism in European Democracy",[69] and he believed that the *liberal majority rule system* would progressively give way to a more disciplined and authoritative democratic system. Customary law, which traditionally advocated tolerance towards extremism, has now largely been rejected, and the principle that the democracy has to fight back when faced with its enemy is now more acceptable.[70]

2.1.2 The Concept of "Lawful Militancy Response" and "Paradoxes of Tolerance"

Loewenstein's influence can be found in the works of his contemporaries, and Karl Popper is a prominent name among them. In his book *The Open Society and its Enemies*,[71] Popper explained the concept of tolerant and intolerant societies towards enemies. He wrote this book in 1938 when he received news of the interruption of Australia. Hence, a major part of the book was written in war time. It was eventually published in two volumes; the first was entitled *The Spell of Plato* and the second *The High Tide of Prophecy*.

In his work, Popper illustrated how civilization is still in a process of transition from the tribal or "closed" society to a more open and accepting society.[72] A consequence of this transition is the rise of different movements. As a result, civilization regresses to tribalism and the concept of an open society diminishes. Additionally, Popper described dictatorship and the implications of the perpetual battle against it. He also scrutinised the rational methods of science and the problems they pose to an open society. Popper condemned social concepts that are responsible for widespread bigotry, which is opposed to the prospects of democratic change (within these philosophies, historicism is deemed the most significant).

Significantly, Karl Popper critically analysed the doctrine of militant democracy. Under the umbrella of *The Principle of Leadership,* Popper provided a detailed discussion on the

[69] Ibid p 658.
[70] Ibid.
[71] Popper, 'The Open Society and Its Enemies (Princeton, 1950)'.
[72] The open society is a concept originally suggested in 1932 by the French philosopher Henri Bergson (Henri Bergson, Les Deux Sources de la morale et de la religion, Félix Alcan, 1937 [1932], pp. 287–343. Translated as The Two Sources of Morality and Religion, trs., R. Ashley A. and C. Brereton, with the assistance of W. H. Carter, Notre Dame, 1977 [1935], ch. 4.), and developed during the Second World War by Austrian-born British philosopher Karl Popper.

Paradoxes of Tolerance and the *Paradoxes of Democracy.*[73] Popper asked, "Does not the excess *of liberty* bring men to such a state that they badly want a tyranny?" and called this the "paradox of freedom",[74] which Plato[75] had also asserted. Popper's work on the paradoxes of tolerance reveals Loewenstein's claim that "unlimited tolerance must lead to the disappearance of tolerance".[76] Popper insisted that tolerance should not be extended towards "those who are intolerant, otherwise the tolerant will be destroyed and tolerance with them".[77] He argued for "the right not to tolerate the intolerant",[78] explaining that "any movement preaching intolerance places itself outside the law",[79] and constitutes an "incitement to intolerance".[80] He further argued that provocation to intolerance should be treated as a criminal act and must be criminalized in a similar way to "incitement to murder, or kidnapping".[81] Fundamentally, Popper's work promotes and explores the theory of militant democracy; he analyses why and how majority rule and unlimited tolerance are not intrinsic to any democratic society. Rather, he explains and endorses the right of society – in the name of tolerance and self-preservation – to intervene and to stop intolerant actions.

The legitimization of the notion of militant democracy stems from arguments regarding how much tolerance can be shown towards political players, including their voters and associates. Popper justified intolerant action of society towards intolerant political players. As previously mentioned, he was a great supporter of the principle that "unlimited tolerance must lead to the disappearance of tolerance".[82] Taking Popper's work into account, John Rawls believed that it was a principle which reflected justice and equity.[83] Rawls asserted that intolerant behaviour is only acceptable in situations involving "some considerable risks to our legitimate interests".[84] For Rawls, any threat towards the nation should be managed by the power of democratic institutions. He believed this would help to control fanatics and curb their intolerant

[73] Ibid p 237.
[74] Ibid p 51.
[75] Tomas Saulius, 'What is "tolerance" and "tolerance education"? Philosophical perspectives' (2013) Indexed in Central and Eastern European Academic Source (EBSCO), IndexCopernicus, SPORTDiscus with Full Text (EBSCO) 48, The paradox of tolerance is the argument that freedom in the sense of absence of any restraining control might lead to a restraint, since it makes the bully free to enslave the meek.
[76] Popper, 'The Open Society and Its Enemies (Princeton, 1950)' p 546.
[77] Ibid p 547.
[78] Ibid.
[79] Karl Popper, The open society and its enemies (Routledge 2012).
[80] Ibid.
[81] Karl Popper, After the open society: Selected social and political writings (Routledge 2014).
[82] Ibid.
[83] Gerald A Cohen, 'Facts and principles' (2003) 31 Philosophy & public affairs 211.
[84] Gregory H Fox and Georg Nolte, 'Intolerant democracies' (1995) 36 Harv Int'l LJ 1.

behaviour. However, this theory may in reality be very difficult to apply in an unstable society, where there are internal political struggles. Nevertheless, building on the theory of Rawls, Andras Sajo asserted that "the state's most significant quality is self-defence and militant democracy can be justified on a similar stand".[85]

A silent approach ought not to be accepted in the face of efforts to harm or abuse privileges, rights and opportunities which have been formally agreed by a democratic regime. The success of the Nazi regime in assuming control of many states in the 1930s caused majority rule government followers to understand that a popularity-based state cannot be maintained without standardized measures to secure itself from the assaults of potential foes. Unfortunately, it required the loss of many lives to acknowledge and realize this. This research will show how there is much to be learnt from Loewenstein's theories. They continue to contribute to contemporary society in significant ways; as he explained, "to neglect the experience of democracies deceased would be tantamount to surrender for democracies living".[86]

2.1.3 Conceptual Approach of Militant Democracy

The issue of militant democracy is profoundly timely and important in the contemporary world. Many books and articles have been written on its significance, jurisdiction and application.[87] Modern legal scholar Macklem has defined democracy as "authorized to protect civil and political freedoms by pre-emptively restricting their exercise in order to guard the democratic character of a constitutional order".[88] Taking into the consideration of Macklem definition I can argue that the notion of "militant democracy" understood as the legal restriction of certain democratic freedoms for the purpose of protecting democratic regimes from the threat of being subverted by legal means has recently been grasped more attention of the legal philosophers. Furthermore the ECtHR's description of the acceptable limits of militant democracy thus provides a set of conditions for understanding the legality of legal pluralism. But the Court's

[85] Sajó and Bentch, Militant democracy, Markus Thiel, The'militant democracy'principle in modern democracies (Routledge 2016).
[86] Loewenstein, 'Legislative control of political extremism in European democracies I' p 658.
[87] See e.g. Paul Harvey, 'Militant democracy and the European convention on human rights' (2004) 29 European Law Review 407, Thiel, The'militant democracy'principle in modern democracies, Miguel Revenga Sanchez, The Move Towards (And the Struggle For) Militant Democracy in Spain (2003), Ömer Aslan, '"Unarmed'We Intervene, Unnoticed We Remain: The Deviant Case of 'February 28th Coup'in Turkey' (2016) 43 British Journal of Middle eastern studies 360, Selin Esen, 'Role of the European Court of Human Rights in the Turkish Constitutional Court's Rulings Regarding the Freedom of Association', Rule of Law, Human Rights and Judicial Control of Power (Rule of Law, Human Rights and Judicial Control of Power, Springer 2017).
[88] Patrick Macklem, 'Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe: Guarding the Perimeter: Patrick Macklem' (2012) 19 Constellations 575.

decision yields a converse insight as well. It offered a second reason why Turkey's ban was not in violation of the convention's guarantee of freedom of association, namely, that Refah had advocated a religious jihad and the use of violence to achieve its ends.

I argue that here the decision, by addressing the acceptable limits of legal pluralism, provides a set of baseline conditions that clarifies the legality of militant democracy. A state is entitled to act in a militant manner toward groups and individuals who engage in violent conduct in the promotion or implementation of their beliefs or who exercise civil and political freedom in a way that poses an imminent threat to the capacity of a constitutional democracy to secure the civil and political freedom of others.

Similar to his ideas Gregory H. Fox and Georg Nolte strongly emphasised the notion of militant democracy; they have defined this concept as a "set of measures to prevent the change of a state's own democratic character, by the election of anti-democratic parties".[89] Legal philosopher Samuel Issac Harf has articulated the notion of militant democracy as "mobilization of democratic institutions to resist capture by antidemocratic forces".[90] The main objective of doing this is to stop forces that act fanatically towards democracy or what may be also be termed "illiberal democracy".[91] Paul Harvey compares militant democracy to a system "capable of defending the constitution against anti-democratic actors who use the democratic process in order to subvert it".[92] Revenga Sanchez explained it "as being the appropriate means to confront the actions of those who attempt to destroy it by taking advantage of the many opportunities".[93] Taken all together, militant democracy is purported to be a very effective means of protecting the constitutional security of society.

Elevating the Macklem concept of Militant democracy I further argue that this doctrine is a preventive tool designed to be used before a disaster occurs.[94] It cannot protect society against violent riots that have already started, natural disasters, or even paramilitary forces. Principally,

[89] Gregory H. Fox & George Nolte, Intolerance Democracies: Some Western and Eastern Responses, in A. Sajo (Ed.), Militant Democracy 171 (2004) p 6.
[90] Samuel Issacharoff, 'Fragile democracies' (2006) 120 Harv L Rev 1405 p 1409.
[91] Ibid.
[92] Harvey, 'Militant democracy and the European convention on human rights' p 408.
[93] Miguel Revenga Sanchez, The Move Towards (And the Struggle For) Militant Democracy in Spain (2003), Paper delivered at the ECPR Conference, Marburg, 18-21, September 2003.
[94] András Sajó, 'From militant democracy to the preventive state' (2005) 27 Cardozo L Rev 2255.

it helps to protect and secure *constitutional comfort.*[95] It encourages political participation, but has a threshold and sets certain limits. It protects society from possible harms and abuses which can issue from a political course. Whilst individuals can equally engage in making choices – either social or political – in constructing their forms of social life,[96] these are to be made within the parameters defined by the constitution itself. Any action perpetrated by an individual or a group which denies the rights of others in the society will be repudiated.

2.1.4 Significance of Militant Democracy in the Contemporary World

In essence, militant democracy allows for pre-emptive actions. It constitutionally authorises society to depart from the conventional form of democracy and take pre-emptive measures against a specific enemy aiming to harm the democratic structure of the state.[97] The enemy represents opponents who intend to abuse the rights given to them by the democratic, open society. Militant democracy is understood as essential to safeguard the democratic nature of the state. However, it varies significantly from national security to public safety and public order. Loewenstein interpreted the fascist movement as an attempt to declare war against democracy and cited Leon Blum's observation that "during war legality takes vacations".[98]

Loewenstein considered the way the pure democracy handles its enemies to be its major weakness; he was aware of the criticisms to his democratic theory and practice.[99] On the issue of possible negative outcomes to fundamental rights and freedoms if democracy changes its form to militant, he said that once fundamental rights are envisaged in the constitution, their provisional deferral to save the democracy is entirely justified.[100] In sum, Loewenstein declared, "if democracy believes in the superiority of its absolute values over the politics of emotions, it will meet the demands of reality",[101] making "every possible effort"[102] to safeguard the core of the constitution "even at the risk and cost of violating fundamental rights".[103]

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[95] Svetlana Tyulkina, 'Militant democracy: an alien concept for Australian constitutional law?' (2015) 36 Adelaide Law Review 517.
[96] Andras Sajo, Militant democracy and Transition towards Democracy, in Andras Sajo (Ed.), Militant democracy 213 (2004) at 210.
[97] Sheldon S Wolin, Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism-New Edition (Princeton University Press 2017).
[98] Loewenstein, 'Militant democracy and fundamental rights, I'.
[99] András Sajó, 'Militant democracy and transition towards democracy' (2004) Militant Democracy 209, in the first essay he investigates the question of "can an idea be suppressed".
[100] Georg SØRensen, 'After the Security Dilemma: The Challenges of Insecurity in Weak States and the Dilemma of Liberal Values' (2007) 38 Security Dialogue 357.
[101] Loewenstein, 'Legislative control of political extremism in European democracies I' p 431.
[102] Ibid p 437.
[103] Ibid.

A main objective of militant democracy is to protect the "core of the constitution".[104] Germany has established a unique way of keeping a provision for militant democracy in its democratic constitution (*Basic Law*) of 1949. In German law, the notion of militant democracy is very clear; the law explains what it means and what it intends to protect. It signifies the notion of "enjoying the rights within the limits".[105] The German Constitution has expressed the notion of militant democracy in various places: i.e. Articles 18, 21(2) and 91(1). Making it compatible with the "eternity clause" of Article 79(3)[106], the Federal Court of Germany has taken the bold step to define the notion of "free democratic basic order" (which came into force in 1952) in the following way:

> The free democratic basic order can be defined as an order which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self-determination of the people as expressed by the will of the existing majority and upon a freedom and equality. The fundamental principles of this order include at least: respect for the human rights given concrete form in the Basic Law, in particular for the right of a person to life and free development; separation of powers; responsibility of government; lawfulness of administration; independence of the judiciary; the multi- Party principle; and equality of opportunities for all political parties.[107]

Unlike Germany, few modern democratic states have acknowledged this notion in their constitutions. Many constitutions have failed to recognize the concept or even consider it

[104] Donald P Kommers and Russell A Miller, The Constitutional Jurisprudence of the Federal Republic of Germany: Revised and Expanded (Duke University Press 2012)Russell A Miller, 'Germany's German Constitution' (2017) 57 Va J Int'l L 95, Martin Klamt, 'Militant democracy and the democratic dilemma: different ways of protecting democratic constitutions' (2007) Explorations in Legal Cultures 133, Giovanni Capoccia, 'Militant democracy:The institutional bases of democratic self-preservation' (2013) 9 Annual Review of Law and Social Science 207.

[105] Patrick Macklem, 'Militant democracy, legal pluralism, and the paradox of self-determination' (2006) 4 International Journal of Constitutional Law 488.

[106] Basic Law for the Federal Republic of Germany, Article 79(3), States that Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

[107] Thiel, *The'militant democracy'principle in modern democracies* at 16.

compatible with their society.[108] Other constitutions have developed separate chapters known as "general principles"[109] and "fundamentals of the constitutional order".[110] Militant democracy can be investigated by looking into the norms of various constitutions. In every democratic constitution there is always an emphasis on some principles that are vital to upholding the democratic order of that state. In the 1958 constitution of France, Article 89[111] prohibits abolishing the republicans from government, comparable with the interpretation of the German Federal Court as a "free democratic basic order". Militant democracy measures are essential for the protection of the democratic core principles of the constitution; in Turkey, the *principles of secularism* and the integrity of the *state territory* are eminent.[112] Keeping in view this code of *protecting the state's integrity*, Turkey has refused to acknowledge any minority group apart from one which is recognised in the Treaty of Lausanne in 1929.[113] This move has imposed restrictions on religious and ethnic minorities.[114]

The notions of secularism do not deny the worship of any religion in the society.[115] The notion of segregation between politics and religion in the USA can easily be understood. The first constitutional amendment of the USA talks about the notion of militant democracy measures and safeguards the secular nature of the constitution.[116] In this context, some may argue that to safeguard the core of the constitution, some jurisdictions exceed the limitation on human rights without any concrete justification. An Indian emergency provision[117] in the constitution is worthy of mention here.

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[108] Juan J Linz and Alfred C Stepan, 'Toward consolidated democracies' (1996) 7 Journal of democracy 14.

[109] For example in Turkey. Part 1 'General Principles consists of eleven articles': I. Form of the State II. Characteristics of the Republic III. Integrity of the State, Official Language, Flag, National Anthem, and Capital IV. Irrevocable Provisions V. Fundamental Aims and Duties of the State VI. Sovereignty VII. Legislative Power VIII. Executive Power and Function IX. Judicial Power X. Equality Before the Law XI. Supremacy and Binding Force of the Constitution.

[110] Chapter 1 of the Russian Constitution which consists of 16 Articles is a valid illustration of such arrangement available at http://www.ksrf.ru/en/Info/LegalBases/ConstitutionRF/Pages/Chapter1.aspx accessed on 14 July 2017.

[111] Article 89 reads as follows: The republican form of government shall not be the object of any amendment. Full text of the Constitution available at the National Assembly website: http://www.assemblee-nationale.fr/english/8ab.asp accessed on 22 September 2016.

[112] Tyulkina, Svetlana Alexandrovna. "Militant Democracy." PhD diss., CEU, Budapest College, 2011 p 208

[113] Derya Bayir, Minorities and nationalism in Turkish law (Routledge 2016).

[114] Christian Joppke, 'The retreat of multiculturalism in the liberal state: theory and policy 1' (2004) 55 The British journal of sociology 237.

[115] Ashis Nandy, 'The politics of secularism and the recovery of religious tolerance' (1988) 13 Alternatives 177.

[116] Gábor Halmai, 'Unconstitutional constitutional amendments: constitutional courts as guardians of the constitution?' (2012) 19 Constellations 182.

[117] Krishna K Tummala, 'The Indian Union and Emergency Powers' (1996) 17 International Political Science Review 373, While a state of emergency is different from militant democracy, in the case of India it demonstrates how different 'core of the constitution' could be in its content. For example, emergency powers constitutionalized

Militant democracy's measures can be effective enough to act according to the threat it wishes to eradicate. Numerous post-socialist European capitals incorporated militant democracy procedures in their laws to safeguard their freedoms against occupancy from former despots, such as communists.[118] Militant democracy works intelligently to maintain the status quo and prevent the enemy from harming the democratic system. Many western type democracies have adopted the policy and incorporated political parties that are formulated in the name of religion or have any ethnic affiliation.[119] This is in order to safeguard their societies from religious radicalization.

2.1.5 Militant Democracy: A Normative Approach to Strengthen the Constitutional Framework

Having gained an understanding of the notion of militant democracy, this thesis suggests that there are substantial reasons to apply it to the state at risk of the threat of terrorism, as there exist no definitive solutions or mechanisms to counter this crime. In assessing whether militant democracy is appropriate in dealing with terrorist activities, a critical analysis of anti-terrorism policies is required. Terrorism uses many horrific ways of killing and creating chaos; therefore, it cannot be defeated by ordinary means. A prominent feature of militant democracy is its preventive mechanisms, which can help to rectify existing legal errors and loopholes. Taking preventive measures can be the best solution to avoid incidents such as the 9/11 attack.[120] Terrorists live in society and are difficult to be identified.[121] The battle against terrorism has captured the imagination of almost all the states of the world.[122] It is a permanent threat which

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in Article 356 of the Indian constitution were invoked in peace times about 100 times already. While the task of preserving peace and democratic order in a country like India should be extremely difficult due to its diverse social structure, but probably the State interprets the 'core principles of democracy' broader than many other democracies.

[118] Andras Sajo, Militant democracy and Transition towards Democracy, in Andras Sajo (Ed.), Militant democracy 213 (2004); Wojciech Sadurski, Political Under Stress in the 21st Century Europe (2006). The Constitution of Poland is a good illustration of such a policy: Article 13: Political parties and other organizations whose programs are based upon totalitarian methods and the modes of activity of Nazism, fascism and communism, as well as those whose programs or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be prohibited.

[119] Richard Gunther and Larry Diamond, 'Species of political parties: A new typology' (2003) 9 Party Politics 167: There shall be no political parties on ethnic, racial or religious lines, nor parties which seek the violent usurpation of state power in Bulgaria. Glenn Eldon Curtis, Bulgaria, a country study (For sale by the Supt. of Docs., USGPO 1993).

[120] Randall D Law, Terrorism: A history (John Wiley & Sons 2016) p 213.

[121] Claudia Aradau and Rens Van Munster, 'Governing terrorism through risk: Taking precautions,(un) knowing the future' (2007) 13 European journal of international relations 89.

[122] Howard Zinn, A people's history of the United States: 1492-present (Routledge 2015).

the traditional democratic structure is ill-equipped to handle. States can be allowed to depart from the traditional way, and this departure may be driven by militant democracy logic. What this entails is adopting deterrent measures and procedures to identify the enemies of society. It signifies the exit from normal constitutionalism, which is acknowledged by governments and is incorporated by the constitutional laws in line with certain conditions of implementation overseen by the judiciary.[123]

It is worth mentioning here that militant democracy and anti-terrorism policies share some common features and together they can be a significant tool to counter the terrorism threat.[124] Deterrence is the primary and common characteristic in both systems.[125] Ordinary laws and national policies can do little in the war on terror, since they can only be applied after an incident has happened and lives have been lost.[126] However, a militant democracy regime can stop the incident from occurring by preventing any political party or movement from abusing laws under the cover of rights and fundamental freedoms. Militant democracy authorizes states to act to avoid incidents of terrorism.[127] Now, in this scenario, it is essential to analyse the role of the international institution, namely the UNO, and its policy to counter the crime of terrorism after 9/11.

2.2 International Perspective of Militant Democracy with Respect to United Nations (UN)

Are states justified in acting in militant and repressive ways to combat threats to their democratic future? Chapter VII[128] of the UN Charter is very important in this regard and its significance increased after the 9/11 attacks on the USA. Chapter VII relates to international peace and the security of nations.[129] The UN Security Council has acted as an executive and instructed states to make a list of terrorists, and to comply with asset freezes and travel bans. At the same time, the Security Council has also acted as legislator and imposed permanent and

[123] Richard Bellamy, 'The democratic legitimacy of international Human Rights conventions: political constitutionalism and the European Convention on Human Rights' (2014) 25 European Journal of International Law 1019.
[124] Ethan Bueno De Mesquita, 'The political economy of terrorism: A selective overview of recent work' (2008) 10 The Political Economist 1.
[125] Shawn Boyne, 'Law, terrorism, and social movements: The tension between politics and security in Germany's anti-terrorism legislation' (2004) 12 Cardozo J Int'l & Comp L 41.
[126] Ariel Merari, 'Terrorism as a Strategy of Insurgency' (1993) 5 Terrorism and political violence 213.
[127] Markus Thiel (Ed.), The 'Militant Democracy' Principle in Modern Democracies (2009), p 2.
[128] Chapter VII: Action With Respect To Threats To The Peace, Breaches Of The Peace, And Acts Of Aggression, see also http://www.un.org/en/sections/un-charter/chapter-vii/index.html accessed on 15 February 2016.
[129] Peter Malanczuk, Akehurst's modern introduction to international law (Routledge 2002) p 364.

general obligations,[130] most notably of Resolution 1373,[131] with respect to terrorism and its financing; the resolution encouraged all member nations to ensure that terrorism and its financing is a serious crime.[132] The resolution also imposed permanent and general obligations on all the states[133] to take adequate measures to remove weaknesses in their domestic legislation to avoid incidents and to act on resolution 1540,[134] which prevents terrorists from gaining access to weapons of mass destruction. Furthermore, it advised nations to make the security of their people a top priority. This call was for all states; however, the intensity of the reactions to the call varied and related to each state's involvement in this problem differently. Security Council Resolution 1267[135] failed to prevent the 9/11 terrorist attack. After this incident and the promulgation of resolution 1373, almost all the nations of the world responded in a manner that reflected their own particular histories and legal, political and social cultures. Many countries responded with tough new anti-terrorism laws with little regard for the rights and the liberties of the people.[136] In this scenario, many countries with poor human rights records have justified their actions.[137]

The United Kingdom also did not show any hesitation in taking the security measures reducing the protection given to Human Rights.[138] The UK derogated from the Europe Convention of Human Rights in order to justify their act of indeterminate detention on the basis of secret

[130] Paul Szasz, Paul C. Szasz, 'The Security Council Starts Legislating' (2002) 96 The American Journal of International Law 901 p 902.
[131] Resolution 1373 (2001), Adopted by the Security Council at its 4385th meeting, on28 September 2001, see also available at http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf accessed on 15 February 2016
[132] National commission on terrorist attacks upon The USA, The 9/11 report (New York: St. Martin's press, 2004), at 5.4.
[133] Szasz, 'The security council starts legislating' at 903, Rosand, 'The Security Council as 'global legislator'': ultra vires or ultra innovative' p 345.
[134] UNSC Res 1540 (28 April 2004) UN Dos S/RES/1540.
[135] UNSC Res 1267 (15 October 1999) UN Dos S/RES/1267, Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida, and associated individuals, groups, undertakings and entities (hereafter "the Committee") oversees the sanctions measures imposed by the Security Council. Sanctions measures Assets Freeze, Travel Ban, Arms Embargo States are required to take the measures above with respect to ISIL (Da'esh), Al-Qaida and other individuals, groups, undertakings and entities associated with them, as designated on the ISIL (Da'esh) and Al-Qaida Sanctions List (hereafter "ISIL (Da'esh) & Al-Qaida Sanctions List").
[136] Harsh legislation designed to impose large scale detentions. See also James Beckman, Comparative legal approaches to homeland security and anti-terrorism (Routledge 2016), Bruce Ackerman, Before the Next Attack new Haven, CT: Yale University Press, 2006).
[137] Tushnet, 'The possibilities of comparative constitutional law' at 1225, for further study and examples see 10 global hotspots for major human rights violations in 2017 available at https://www.cnbc.com/2018/02/23/amnesty-ten-global-hotspots-for-major-human-rights-violations-in-2017.html accessed date 08 December 2018.
[138] See legislation.gov.uk available at http://www.legislation.gov.uk/ukpga/2001/24/contents accessed on 16 February 2016.

evidence of a non-national suspected of involvement in terrorism,[139] who could not be deported because of the apprehension that he might be tortured. Canada used immigration law as counter-terrorism law[140] to impose indefinite detention on the basis of secret evidence. The USA has also opted for dramatic measures to stop this kind of attack in future. The Patriot Act of 2001[141] was the major legislation for the USA to justify its actions against terrorism.

2.2.1 States' Response to the UN Security Council Resolutions; and the Anti-Terrorism Laws

The crime of terrorism incorporates "criminal acts intended or calculated to provoke a state of terror in the public, a group of persons or particular person for political purposes".[142] Terrorism has been described in 13 multilaterals and 7 regional treaties and encompasses hijacking,[143] bombing,[144] the financing of terrorism[145] and nuclear terrorism.[146] In 2004, the United Nations *High-Level Panel on Threats, Challenges and Change*[147] defined terrorism as attacking "the values that lie at the heart of the Charter of the United Nations: respect for human rights; the rule of law; rules of war that protect civilians; tolerance among peoples and nations; and the peaceful resolution of conflict".[148] Crucially, it is also recognised that "terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse; it also flourishes in contexts of regional conflict and foreign occupation; and it

[139] *A and others v Secretary of State for the Home Department* [2004] UKHL 56 (also known as the *Belmarsh 9* case) is a UK human rights case heard before the House of Lords. It held that the indefinite detention of foreign prisoners in Belmarsh without trial under section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with the European Convention on Human Rights.
[140] See legislation.gov.uk available at http://www.lop.parl.gc.ca/content/lop/researchpublications/bp252-e.htm 16 February 2016.
[141] The USA Patriot Act is an Act of Congress that was signed into law by President George W. Bush on October 26, 2001. Its title is a ten-letter backronym (U.S.A. P.A.T.R.I.O.T.) that stands for "Uniting and Strengthening America by Providing Appropriate Tools Required to intercept and Obstruct Terrorism Act of 2001".
[142] This definition is used in numerous UN resolutions, such as the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, UN Doc A/Res/ 51/210, 17 December 1996.
[143] See the Tokyo Convention on Offences and Certain Other Acts committed on Board Aircraft (1963), the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971).
[144] See the International Convention for the Suppression of Terrorist Bombings (1997), adopted by the General Assembly in resolution 52/164 of 15 December 1997, and entered into force on 23 May 2001.
[145] See the International Convention for the Suppression of the Financing of Terrorism (1999), adopted by the General Assembly in resolution 54/109 of 9 December 1999, and entered into force on 10 April 2002.
[146] See the International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the General Assembly in resolution 59/290 of 13 April 2005, opened for signature on 14 September 2005.
[147] A more secure world: our shared responsibility.' Report of the High-level Panelon Threats, Challenges and Change, UN Doc A/59/565, 2 December 2004.
[148] Ibid para 145.

profits from weak State capacity to maintain law and order".[149] Since 1996,[150] the United Nations[151] has sought to reach a consensus on one definition of "international terrorism", however, due to the diversified geopolitical perspectives of states, it failed to do so within the context of the draft comprehensive Convention on International Terrorism. Nevertheless, there is international agreement that the crime of terrorism involves the deliberate targeting of civilians.[152] A major reason for the failure to agree on one comprehensive definition is the issue of intention. Islamic states insist that to determine an act of terrorism, intention should be taken into consideration, rather than exclusively relying on actions or consequences.[153] Using this rationale, attacks in self-defence, such as those exhibited by national liberation movements or for self-determination, should not constitute acts of terrorism. On this matter, UN Secretary General Kofi Annan (1997-2006) spoke as follows:

> I understand and accept the need for legal precision. But let me say frankly that there is also a need for moral clarity. There can be no acceptance of those who would seek to justify the deliberate taking of innocent civilian life, regardless of cause or grievance…[154]

The United Nations General Assembly's ad hoc committee, which is working on the draft of the convention, is still struggling to achieve consensus among all parties on one definition of international terrorism.[155]

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[149] Ibid para 146.
[150] See 'Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Ninth session (28 March-1 April 2005)', UN doc. A/60/37, pp 23- 29. Further issues regarding the definition may be found in Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN doc E/CN4/2006/98, 28 December 2005, paragraphs 26- 50.
[151] Mahmoud Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention' (2006) 4 Journal of International Criminal Justice 1031.
[152] The 2005 World Summit Outcome simply stated, "We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security". 2005 Summit Outcome, UN doc. A/Res/60/1, 24 October 2005, para 81.
[153] John G Horgan and John Horgan, The psychology of terrorism (Routledge 2004), Bart Schuurman and John G Horgan, 'Rationales for terrorist violence in homegrown jihadist groups: A case study from the Netherlands' (2016) 27 Aggression and violent behavior 55.
[154] Simon Chesterman, 'The Secretary-General We Deserve?' (2015) 21 Global Governance: A Review of Multilateralism and International Organizations 505.
[155] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Tenth session (27 February-3 March 2006)', UN doc A/61/37 (Supp), 3 March 2006.

2.2.2 International Perspectives of Anti-Terrorism Laws

According to public international law, international treaties can play a vital role in supporting a standard principle of democracy. "Article 22 (2) of the International Covenant on Civil and Political rights (ICCPR) explicitly specifies that certain rights can be restricted when 'necessary in democratic society'".[156] Using the EU compliance criteria (known as the Copenhagen criteria)[157] and the Council of Europe membership requirements[158] an individual can conclude that human rights instruments should be respected in practice.[159]

Human Rights instruments do not directly provide a solution on whether democracy can legitimately limit rights of anti-democratic actors.[160] However, the UN's regional practices, in combination with Article 5, abuse clauses, standards of reasonableness and states of emergency, acknowledge that public international law allows for actions against anti-democratic parties. It also permits states to enact democracy's self-protection legislation,[161] for example, against hate speech and intimidating religious movements. For example, Fox and Nolte[162] address the banning of political parties and groups combined with the 'abuse clause'

[156]Article 22(2) of the ICCPR reads as follow: "No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right".

[157] European Council in Copenhagen, 21-22 June 1993. Conclusion of the Presidency. Article 7(A) (iii) states that "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." Available at http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/93/3&format=HTML&aged=1&language=EN&guiLanguage=en accessed on date 31 July 2017 .

[158] Statute of the Council of Europe adopted on the 5th of May 1949.
Article 3: Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I.
Article 4: Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe.
Article 8: Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

[159] Gregory H. Fox & George Nolte Fox and Nolte, 'Intolerant democracies' at 39 authors refer to Oscar M. Garibaldi, On the Ideological Content of Human Rights Instruments: The Clause "In a Democratic Society, in L. B. Sohn, 23 Contemporary Issues in International Law: Essays in Honor (Thomas Buergenthal ed., 1984) and mention that similarly. John Humphry suggests that "the General Assembly meant by democratic society the kind of society in which the rights enunciated by the Universal Declaration of Human Rights are recognized and respected." John P. Humphry, The Just Requirements of Morality, Public Order and The General Welfare in a Democratic Society, in The Ronald. St. J. MacDonald & John .P. Humphry (Eds.), Practice of Freedom 137, 147(1979).

[160] Ibid p 39.

[161] Ibid p 59.

[162] Ibid p 41.

provided in Article 5(1) of the ICCPR.[163] The Strasbourg court or the European Court of Human Rights (European Court of Human Rights) has shown no hesitation to take cognizance of cases related to hate speech.[164]

Sajo has taking into consideration the notion of militant democracy measures, stating that this notion does not contradict the principles of international human rights law,[165] as militant democracy encompasses both the protection of society and the rights of the individual. Fox and Nolte have also debated whether the international community can declare the rights and wrongs for other nations, due to the fact that every state is sovereign and makes laws for its land,[166] and they observed that some provisions found in international human rights treaties are binding on the states, such as prohibitions of torture and slavery.[167]

The respect of democratic norms is enshrined in the heart of international law.[168] State parties are responsible to further develop and protect these principles by enacting appropriate preventive measures. This can be achieved through provisions requiring state parties to adopt legislation that gives effect to the listed rights[169]. Fox and Nolte conclude that "while the international community may define a range of responses to authoritarian movements it should not dictate a choice among them".[170] This article by Fox and Nolte was published before the judgment on the Refah Partisi (Welfare Party) case[171] was announced by the European Court of Human Rights and declared that the state action to ban the party was justified.

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[163] Article 5(1) reads as follows: Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or performance aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

[164] For example, in Garaudy v. France Admissibility Decision (Application No. 65831/01), David Keane, 'Attacking hate speech under Article 17 of the European Convention on Human Rights' (2007) 25 Netherlands quarterly of human rights 641, the European Court of Human Rights reminded that freedom of expression has limit sand declared that "there is no doubt that, like any other remark directed against the Convention's underlying values, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10" and that there is "a category [of] clearly established historical facts – such as the Holocaust - whose negation or revision would be removed from the protection of Article 10 by Article17".

[165] Sajó, A. (2005). From militant democracy to the preventive state. *Cardozo L. Rev.*, *27*, 2255.

[166] Jed Rubenfeld, 'Unilateralism and constitutionalism' (2004) 79 NYUL Rev 1971.

[167] Fox and Nolte, 'Intolerant democracies' p 75.

[168] Amichai Magen, 'Cracks in the foundations: understanding the great rule of law debate in the EU' (2016) 54 JCMS: Journal of Common Market Studies 1050.

[169] I.e. Article 2(2) of the ICCPR which requires that "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant".

[170] Gregory Fox and Nolte, 'Intolerant democracies' p 69.

[171] Tyulkina, Svetlana Alexandrovna. "Militant Democracy" p 122.

However, amongst the critics who opposed the judgment in the Refah Partisi case was Markus Thiel.[172] He asserted that the judgment failed to recognize the fundamental right of the people to freedom of expression. He compared the decision to the German militant democracy model.[173] Thiel explained that the European Court of Human Rights has recognized the notion of a defensive democracy (militant democracy).[174] When evaluating the case, he spoke of the exclusion of political parties which is sanctioned in constitutional legislation.[175] When analysing the European Union, evidence can be found of the duty to take protective measures to preserve democracy and that failure to do so incurs certain sanctions.[176] The issue was established in 1992 when the Treaty of the European Union was drafted. Markus Thiel cites Article 6(1): The union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member State.[177]

If these principles are breached, member states can be suspended and stripped of certain rights.[178] Such sanctions demonstrate how the EU is aware of possible threats to the fundamental principles of democracy. However, it has the power to make member states bound

[172] Thiel, *The'militant democracy'principle in modern democracies*ibid p 176.
[173] Ronald J Krotoszynski Jr, 'A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany' (2003) 78 Tul L Rev 1549.
[174] Thiel, The'militant democracy'principle in modern democracies p 45.
[175] Ibid.
[176] Oona A Hathaway, 'Do human rights treaties make a difference?', International Law and Society (International Law and Society, Routledge 2017).
[177] Former Article 6(1) (before the adoption of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007) read as follows: 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. Similar but modified provision can be found in Article 2 of the current version of the Treaty on European Union: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
[178] Article 7(2) as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007: The European Council acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations. (3): Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

to provide defensive legal mechanisms to assist in the survival of democracy.[179] Another critic of the Refah Partisi case, Eva Brems,[180] raised another issue that concerns Article 4 of the Convention,[181] which talks about the prohibition of the elimination of all form of racial discrimination and describes the methods of dealing with different racist organizations.[182] Article 4 (b) allows the state to exclude, eliminate and disregard a political party if it has any racist political agenda to promote racist motives.[183] Rory O'Connel[184] elaborated on the arguments of Brems when explaining Spain's prohibition of the Batasuna party.[185] He argued that the European Court of Human Rights judgement imposes positive obligations on the State to ban certain parties.[186] In this case, the European Court of Human Rights acknowledged the government action to oust the Batasuna party based on its support of political violence.[187] Moreover, O'Connell revealed that this judgment "also went on to indicate that such a conclusion was in accordance with the state's positive obligations",[188] Hence, one can conclude "that the state may have a duty to ban certain political parties".[189] While it is not obligatory on the member states to adopt the militant democracy measures, it is evident that acceptance of this principle may help the state to save the society from internal and external aggressions.[190]

2.2.3 Militant Democracy and the war on terror

Militant democracy's most recent visible manifestation is the raft of antiterrorism legislation, legitimised by militant democracy measures, which allows states to introduce such measures especially in the wake of the events of September 11, 2001. More traditional manifestations of militant democracy include hate-speech legislation, the banning of political parties,

[179] Richard S Katz and Peter Mair, 'Changing models of party organization and party democracy: the emergence of the cartel party' (1995) 1 Party politics 5.
[180] Eva Brems Eva Brems, Freedom of political association and the question of party closures (Oxford University Press 2006).
[181] Egon Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) International and Comparative Law Quarterly 996.
[182] Articles 4(b) impose obligation to "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law".
[183] Simon Hix and Bjørn Høyland, The political system of the European Union (Macmillan London 1999)
[184] Rory O'Connell, 'Realising political equality: the European Court of Human Rights and positive obligations in a democracy' (2010) 61 N Ir Legal Q 263.
[185] HerriBatasuna v Spain (2009), Applications No. 25803/04, 25817/04.
[186] O'Connell, 'Realising political equality: the European Court of Human Rights and positive obligations in a democracy' p 277.
[187] Katherine A Sawyer, 'Rejection of Weimarian Politics or Betrayal of Democracy: Spain's Proscription of Batasuna under the European Convention on Human Rights' (2002) 52 Am UL Rev 1531.
[188] O'Connell, 'Realising political equality: the European Court of Human Rights and positive obligations in a democracy' p 278.
[189] Ibid p 279.
[190] Lawrence Freedman, 'The transformation of grand strategy' (2006) 45 Adelphi papers 27

restrictions on mass demonstrations, and the criminalization of certain political organizations. Introduced to combat extremist political agendas that threaten peace, security, and democratic order, these initiatives typically interfere with the exercise of individual human rights, such as freedom of expression, opinion, religion, and association, or rights to counsel or a fair trial, in the name of democratic self-preservation.

Yet the limits of militant democracy remain to be defined and defended, leaving fundamental freedoms exposed to the risk of abusive state action. This problem presents itself most vividly in the context of legislation containing broad definitions and open-ended delegations of authority initially aimed at suppressing domestic forms of extremism or terrorism. Section 1 of the United Kingdom's Terrorism Act 2000,[191] for example, "defines terrorism as certain actions that are "designed to influence the government or to intimidate the public or a section of the public" and are "made for the purpose of advancing a political, religious or ideological cause". Such actions include not only "serious violence against a person and endangering life" but also the creation of a "serious risk" to public health or safety, and "serious interference with or disruption of an electronic system".[192] In my analyses, provisions such as section 1(1) of the Terrorism Act are shot through with ambiguity.[193] These phrases can be interpreted in a variety of ways, and a clearer understanding of the limits of militant democracy is needed to determine their international legality and reach.

In "late 2001, for example, Italy amended its criminal code to make it an offense to promote, form, organize, manage, or finance both domestic and international associations active in terrorism or the subversion of the democratic order".[194] What constitutes a subversive association is often not immediately apparent from the text of such legislative initiatives, raising questions about the extent to which a state can criminalize activity that ordinarily would be regarded as a legitimate exercise of civil and political freedom. Vague definitions of what constitute terrorist and subversive organizations underpin many militant state legislative

[191] Terrorism Act, 2000, ch. 11, s. 1(1). See generally Kent Roach, The World Wide Expansion of Anti-Terrorism Laws After 11 September 2001, (2004), CXVI (III Serie), III, 2004 Fasc. 3 Studi Senesi, 487–527.
[192] Terrorism Act 2000, ch.11, s. 1(2).
[193] See Opinion of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on certain aspects of the United Kingdom 2001 derogation from article 5 paragraph 1 of the European Convention on Human Rights, Aug. 28 2002, available at https://wcd.coe.int/ViewDoc.jsp?id¼980187& BackColorInternet¼99B5AD&BackColorIntranet¼FABF45&BackColorLogged¼FFC679 (noting that the definition of terrorism in the U.K. legislation—as amended—enables its application to persons who are unrelated to any terrorist emergency and thus may jeopardize rights enshrined in the European Convention).
[194] Introduced by the Decree-Law of 18 October 2001, no. 374 (converted with amendments into the Law of 15 December 2001,

initiatives.[195] In early 2004, for example, France introduced sweeping new legislation aimed at organized criminal networks, conferring greater police surveillance powers and allowing for detention without prosecution".[196] The UK "amended its immigration law in late 2001, authorizing the indeterminate detention of a person on the basis of a reasonable suspicion that he or she is supporting or assisting an international terrorist organization".[197] Recent restrictions on freedom of expression and association introduced by some states in the "war against terrorism" have worsened these concerns.[198]

2.2.4 The European Convention on Human Rights, the United Kingdom and the Threat of Terrorism

The UK Human Rights Act[199] was enacted in 1998 and implemented in 2000. The concept of this Act is to provide influence on the rights outlined by the European Convention of Human Rights.[200] Courts are compelled to preserve primary laws throughout practice offering cases according to the Convention rights.[201] Hence, the Courts have been authorized to interpret and provide outcomes to law-making in a fashion that befits the Convention.[202] Subsequently, it forwards to domestic courts to take applicable case legislature from Strasbourg into consideration.[203] Comparatively, intercessions are still commonplace in the UK's political affairs. In the event that a Superior Court cannot analyse laws in relation to the concept of the

[195] such as the extension of powers of investigation, surveillance, and prosecution; the intensification of the monitoring of communications; the confiscation of certain forms of property; prohibitions on the financing of purportedly subversive organizations; special procedures for the prosecution of certain crimes; interstate sharing of personal telecommunications and travel data; and changes to immigration procedures facilitating the deportation and expulsion of individuals to foreign states.
[196] Lawyers Protest Across France at Sweeping Anticrime Law, N Y. TIMES, Feb. 12, 2004, at A11.
[197] Anti-terrorism, Crime and Security Act, 2001 c. 24, Part IV.
[198] For overviews, see Confronting Terrorism: European Experiences, Threat Receptions and Policies (Marianne van Leeuwen, ed., Kluwer 2003).
[199] Human Rights Act, 1998 c.42.
[200] Convention for the Protection of Human Rights and Fundamental Freedoms in Europe 1950, The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international convention to protect human rights and political freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe,[1] the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity. The Convention established the European Court of Human Rights (ECtHR). Any person who feels his or her rights have been violated under the Convention by a state party can take a case to the Court. Judgments finding violations are binding on the States concerned and they are obliged to execute them. The Committee of Ministers of the Council of Europe monitors the execution of judgments, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained. The compensations imposed under ECHR can be large; in 2014 Russia was ordered to pay in excess of $2 billion in damages to former shareholders of Yukos. The Convention has several protocols, which amend the convention framework.
[201] Human Rights Act, Op cit, s 6(1) and (2).
[202] Human Rights Act, Op cit, s 3(1).
[203] Human Rights Act, Op cit, s 2(1(a)).

Convention, it is applicable to give a statement of incompatibility.[204] This aims to put pressure on government officials who opt to alter the legislation either via primary or remedial action.[205] The government is enforced by no lawful prerequisite to amend the law, and subsequently, the principal of parliamentary authority is maintained.[206] Irrespective of parliamentary authority, the Human Rights Act also produces an influential shift in constitutional legislature. Currently, there is a written declaration outlining the rights of certain peoples in the United Kingdom.[207] Whilst the EHCR has been longstanding in the UK, the Act still signifies a significant alteration of present practice.

> The Human Rights Act makes the Convention far more central to the practice of law in Britain. Until it came into force, there was no overriding presumption that Parliament intended in the past and in the future to legislate so as to conform to the rights protected by the Convention.[208]

Talking about political rights[209] and their protection in the UK's Human Rights Act 1998, it is evident that they are secure under Article 10 of the Act. This Article refers to freedom of expression and the safeguarding of this right that can be used for a legitimate aim.[210] Freedom of expression in Article 10 is the qualified law, and the state can derogate from this right at times of emergency (if the state faces the threat of public safety and national security), and it

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[204] Human Rights Act, Op cit, s 4(2).
[205] Human Rights Act, Op cit, s 10.
[206] Jonas Tallberg, 'Supranational influence in EU enforcement: the ECJ and the principle of state liability' (2000) 7 Journal of European Public Policy 104.
[207] David Feldman, 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19 Legal Studies 165, see also Dualism, Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well, or it is no law at all. If a state accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law. But one cannot claim that the treaty has become part of national law. Citizens cannot rely on it and judges cannot apply it. National laws that contradict it remain in force. According to dualists, national judges never apply international law, only international law that has been translated into national law.
[208] Aileen Kavanagh, Constitutional Review under the UK Human Rights Act (Cambridge University Press 2009) p 233.
[209] Civil and political rights are a class of rights that protect individuals' freedom from infringement by governments, social organizations, and private individuals. They ensure one's ability to participate in the civil and political life of the society and state without discrimination or repression. Civil rights include the ensuring of peoples' physical and mental integrity, life, and safety; protection from discrimination on grounds such as race, gender, sexual orientation, gender identity, national origin, color, age, political affiliation, ethnicity, religion, and disability;[1][2][3] and individual rights such as privacy and the freedoms of thought, speech, religion, press, assembly, and movement.
[210] European Convention of Human Rights, Op cit, Articles 10 (2) and 11(2).

can be restricted for as long as the law prescribes. By attempting to constitutionalize rights which fuel democracy, the HRA states the substantive grounds under which rights can be breached. The introduction of a formal commitment to such rights discussed in the HRA can lead to procedural equality being abolished. By including substantive outcomes in domestic law, such dilutions may be legally justified.

2.2.5 The ECtHR and the Notion of Militant Democracy

The "European Court of Human Rights has long had to deal with issues of militant democracy, whether it be in relation to the persistence of racist and fascist parties, Germany's loyalty laws, or political violence in the UK and Ireland.[211] The theme has become more urgent though in the last fifteen years. The collapse of the Iron Curtain and the expansion of the Council of Europe to the East have given rise to many issues of transitional justice. A variety of different techniques of militant democracy have appeared in Strasbourg cases. Perhaps the most extreme have been the instances where a State has sought to remove from Parliament elected politicians once their party has been deemed unconstitutional.[212] Political parties have also been dissolved,[213] or have had their applications to be registered refused.[214] In a few cases, individuals may be prohibited from running for public office, or holding a varying range of offices in the public sector, or even in parts of the private sector.[215] The court allows states to take measures include restricting the free expression[216] or free association rights[217] of individuals, prohibiting the use of certain symbols,[218] or denying public financing to parties.[219] States may take steps to ensure the political neutrality and integrity of their public service."

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[211] Harvey, "Militant democracy and the European Convention on Human Rights" (2004) 29 (3) European Law Review 407-420.
[212] Sadak and others v. Turkey Applications Nos. 26149/95 to 26154/95, 25144/94, 27100/95 and 27101/95, 11 June 2002 (ECtHR).
[213] Refah Paritisi (Welfare Party) v. Turkey (2003) 37 EHRR 1.
[214] Partidul Comunistilor (Nepeceristi) v. Romania Application no. 46626/99, 5 February 2005 (ECtHR); Linkov v. Czech Republic Application no. 10504/03, 7 December 2006 (ECtHR).
[215] Sidabras v. Lithuania (2006) 42 EHRR 6.
[216] Brind v. United Kingdom (1994) 77 D&R 262. Issaacharoff gives the example of speech codes during elections in India: S. Issacharoff, "Fragile Democracies" (2007) 120 Harvard Law Review 1405, 1423.
[217] Christian Democratic People's Party v. Moldova (2006) 45 EHRR 13.
[218] The Hungarian law prohibiting the wearing of "totalitarian" symbols was considered in Vajnaj v Hungary application no. 33629/06, 8 July 2008 (ECtHR).
[219] Parti Nationaliste Basque v France Application no 71251/01, 7 June 2007 (ECtHR). Funding was denied to the French branch of the Basque Nationalist Party due to the fact it illegally received funds from abroad, i.e. the Spanish Basque party.

Having examined the literature on the issue in hand, I must say that "a number of different reasons are generally given by ECtHR for the use of militant democracy type measures;[220] typically these include combating political violence; controlling racist and far-right parties; defending fundamental constitutional or human rights principles; securing the transition to democratic rule; or protecting the territorial integrity of the state. Other reasons may easily be imagined: some states may proscribe parties with an ethnic or religious focus,[221] even the use of militant democracy in relation to parties whose internal structure" is undemocratic.[222] ECtHR has, on the whole, been exacting in its scrutiny of these measures. "In my view the restrictions on rights satisfy the three part justification test of being for a legitimate purpose, prescribed by law and necessary in a democratic society. Political movements which engage in, advocate or are linked with political violence, are subject to restrictions in several European states. However, in my view, the court means that the actual evidence of a commitment to violence before an organisation's Convention rights might be limited; it is not enough that an organisation adopt a name likely to promote hostility,[223] nor that it describe itself as 'revolutionary'.[224] This severity in examining state restrictions allegedly based on the need to protect national security and public order is welcome."

This is made clear in *Herri Batasuna and Batasuna v Spain*,[225] which demonstrates that the Strasbourg court will accept limitations on political rights of parties associated with political violence. Citing a 2002 law on political parties, the Spanish Supreme Court ordered the dissolution of the two applicant parties because of their connections with the *Basque separatist group* (*Euskadi Ta Askatasuna's*) ETA. When the political party complained to the ECtHR, the latter first found that there was interference with Article 11.1 and proceeded to see if the

[220] Issaacharoff discusses the threats posed by insurrectionary, separatist and anti-dmeocratic parties: S. Issacharoff, "Fragile Democracies" (2007) 120 Harvard Law Review 1405, 1433-1447.
[221] M. Basedau, M. Bogaards, C. Hartmann and P. Niesen, "Ethnic Party Bans In Africa: A Research Agenda" (2007) 8 (6) German Law Journal 617-634.
[222] Yigal Mersel, "The dissolution of political parties: The problem of internal democracy" (2006) 4 International Journal of Constitutional Law 84. See also E. Brems, "Freedom of Political Association and the Question of Party Closures" in Wojciech Sadurski (ed.) Political rights under stress in 21st century Europe (Oxford ; New York: Oxford University Press, 2006), 161.
[223] Association of Citizens Radko and Paunkovski v Former Yugoslav Republic of Macedonia Application no. 74651/01, 20 January 2009 (ECtHR). "Radko" was the pseudonym of Ivan Mihajlov, who, according to the Macedonian Constitutional Court, denied the existence of Macedonian ethnicity.
[224] Tsonev v. Bulgaria (2008) 46 EHRR 8. However the Court has rejected challenge to a French law punishing persons for "condoning terrorism": Leroy v France application no. 36109/03, 2 October 2008 (ECtHR). The applicant had published a cartoon based on the September 11th attacks on the Twin Towers with the caption "We have all dreamed of it … Hamas has done it". The Court rejected the applicant's view that he was merely engaging in satire to critique American imperialism (paragraphs 43-46).
[225] Herri Batasuna v Spain application nos. 25803/04 and 25817/04, 30 June 2009.

measure could be justified under Article 11.2. The ECtHR concluded that the interference was prescribed by law and for a legitimate aim; the crucial question was whether the measure was necessary in a democratic society. Having outlined the principles, it was necessary to consider the specific case as a large number of facts which indicated that the parties were encouraging a "climate of social confrontation" and were offering implicit support to ETA.[226]" The ECtHR alluded to the idea that the silence of politicians could be invoked to gauge some idea of the party's intentions.[227] I believe that the ECtHR has rightly placed the Spanish court decision in the context of Council of Europe and European Union measures which condemn making apologies for terrorism.[228]

This "means that a political movement is opposed to fundamental constitutional or human rights principles is a motivation sometimes invoked to justify limiting political rights.[229] This was so in the Turkish Welfare Party case: the Welfare Party's supposed advocacy of Sharia and the introduction of personal laws, conflicting with the principle of secularism, was held to justify its dissolution.[230] What constitutes a fundamental constitutional principle is open to disagreement: one Bulgarian case concerned an effort to ban a pro-monarchy association,[231] while the Czech Republic sought to refuse registration of one political party because it seemed to challenge the principle of non-retrospectivity of criminal laws (in the context of advocating bringing to justice human rights violators from the previous regime).[232]"

The most "dramatic and controversial of all the ECtHR decisions on the theme of militant democracy was the decision in the Turkish Welfare Party case.[233] The Turkish Constitutional Court had ordered the dissolution of the Welfare Party on the primary ground that it was opposed to secularism. Most strikingly, the Welfare Party was actually in a coalition government at the time and was indeed the largest party represented in the Turkish Parliament. The ECtHR research to the conclusion on three grounds. The first one was that the party had

[226]vRefah Paritisi (Welfare Party) v. Turkey (2003) 37 EHRR 85.
[227] Refah Paritisi (Welfare Party) v. Turkey (2003) 37 EHRR 88.
[228] Refah Paritisi (Welfare Party) v. Turkey (2003) 37 EHRR 90.
[229] The aim of protecting the principle of territorial integrity is one such constitutional principle. This aim has been invoked for instance in cases from Turkey (United Communist Party of Turkey v. Turkey (1998) 26 EHRR 121.), Russia (Vatan v. Russia Application no. 47978/99, 7 October 2004 (ECtHR).) and Bulgaria (United Macedonian Organisation Ilinden – Pirin and others v. Bulgaria Application no. 59489/00, 20 October 2005 (ECtHR)).
[230] Refah Paritisi (Welfare Party) v. Turkey (2003) 37 EHRR 1.
[231] Zhechev v. Bulgaria Application no. 57045/00, 21 June 2007 (ECtHR).
[232] Linkov v. Czech Republic Application no. 10504/03, 7 December 2006 (ECtHR).
[233] Refah Paritisi (Welfare Party) v. Turkey (2003) 37 EHRR 1.

failed to distance itself sufficiently from advocacy of violence; second, the party desired to introduce a system of personal law for Turkish citizens (i.e. different legal systems depending on religion); and finally, the party was in favour of introducing Sharia law. This was the only party dissolution case from Turkey where the Court of Human Rights upheld the Constitutional Court's decision".

Despite this, "the decision, and especially the reasoning and language of the Court have given rise to considerable controversy. Any restrictions on political rights must be necessary in a democratic society. The theory of militant democracy is that a democratic state is entitled to take preventive steps against a political movement which uses undemocratic means (violence) or pursues anti-democratic goals. The legitimacy of such measures is questionable if the state is not itself committed to democratic means and goals. For the most part, the European Court of Human Rights has admirably struck the balance in favour of human rights in a democratic society when considering the problems posed by supposedly anti-democratic political movements. As Harvey notes, it is not necessarily the case that Council of Europe states are ideal liberal democracies[234] and sometimes even established democracies fall short of the ideal. For this reason it is imperative that courts apply the human rights principles rigorously.[235]"

2.2.6 The United Kingdom's Response: Militant Democracy

Militant democracy helps to legally justify the provisions in the UK Terrorism Act, despite their negative impact upon human rights and freedom. The UK Terrorism Act 2000[236] gives a huge amount of power to the Home Secretary to label any group as terrorist,[237] if it is directly or indirectly involved in terrorist activities. The Act has defined the term "concerned in terrorism" as "commits or participates in acts of terrorism",[238] "preparation for terrorism",[239] or "promotes and encourages terrorism".[240] The definition of the group is enumerated in Section II of the Act and there is a procedure to be followed to add any party to the list with

[234] P. Harvey, "Militant democracy and the European Convention on Human Rights" (2004) 29 (3) European Law Review 407, 419.
[235] Nathan A IV Adams, 'A Human Rights Imperative: Extending Religious Liberty Beyond the Border' (2000) 33 Cornell Int'l LJ 1.
[236] United Kingdom's Terrorism Act, 2000 c.11-This legislation allowed for the proscription of groups concerned in International terrorism. Previous legislation had limited proscription to 14 groups associated with the conflict in Northern Ireland.
[237] United Kingdom's Terrorism Act, 2000, s3(4).
[238] Ibid s3(5(a)).
[239] Ibid s3(5(b)).
[240] Ibid s3(5(c)).

the consent of the UK parliament.[241] Principally, the "Terrorism Act 2000 represents the significant effort by the UK government to tackle the legal problems posed by political violence, [and] the legislation builds upon statutory codes which have been developed over the last three decades in Britain and Ireland".[242]

This Act includes the glorification of terrorism as a crime, and describes "terrorism" as "the use of or threat of action,[243] which has been designed to pressurise the government or an international government organization.[244] Section one, subsection one, clause c explains that the objective of this crime is 'to advance a political, religious or ideological cause'. [245] The definition of terrorism in this act is exhaustive and section one, sub-section two[246] describes a series of actions which amount to the act of terrorism. Section 11 of this Act delineates that a member of any such organization is considered to be guilty of this offence.[247] It is worth noting that under the UK Terrorism Act 2000, 74 organizations had been listed as terrorist organisations by 22 December 2017;[248] this figure excludes 14 organizations from Northern Ireland.[249]

The passing of the Terrorism Act 2006 was a direct response to the terrorist attack on 7 July 2005 in the UK.[250] The offence of glorification was believed to have motivated it—a belief influenced by the Home Secretary when speaking in Parliament in October of that year:

> The July events indicate that there are people in this country who are susceptible to the preaching … of an argument or a message

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[241] Ibid s123.
[242] Rasiah N, 'Reviewing Proscription under the Terrorism Act 2000.' (2008) 13(3) Jud Rev 187.
[243] Ibid s1(1).
[244] Ibid s1(1(b)).
[245] Ibid s1(1(c)).
[246] Ibid s1(2).
(2) Action falls within this subsection if it—
(a)involves serious violence against a person,
(b)involves serious damage to property,
(c)endangers a person's life, other than that of the person committing the action,
(d)creates a serious risk to the health or safety of the public or a section of the public, or
(e)is designed seriously to interfere with or seriously to disrupt an electronic system.
[247] United Kingdom's Terrorism Act, 2000 s11.
[248] Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/670599/20171222_Proscription.pdf accessed on 16 Feb 2017.
[249] Ibid.
[250] Martin Innes, 'Policing uncertainty: Countering terror through community intelligence and democratic policing' (2006) 605 The Annals of the American Academy of Political and Social Science 222.

> that terrorism is a worthy thing, a thing to be admired, a thing to be celebrated and then act on the basis of that…. What this Bill is about is trying to make that more difficult, that transition from people encouraging, glorifying to then an act being undertaken.[251]

The word 'terrorism' has prompted a worldwide shift in attitude in the balance between individual freedoms and public security. Tony Blair announced in August 2005 that "the rules of the game have changed".[252] The 2006 Act is said to be a reaction to:

> The emergence of religious and ideological divisions of unprecedented persistence and depth and by the recent perpetration of unimaginable acts of terrorist violence.[253]

The goal of democratic governments is to defend their citizens from political aggression,[254] making it difficult to maintain procedural equality in the presence of those who show no regard for equality. This is usually expressed through their motivation to impose aggression and even death. Exclusion can be viewed as a declaration of intention. "[M]uch of the purpose of proscription is symbolic to express society's revulsion at violence as a political strategy as well as its determination to stop it".[255] This makes specific reference to those groups banned under the Terrorism Act. The analyst Clive Walker declared:

> There is little doubt that the clear majority… listed organizations have in fact engaged in terrorism and are still capable of doing so…Many of the same groups are banned by other countries, and some appear in terrorism finance lists issued by either the United Nations or the European Union.[256]

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[251] Hansard Commons Draft Terrorism Bill, Written and Oral Evidence, HC 515-I, October 11, 2005, Q.3 and Charles Clark were the Home Secretary.
[252] Quoted in Guardian Leader Article 'Liberty is our Defence' accessed on August 23rd 2005, available at www.guardian.co.uk/Politics/2005/aug/23/immigrationpolicyterrorism.
[253] Barnum, Op cit, 277.
[254] Fareed Zakaria, 'The rise of illiberal democracy' (1997) 76 Foreign Aff 22
[255] Clive Walker, 'Militant Speech About Terrorism in a Smart Militant Democracy' (2010) 80 Miss LJ 13951409.
[256] Ibid 1410-11.

This emphasizes that both the 2000 and the 2006 Act incite conditions that are aggravating from a democratic viewpoint.[257]

2.2.7 The Norwood Case: A Philosophical Approach towards Militant Democracy

Mark Norwood, a local supporter of the BNP, pleaded guilty of a criminal offence in 2003.[258] He was convicted on the count of causing fear and distress,[259] and was jailed for one year for motivating racial and religious activities.[260] The appellant, Norwood, had placed a poster made by the BNP on his window which showed pictures of terrorists involved in the 9/11 bombings. The poster was designed to produce animosity towards Muslims and towards their religion, Islam; it carried the statements 'Protect the British People' and 'Islam out of Britain'. Furthermore, the poster also depicted the emblem of Islam – a crescent with a star – under a proscription sign.[261] In this case, an assertion was submitted from the defence that the conviction represented a serious violation of Norwood's right to freedom of expression. Furthermore, under Article 10 of both the Human Rights Act 1998 and the European Convention of Human Rights,[262] he has a fundamental right of freedom of expression and the poster which he displayed was his opinion about the religion of Islam, which he believes instigates the killing the innocent people and hence is not welcome in the UK.[263]

However, the appellate court upheld the punishment and referred to Article 10(2) of the Act, which delineates the legitimate aim when restricting the right of freedom of expression.[264] The core of the article focuses on the rights of others,[265] keeping in view the law of preventive crime and disorder; the court indicated that "the poster displayed a hate message against all the Muslims in the country.[266]

The appellant then referred the contents of the case to the European Court of Human Rights[267] and alleged a breach of his Article 10 rights.

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[257] Mat Coleman, 'The naming of 'terrorism'and evil 'outlaws': geopolitical place-making after 11 September' (2003) 8 Geopolitics 87.
[258] Mark Anthony Norwood v Director of Public Prosecutions 2003 WL 21491815.
[259] Public Order Act 1986 c.64, s5 (1) (b).
[260] Crime and Disorder Act 1998 c.37, Ss 28 and 31.
[261] Mark Anthony Norwood v Director of Public Prosecutions 2003 WL 21491815 at 6.
[262] Ibid at 27.
[263] Ibid at 30.
[264] Keane, 'Attacking hate speech under Article 17 of the European Convention on Human Rights' p 45.
[265] Ibid (N 225) at 40.
[266] Ibid at 33.
[267] Norwood v United Kingdom (2005) 40 E.H.R.R. SE11.

> …free speech includes not only the inoffensive but also the irritating, contentious, eccentric, heretical, unwelcome and provocative, provided that it does not tend to provoke violence. Criticism of a religion is not to be equated with an attack upon its followers.[268]

The court in this case referred to the abuse clauses of Article 10[269] and Article 17[270] of the convention and dismissed the merit of the case under Article 10. Essentially, Article 17 of the convention prevents individuals or groups from spreading tyranny in society.[271] It is an established norm that Article 10 cannot be used if it in any way violates Article 17. According to the final decision of the court, the act of the Appellant amounted to the violation of Article 17 of the convention.[272] Violence toward a religious class and linking the group to terrorism is at odds with the beliefs and morals implemented by the Convention.[273] Of greater significance is that public peace and non-discrimination are being dishonoured. Exhibiting the poster in a window constitutes an act in Article 17 (prohibition of abuse of rights), and as a result, the appellant was denied the safeguarding of Article 10 (freedom of expression) or Article 14 (prohibition of discrimination).[274] The verdict to remove Norwood's expression from Article 10 sparked a great deal of criticism. Steve Foster[275] argued that using Article 17 to justify suppression of speech has resulted in courts placing major limitations on freedom of expression. This is based purely "on grounds of the nature of the speech rather than its proven or likely harm.[276] Another critic, Sophie Turenne, suggested that "without the requirement to prove the likelihood of harm sets a ground for over-invasive interventions".[277] "This

[268] Ibid.
[269] Article 10 "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime…".
[270] Article 17 "Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein …".
[271] Keane, 'Attacking hate speech under Article 17 of the European Convention on Human Rights'.
[272] Keane, 'Attacking hate speech under Article 17 of the European Convention on Human Rights.
[273] Ben Saul, 'Speaking of terror: criminalising incitement to violence' (2005) 28 UNSWLJ 868.
[274] Norwood v United Kingdom (2005) 40 E.H.R.R. SE11.
[275] Steve Harold Foster, 'Whole Life Sentences and Article 3 of the European Convention on Human Rights: Time for Certainty and a Common Approach?' (2015) 36 Liverpool Law Review 147.
[276] Ibid, Steve Foster ' Case Comment: Racist Speech and Articles 10 and 17 of the European Convention of Human Rights' in Coventry Law Journal, Vol 10(1), 2005, 94.
[277] Shimon Shetreet and Sophie Turenne, Judges on trial: the independence and accountability of the English judiciary, vol 8 (Cambridge University Press 2013).

intertwines with political rights, as the proof of possible harm was absent in the Norwood case.[278]

> One might rather say that Norwood was 'aiming' only to further his cause at a local political level, for he could hardly have contemplated that the publication of his poster in his home in Shropshire would lead to a revolution among the public which would lead to the expulsion of all Muslims.[279]

Ivan Hare further developed these criticisms by arguing that allowing for the suppression of expression on the grounds of speech alone could cause uncertainty about what is a legitimate political debate.

> …the state will (especially in times of particular religious or cultural sensitivity) be able to restrict or prohibit with impunity the expression of unpopular views by those who do not espouse mainstream liberal positions. If this is permitted to occur, the essential contribution which pluralism, tolerance and broadmindedness make to the definition of a democratic society under the Convention is substantially negated.[280]

Analyst Richard Mullender was in favour of the decision reached in *Norwood.* He openly acknowledged that it has negative implications for "rights based protection to political expression".[281]

> But we have to set against this the consideration that the European Convention of Human Rights' response to the defendant's conduct underscores the importance of distributive justice in a society committed to militant democracy. For it gives expression to the view that entitlements enjoyed by individuals are not absolute guarantees. Rather, they are contingent on

[278] Ibid p 101.
[279] Sophie Turenne, 'The compatibility of criminal liability with freedom of expression' (2007) Criminal Law Review 866.
[280] Ivan Hare 'Crosses, crescents and sacred cows: criminalizing incitement to religious hatred' in Public Law, Autumn 2006, 530.
[281] Mullender Richard Mullender, 'Human rights: universalism and cultural relativism' (2003) 6 Critical Review of International Social and Political Philosophy 70.

> willingness to act in ways that serve to sustain a legal order in which the fundamental interest of all the law's addressees enjoy a significant measure of protection.[282]

It is important to note that it is a necessity to uphold the rights of citizens, to maintain a society where everyone's interests are taken under consideration and protected. Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 of the European Convention on Human Rights, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.[283]

So, this section demonstrated that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance, provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued.[284] When dealing with cases concerning incitement to hatred the approach of exclusion from the protection of the Convention, provided for by Article 17 (prohibition of abuse of rights), and where the comments in question amount to hate speech and negate the fundamental values of the Convention; and - the approach of setting restrictions on protection, provided for by Article 10, paragraph 2, of the Convention, does not amount to destroy the fundamental values of the Convention.

[282] Richard Mullender, 'Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy'(2000)' 27 Journal of Law and Society 493.
[283] Handyside v. the United Kingdom judgment of 7 December 1976, S 49.

[284] Erbakan v. Turkey judgment of 6 July 2006, s 56

2.3 Militant Democracy versus National Crime and Prevention Policy

The European Convention on Human Rights repudiates, restricts and rejects these rights and does not allow them to be misused.[285] This is also the concept of militant democracy, as reflected in Article 17: the "abuse clause" [286] of the convention. The basic notion of militant democracy also imposes limitations on the rights of individuals who disrespect other people's rights.[287] Article 17 of the European Convention on Human Rights applies to all the rights mentioned in the convention equally. The notion of militant democracy does not harm or restrict rights in a normal situation; however, it restricts the rights of those who become intolerant towards others' rights, which, as considered in the previous section, could involve using freedom of expression to promote hate.[288] Hence, the notion of militant democracy helps the state to run the government constitutionally.[289] It is pertinent to understand here the difference between militant democracy and ordinary limitation clauses.

Every section which explains and elaborates the right also contains an ordinary limitation clause, which explains the situation and criteria to limit that right.[290] The abuse clause in the section allows space for interpretation of the Article and can often lead to the expansion of the principle. In this scenario, the European Convention on Human Rights[291] whose Article 17 was established to deal with these issues, often comes under the ordinary limitation clause domain. In this scenario, militant democracy also emphasises the social and political aspects of life,[292] and only allows to derogation from the rights which are essential to be limited. Furthermore, militant democracy measures usually affect only some citizens directly.[293] Militant democracy measures are implemented independently, case by case. These measures are not allowed to be

[285] Michael Ignatieff and Anthony Appiah, Human rights as politics and idolatry (Princeton University Press 2003) p 125.
[286] Article 17 reads as follows: Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention ……
[287] Benjamin Barber, *Strong democracy: Participatory politics for a new age* (Univ of California Press 2003).
[288] Hurst Hannum, Autonomy, sovereignty, and self-determination: the accommodation of conflicting rights (University of Pennsylvania Press 2011).
[289] Michael Freeman, Human rights (John Wiley & Sons 2017) p 87.
[290] If to consider the European Convention of Human Rights, the most frequent Articles invoked in militant democracy related cases were Articles 10 and 11 (freedom of speech and freedom of association respectively). For more details see Harvey, 'Militant democracy and the European convention on human rights'- 420.
[291] Article 17 is used by the European Convention of Human Rights more often to declare the case inadmissible; therefore there is not much of jurisprudence on the scope and manner of application of this provision.
[292] Donatella Della Porta, Social movements, political violence, and the state: A comparative analysis of Italy and Germany (Cambridge University Press 2006) p 124.
[293] Gabriel Abraham Almond and Sidney Verba, The civic culture: Political attitudes and democracy in five nations (Princeton university press 2015) p 217.

utilized on a political community.[294] Hence, militant democracy measures always include the involvement of the State as a party,[295] and do not deal with cases on an individual basis.[296]

The differences outlined above illustrate the distinctions between a militant democracy state and a state of emergency.[297] In very rare scenarios, a state of emergency is introduced in stable democracies.[298] This is usually for a short period of time only, in contrast to militant democracy measures, which take longer,[299] remaining in place until the threat vanishes. A state of emergency is declared in response to the occurrence of a disaster. There is traditionally a strictly prescribed mechanism declaring a state of emergency[300]. Militant democracy, on the other hand, is a concept which prides itself on taking pre-emptive action and making decisions in advance. It is important to understand that the disparity between these two systems becomes vague and disappears in certain areas. As stated earlier, the state of emergency can be used when a state declares an emergency in connection to riots, violence and vehemence, which are caused because of political unrest.[301] The measures of militant democracy cannot be used in such circumstances. In a highly sensitive situation, a state of emergency can be declared to tackle the unrest and the notion of militant democracy remains within the constitutional framework.[302] In any case, the distinctions are obvious. Principally, the state of emergency can be declared in response to the outbreak of chaos, riots and unrest in the society[303] and militant democracy before the incident happens. At the time of the application of both measures, human rights and fundamental freedoms can be suspended.[304] However, there are only a few qualified rights[305] which can be suspended at the time of emergency, while others remain functioning.[306] Militant democracy is designed to eradicate the intolerant group permanently (or at least

[294] James Raymond Vreeland, 'The effect of political regime on civil war: Unpacking anocracy' (2008) 52 Journal of conflict Resolution 401.
[295] Wilkinson, *Terrorism versus democracy: The liberal state response* p 234.
[296] Ibid.
[297] For brief overview of state of emergency see Norman Dorsen, Michel Rosenfeld, Andras Sajó, Susanna Baer (Eds.), Comparative Constitutionalism: Cases and Materials 328-349 (2003).
[298] Arend Lijphart, Patterns of democracy: Government forms and performance in thirty-six countries (Yale University Press 2012).
[299] Ibid.
[300] For details see Oren Gross & Fionnuala Ni Aolain, Models of Accommodation, in Oren Gross & Fionnuala Ni Aolain, Law in Times of Crisis. Emergency Powers in Theory and Practice 54 (2006).
[301] Wilkinson, Terrorism versus democracy: The liberal state response 245.
[302] Oren Gross and Fionnuala Ní Aoláin, Law in times of crisis: emergency powers in theory and practice, vol 46 (Cambridge University Press 2006).
[303] Wilkinson, *Terrorism versus democracy: The liberal state response*
[304] Gross and Aoláin, *Law in times of crisis: emergency powers in theory and practice*
[305] European Convention of Human Rights Article 8 to Article 12.
[306] See for example Article 4(2) of the International Covenant on Civil and Political Rights; Article 15 of the European Convention on Human Rights.

temporarily) from the political arena. This is one of the reasons why critics describe militant democracy as a self-contradicting thought, meaning that this notion limits rights and freedoms in order to secure its own existence,[307] and in its own way. A modern example to illustrate this is in Turkey, where this notion of militant democracy created an unpleasant political situation by placing restrictions on one political party under the so-called "spare-party" system.[308]

Now, if the state banned political parties, it could be a cause of embarrassment for the state if the banned party were popular and had many supporters (such as the Refah party). Some critics believe that preventive measures can cause societal chaos, unrest and anxiety, as "fear breeds repression [...], repression breeds hate".[309] However, advocates of militant democracy reject criticisms that show the weak side of this doctrine.[310] They justify their thoughts by citing that militant democracy only acts against those who are intolerant and dangerous to the society and not against those who respect democracy.[311] Ultimately, it is the judiciary who must decide whether militant democracy norms have violated any rights or damaged any freedom.[312] The principle of militant democracy is based on the notion of Rule of Law and protected by the constitution of the state.[313]

The "Strasbourg institutions have generally been accepting of limitations imposed on self-avowed racists".[314] Although these decisions assist in assessing the international legality of the means chosen to combat threats to democracy, they provide less guidance on what could

[307] Otto Pfersmann Pfersmann, 'Shaping Militant Democracy: Legal Limits to Democratic Stability'at 211

[308] Dicle Kogacioglu, Progress, Unity, and Democracy: Dissolving Political Parties in Turkey, 38 Law and Society Review 3 (2004); at 435, "In the post 1980 era, parties that speak for politically engaged Islamic or Kurdish sentiments operate under the somewhat normalized threat of dissolution (Shambayati 2003). In fact, the prospect of a Constitutional Court case against a party with Kurdish or Islamic tendencies is so normal that in recent years an interesting strategy of founding what is called "a spare party" has emerged. For example, in March 2003, HADEP (Halkin Demokrasi Partisi the People's Democracy Party) was dissolved. HADEP was the fourth in a line of likeminded pro-Kurdish political parties, each founded in the aftermath of the dissolution of the previously existing one, itself to be dissolved later. A few days before the dissolution, members of HADEP revoked their association with the party and joined DEHAP (Demokratik Halk Partisi the Democratic People's Party). This latter party was specifically founded as a "spare party" that members could join to resume political activity in case the main party was dissolved. However, this strategy of reemergence on the part of the banned political parties has not gone unrecognized by the Constitutional Court. The day HADEP was dissolved, the prosecutor initiated a Constitutional Court case against DEHAP as well, again seeking dissolution" P 436.

[309] Whitney v. California, 274 US 357, at 375 (1927). Cited in Andras Sajo (Ed.), Militant Democracy 47 (2004), at 214.

[310] Andras Sajo (Ed.), Militant Democracy 47 (2004), p 211.

[311] Jerome H Skolnick, Justice without trial: Law enforcement in democratic society (Quid pro books 2011).

[312] Ibid.

[313] Macklem, 'Militant democracy, legal pluralism, and the paradox of self-determination' p 290.

[314] For a critical analysis of the ECtHR jurisprudence see Eric Heinze, "Viewpoint Absolutism and Hate Speech" (2006) 69 (4) Modern Law Review 543-582.

constitute a threat to democracy so grave that a state may deviate from traditional democratic norms and assume a pre-emptive militant stance. Article 17 of the ECHR provides some insight into this question. It stipulates that the convention does not confer on "any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms"[315] enshrined in the convention. In the early years of the convention, the European Commission relied on Article 17 in its support of West Germany's ban on the German Communist Party, as well as its exclusion of individuals who distributed racist pamphlets from participation in an election".[316] Article 17 suggests that a state might be entitled to act in a militant manner toward associations or organizations that aim to destroy the rights and freedoms enshrined in the convention, but it fails to stipulate any criteria for determining whether an organization or association fits this description.

The recent case of Norwood v. UK[317] is another important case, where a member of the British National Party was convicted of an offence under the Public Order Act 1986 for displaying a poster that contained a photograph of the Twin Towers in flames and a crescent and star in a prohibition sign. The poster carried the words "Islam out of Britain – Protect the British People". The European Court observed that making hostile comments about somebody's race or ethnicity is tantamount to criticising a person for what he or she is, which might also hold true with regard to one's religion. The Court therefore declared that the words and images contained in the poster amounted to a public attack on the entire Muslim population in the United Kingdom. In sum, the European Court has so far taken a robust approach against all forms of expression that spread, promote, encourage or justify hatred based on intolerance (including religious intolerance), discrimination or racism.

2.4 The significance of Freedom of Expression in a democratic society

Freedom of Expression is one of the basic human rights in documents regarding international human rights.[318] It remains an integral element of a democratic society.[319] One can decide

[315] Poorna Mishra, 'Truth on Trial: Law, Memory, and Freedom of Expression in Europe' (2018) 5 SOAS LJ 40.
[316] K.D.P. v. Germany, 1 Y.B. Eur. Conv. H.R. 222 (Eur. Comm'n on H.R.). See also X v. Austria.
[317] Norwood v. United Kingdom, App. No. 23131/03 (2004).
[318] Freedom House, Freedom in the world 2014: The annual survey of political rights and civil liberties (Rowman & Littlefield 2014).
[319] Ibid p 165.

whether a society is of a democratic nature by looking at the individual's rights to speak.[320] Many international documents guarantee the right to freedom of speech and expression.[321] Freedom of Expression is protected in the Universal Declaration of Human Rights (UDHR). Its Article 19 says that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".[322] Similarly, the European Convention on Human Rights Article 10 protects freedom of expression in the following way: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".[323] Similarly, Article 19 para 2 and 3 of the International Covenant on Civil and Political Rights (ICCPR) affirm:

> Everyone shall have the right to hold opinions without interference; everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[324]

However, in the war on terrorism, the government has the duty to protect citizens with security from the threat posed by terrorists.[325] Nonetheless, laws established to counteract terrorism can forbid legitimate forms of political expression, such as protests.[326] With respect to the individual, freedom of expression is a "key to the development, dignity and fulfilment of every person".[327] The ability to openly share perspectives and opinions without consequences is vital for personal development; it encourages members of society to acquire and share new concepts with each other. It can serve to deepen an individual's understanding of the world and assist them in grasping complicated concepts. Freedom of expression is known as the cornerstone of

[320] Ibid.
[321] Alison Dundes Renteln, International human rights: universalism versus relativism (Quid Pro Books 2013).
[322] See The UDHR (1948), Article 19.
[323] See The European Convention of Human Rights (1950), Article 10, paragraph 1.
[324] ICCPR (1966), Article 19, paragraph 2.
[325] Jessica Wolfendale, 'Terrorism, security, and the threat of counterterrorism' (2007) 30 Studies in Conflict & Terrorism 75.
[326] Ibid .
[327] Description by Article 19, www.article19.org.

democratic rights and freedoms,[328] and is also considered the "lifeblood of democracy".[329] It represents the right to obtain information and to express opinions, giving members of the public a platform to share their views and perspectives. Freedom of expression, as mentioned in Article 10[330] of the European Convention on Human Rights, is a qualified right. This protects the state from liability in times of emergency. Several states have taken action to limit freedom of expression under the guise of counter-terrorism policies.

It is important to recognize that there is no freedom which can be exercised without restraint. Although the limits of these rights need to be more precise, there are restrictions elaborated upon in all international documents which should be adhered to. According to ICCPR, "there are two key categories of restrictions that limit freedom of expression: for respect of the rights or reputations of others; for the protection of national security or of public order (order public), or of public health or morals".[331] The restriction of rights can only be enforced when there is a real threat of harm, and moreover can only be initiated by law.[332] The European Convention on Human Rights has mentioned in Article 10 (2) some restrictions which can be implemented by states at the time of an emergency after fulfilling the formalities prescribed by the law: this right can be limited in the interests of national security, territorial integrity or public safety; for the prevention of disorder or crime, for the protection of health or morals; for the protection of the reputation or the rights of others; for preventing the disclosure of information received in confidence; for maintaining the authority and impartiality of the judiciary.[333]

2.5 Counter-Terrorism Laws and Freedom of Expression in EU States

It is pertinent to mention here that the Counter-Terrorism Laws and policies are legitimised under the notion of militant democracy. I must say that limiting the rights of the individual shall satisfy two key preconditions: it should be an established statute and be required in a

[328] Hannes Cannie and Dirk Voorhoof, 'The abuse clause and freedom of expression in the european Human Rights convention: an added Value for Democracy and Human Rights Protection?' (2011) 29 Netherlands Quarterly of Human Rights 54.
[329] Lord Steyn in R. v. Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115, at 126.
[330] Article 10 of ECHR – Freedom of expression.
Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
[331] Ibid (N 279) paragraph 3.
[332] Cass Sunstein, 'Democracy and the problem of free speech' (1995) 11 Publishing Research Quarterly 58.
[333] The European Convention of Human Rights (1950), Article 10, paragraph 2.

democratic society.[334] Therefore, the guidelines of the Convention strictly interpret these requirements set out in the European Courts of Human Rights.[335] Article 10(2) of the European Convention on Human Rights says that the exercise of freedom of expression brings with it "duties and responsibilities".[336] Restrictions placed on the freedom of expression can be justified under Article 10(2) and Article 17[337] of the European Convention on Human Rights. However, before authorizing any constraints placed on freedom of expression, it is essential to refer to Article 10.[338] The extreme racist views shared amongst many are likely to be protected if the intention is to expose and explain, instead of it being used to promote those views.[339] This is because it defies principles based on tolerance, pluralism, and receptivity.

Counter- Terrorism "laws and policies must be judged and evaluated by the Courts".[340] Its most recent visible manifestation is the raft of antiterrorism legislative initiatives that many states introduced in the wake of the events of September 11, 2001. More traditional manifestations of militant democracy include hate-speech legislation, the banning of political parties, restrictions on mass demonstrations, and the criminalization of certain political organizations. Introduced to combat extremist political agendas that threaten peace, security, and democratic order, these initiatives typically interfere with the exercise of individual human rights, such as freedom of expression, opinion, religion, and association, or rights to counsel or a fair trial, in the name of democratic self-preservation. Although human rights often give way to countervailing state interests in a constitutional democracy, the cumulative effect of such initiatives is a dramatic recalibration of the legal relationship between the individual and the state: a phenomenon that is occurring, although unevenly, in all European democracies.

In reference to the United Kingdom, in the *Handyside* case, the ECtHR acknowledged the involvement of the media in highlighting political matters and issues related to public interest. The content of their words becomes a voice to freely express issues of public interest and to be

[334]Montserrat Guibernau, 'Secessionism in Catalonia: After Democracy' (2013) 12 Ethnopolitics 368.
[335] Ibid.
[336] Cannie and Voorhoof, 'The abuse clause and freedom of expression in the european Human Rights convention: an added Value for Democracy and Human Rights Protection?'.
[337] This Article describes and prevents the 'abuse of rights'. Also see, for example, Le Pen v. France. Application No. 18788/09, 20 April 2010; Féret v. Belgium. Application No. 15615/07, 16 July 2009. Judgments available in French only.
[338] Ibid (n 192).
[339] Jersild v. Denmark [1994] 19 EHRR 1.
[340] Yigal Mersel, 'Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era' (2005) 38 NYUJ Int'l L & Pol 67.

heard. In the court's view, pluralism is essential in allowing the scope of freedom of expression to flourish, which in turn is vital to the democratic society.[341] According to the court:

> …it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[342]

In Porubova v Russia, the court reiterated this principle in the statement which describes that under Article 10 sub-section-2 of the Convention very strong reasons are required to justify restrictions on political speech or debates on questions of public interest.[343] Similarly, in Piermont v France, the court recognised that "a person opposed to official ideas and positions must be able to find a place in the political arena".[344] In Erdoğdu and İnce v Turkey, the court found a violation of Article 10 and declared that interviewing a sociologist in order to publicise the political situation in South East Turkey should not be considered to be aggravating Kurdish Patriot sentiment in the area. On this matter, the court stated:

> Domestic authorities in the instant case failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them.[345]

The basic principle of democracy is to give everyone their due right,[346] and it is also an established principle that without the normative role of a sovereign, it is difficult to establish rule of law in a society. Autonomy, human rights and democracy are interconnected with each

[341] Jeffrey A Brauch, 'The margin of appreciation and the jurisprudence of the European Court of Human Rights: threat to the rule of law' (2004) 11 Colum J Eur L 113 p 145.
[342] Handyside v United Kingdom, para 49. See also Jersild v Denmark, App no 15890/89 (European Convention on Human Rights, 23 September 1994), para 37.
[343] Porubova v Russia, App no 8237/03 (European Convention on Human Rights, 8 October 2009), para 42.
[344] Piermont v France, App no 15773/89 (European Convention on Human Rights, 27 April 1995), para 76.
[345] Erdogdu and Ince v Turkey, App no 25067/94 (European Convention on Human Rights, 8 July 1999), para 51. For a recent case, see Çamyar and Berktaş v Turkey, App no 41959/02 (European Convention of Human Rights, 15 February 2011), paras 37-38.
[346] Ezetah R, 'The Right to Democracy: A Qualitative Inquiry.' (1997) 22(3) Brook J Int'l L 495.

other by democratic society. Freedom of expression is a very delicate right and should be dealt with appropriately, therefore allowing it to remain protected from ill intentions from government and other influential persons. Violation of human rights can also be caused by unlimited freedom, such as infringement of public health and morals.[347] According to the European Convention on Human Rights, speech shocks can be classified as protected speech.[348] However, defamation of a public official or a well-known celebrity is categorised as protected speech.[349] For the benefit of democracy, it is paramount to discuss alternative opinions on public matters. In the case of *Lingens v Austria*[350] the European Convention on Human Rights concluded that it is appropriate for a politician to face more criticism than the normal individual. This allows journalists to openly criticize politicians, so that they can maintain their professional reputation. It contrasts with libel laws which make it permissible to prosecute journalists who criticize public personalities.[351] The right to speak is one of the most essential elements of a democratic state.[352] It plays a significant part in making and developing society.

2.6 Freedom of expression and United Nations, General Comment 34

The United Nations general comment no. 34 addresses the importance of the freedom of expression and replaces the general comment no. 10 in its nineteenth session. These comments reiterated that freedom of expression is an essential condition for the complete growth of the person and is indispensable for the society. Furthermore, the freedom of expression establishes the basic cornerstone for every free and democratic society. Hence, they provide an essential condition for the understanding of the norms of transparency and accountability that are vital for the elevation and safety of human rights. Among others, articles mentioned in the International Covenant on Civil and Political Rights (ICCPR) that contain guarantees for

[347] See the case of Handyside v. United Kingdom, Application no. 5493/72, Judgment, Strastbourg, 7 December 1976, Mr. Richard Handyside, proprietor of "Stage 1" publishers, purchased British rights of "The little red schoolbook", written by S. Hansen and J. Jensen and published, as of 1976, in European and non-European countries. Its chapter on Pupils contained a twenty-six-page section concerning "Sex". He also placed advertisements for the book. The book became subject of extensive press comment.
[348] Dirk Voorhoof and Hannes Cannie, 'Freedom of Expression and Information in a Democratic Society' (2010) 72 International Communication Gazette 407.
[349] Ibid, speeches mentioned here after are not protected, and not allowed by any law, e.g. Obscenity, Fighting words, Defamation (including libel and slander), Child pornography, Perjury, Blackmail, Incitement to imminent lawless action, True threats, p 409.
[350] See the case of Lingens v. Austria, Application no. 9815/82, Judgment, Strasbourg, 8th July 1986
[351] Roger Kiska, 'Hate speech: A comparison between the European Court of Human Rights and the United States supreme court jurisprudence' (2012) 25 Regent UL Rev 107.
[352] Ibid.

freedom of opinion and/or expression are Articles 17, 18, 25 and 27. The obligation to respect freedoms of opinion and expression is binding on every State party as a whole.

Comment 34 also imposes an obligation on the States parties to provide the Committee, in accordance with reports submitted pursuant to Article 40, with the relevant domestic legal rules. Furthermore, the states are also under obligation that their administrative practices and judicial decisions, as well as relevant policy level and other sectorial practices relating to the rights protected by Article 19, take into account the issues discussed in the present general comment. They also should include information on remedies available if those rights are violated.

It is pertinent to mention here that General Comment 34 clarifies the legitimate grounds for restricting the right to freedom of expression, and how such restrictions must conform to the strict tests of necessity and proportionality. The legitimate grounds for restriction listed in the ICCPR are:

a. For respect of the rights or reputations of others; and
b. For the protection of national security or of public order, or of public health or morals.

In reference to these restrictions, General Comment 34 (para 35) highlights that "When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat".

However, before sanctioning these restrictions, the whole of Article 10 must be taken into account. For instance, the representation of extreme racist views is likely to be protected if the intention is to expose and explain them, rather than to promote those views.[353] Some scholars are of the opinion that freedom of expression should not be protected if it is incompatible with an open and progressive society that is based upon tolerance and pluralism.[354] For instance, Article 10 should not be used to condone Holocaust denial or the expression of extremist anti-

[353] Jersild v. Denmark [1994] 19 EHRR 1.
[354] Will Kymlicka and Wayne Norman, 'Return of the citizen: A survey of recent work on citizenship theory' (1994) 104 Ethics 352.

democratic ideas.[355] In the UK, prior to the implementation of the Human Rights Act 1998 (HRA), there was no general statutory protection of freedom of expression. It was a part of the "residual liberty" enjoyed by everyone, or as observed by the "Master of the Rolls" in the *Spycatcher* case, there was a law which established that "the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or by statute".[356]

In these contents, it is important to state that the freedoms are divergent, and as a result, one's thoughts and expressions can, without doubt, lead to penalties for others. In these scenarios, they can be legitimately fixed by society. Freedom of thought and freedom of expression are undeniably linked, as they are both "…almost of as much importance as the liberty of thought itself and resting in great part on the same reasons".[357] Here, I emphasize that if a person holds and expresses views that are harmful to others, then the State can interfere; however, it must prevent harm to everyone as well as proving to be more beneficial than if it were not to interfere at all. To create a clear distinction between certainty and truth, "absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological"[358] must be in place. Hence, the strong judgement on some opinions being false should not suppress the expression of these views. Not only will this express our obsession with being right, but it will also prove that we are infallible.

2.7 The European Convention of Human Rights, Militant Democracy and Extreme Expressions

There is no other law that implements as many restrictions as the European Convention on Human Rights.[359] The European Court of Human Rights has also taken the measures of militant democracy, as the Right to Freedom of Expression and its Limitations under the European tradition does not regard freedom of expression as an absolute value. As can be observed from the early case laws, the system acknowledges certain limitations to the right of freedom of

[355] Glimmerveen v. Hagenbeek v. Netherlands. Application Nos 8348/78 and 8406/78 [1979] 18 DR 187.
[356] Attorney General v. Guardian Newspapers (No. 2) [1990] 1 AC 109, at page 178F. The Spy-catcher case concerned the publication of a book called Spy-catcher: the candid autobiography of a senior intelligence officer which was co-authored by a former MI5 officer. The book was first published in Australia but the allegations it made were blocked from publication in England.
[357] Ten, C. L. "Mill and Liberty." *Journal of the History of Ideas* 30, no. 1 (1969): 47-68.
[358] Ibid page 52.
[359] Malanczuk, *Akehurst's modern introduction to international law*, p 97.

expression, as envisaged under Article 10 (2).[360] Yet, within these limitations, extremist expressions are not enlisted as a specific category, but these limitations have the potential to damage the individual's freedom of expression.

2.7.1 Limitations Based on Extreme Expressions

As noted earlier, "the European Convention does not specifically prohibit hate speech. The victims of hate speech cannot invoke the non-discrimination clause prescribed in Article 14 of the Convention either; for unlike the ICCPR, the non-discrimination clause under the European Convention is not free standing. In other words, Article 14 prohibits discrimination in connection with the enjoyment of other substantive rights set forth in the Convention. Although Protocol 12 to the Convention is not parasitic and does not require claims of discrimination attached to other substantive rights, it does not prohibit discrimination by private parties. Therefore, this clause does not provide sufficient means to challenge Extreme Expressions (hate speech) effectively. The European Commission in a number of decisions invoked Article 17 and Article 14 of the Convention to allow governments to prohibit and prosecute people who exercise their right to freedom of expression or association with the aim of destroying other rights."

In this context, I will take the case of Glimmerveen and Hagenbeek.[361] In this case, there was a distribution of racist leaflets, and it was considered to be beyond the final limit of the protected expression, and hence the application was declared manifestly ill-founded. Similarly, in another case,[362] it was held that "National Socialism is a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17".[363]

I must concur that the case of Garaudy[364] "is also quite illustrative of the strict approach of the European Court towards the revisionist theories. In that case, the applicant, who was the writer of the book *The Founding Myths of Modern Israel*, was convicted of disputing the existence of

[360] Cannie and Voorhoof, 'The abuse clause and freedom of expression in the european Human Rights convention: an added Value for Democracy and Human Rights Protection?'
[361] 4 Eur. Ct. H.R. 260 (1979).
[362] Sandra Coliver, Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 20 HuM. RTS. Q. 12, 14 (1998).
[363] Majid Nikouei and Masoud Zamani, 'Jurisprudence of Tolerance: Hate Speech, Article 17 and Theory of Democracy in the European Convention on Human Rights' (2019) 8 International Human Rights Law Review 67
[364] Garaudy v. France, App. No. 65831/01 (2003).

crimes against humanity, racial defamation of a group of people, the Jewish community, and inciting racial hatred. The applicant, inter alia, complained under Article 10 of the European Convention that his right to freedom of expression was violated. The Court, however, decided that the case was inadmissible, for it fell into the category of prohibited aims under Article 17 of the Convention.[365] This judgment clearly reflects the underlying philosophy of the European system in which free speech is not regarded as an end in itself, but one of the important tools for the establishment of democratic societies. Perhaps the most significant case highlighting such philosophy is Jersild v. Denmark,[366] where the conviction of a journalist, for aiding and abetting the dissemination of racist views in a televised interview that was conducted with the members of an extreme right-wing group called the *Greenjackets,* was considered to violate the right to freedom of expression. In the interview the members of the racist group made abusive and derogatory remarks about immigrants and ethnic groups. While the interview was edited down to a few minutes, some of these racist remarks were retained and broadcasted. The programme was introduced by addressing a discussion about racism in the country and the motives behind such a reality."

Although human rights often give way to countervailing state interests in a constitutional democracy, the cumulative effect of such initiatives is a dramatic recalibration of the legal relationship between the individual and the state: a phenomenon that is occurring, albeit unevenly, in all European democracies. Here the most important question arises: what if the state, which is taking the measures of militant democracy, protects the society from aggression but damages its fundamental rights? No doubt, there are rules to limit these rights, but what if states with a poor human rights record use them as a shelter to fulfil their ulterior motives?

2.8 Conclusions

The analysis of the historical background, features, concept and paradoxes of militant democracy in this chapter have helped advancing the main argument of this thesis which is that

[365] The Court noted that: "denying the reality of clearly established historical facts, such as the Holocaust ... does not constitute historical research akin to a quest for the truth.... [T]he real purpose [is] to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others", Garaudy v. France, App. No. 65831/01 (2003) para 23.
[366] Jersild v. Denmark, App. No. 15890/89 (1994).

the doctrine of militant democracy is integral to the security of the democratic society; however, it is challenging and difficult as well. This chapter argued that the doctrine of militant democracy, which legitimizes Anti-Terrorism Laws,[367] is not always compatible with the freedom of expression and how international and national institutions evaluate this doctrine.

The chapter argued that there is no alternative system in place that can save the core of the constitution at the time of an emergency. The doctrine reveals that the democratic society should not tolerate intolerant people. The chapter also explored the crime of terrorism: a major threat that ruins lives and disturbs peaceful relationships amongst countries. International law, arduously formulated over centuries, is the common backbone of an international directive founded on justice and tranquillity: a situation in which terrorism has no dwelling. Hence, the archetypal movement inferred by the "war on terrorism" strives to implement and exercise strong actions against the terrorist foe. The risk created by the fear of a terrorist threat ensured that no state is yet ready to compromise on national security issues, nor on fundamental rights. However, in practice, it has the potential to harm the most fundamental components of the international protection and human rights.

This chapter also argued that the militant democracy is an interpretive instrument, and is not yet defined in any precedent. Despite the historical merits of "militant democracy" as a response to the challenge of transition, demographic change and regional evolution may well imply the re-evaluation of prevailing rights-protection principles, both in relation to domestic constitutional practice and at the regional level. As examined in the chapter, national crime and prevention policy may not always be effective in the war on terrorism. It has no preventive mechanisms, for it is a policy that only acts after an incident has occurred.

The chapter further concluded that there exist some reservations in the interpretation of militant democracy and the way it is applied by some states. It is observed that this doctrine has been misused by states with poor human rights records. This can also be attributed to international institutions failing to delineate the parameters of militant democracy, leaving states at liberty to interpret this principle according to their constitutions. Arguably, these actions have dragged humanity into the draconian era once again and further leave qualified rights at risk of abuse from the state.

[367] Howell and Lind, *Counter-terrorism, aid and civil society: Before and after the war on terror*.

In relation to Article 10 of the European Convention on Human Rights, this chapter suggested that freedom of expression is one of the fundamental rights that enjoy special protection. Intervention on freedom of expression must have a legitimate aim to protect one or more of the public interests, such as national security, territorial integrity or public safety, the protection of public order and the prevention of crime, or the threat of terrorism.[368] However, "in spite of the comprehensive legal framework, in practice there are many cases where freedom of expression is violated, raped or deprived.[369] "The judiciary has to act wisely. The judiciary, as the curator of the constitution and the custodian of human rights, has to shoulder two major issues: threats to the state's security and the rights of the individual. A balance between the two has to be made by the judiciary in this specific scenario. The chapter also showed how, as a custodian of fundamental rights, the judiciary is tasked with preventing the violation of human rights and fundamental freedoms by the misuse of militant democracy. Modern anti-terrorism laws are the new policies of militant democracy principles, in a system of parliamentary sovereignty. Hence, the judiciary, through the system of judicial review, has to check the balance between the state's actions and the rights damaged. Essentially, it must assess whether the purpose of the restrictions on the human rights is equal to the threshold of harm, and whether the objective has been obtained by the restriction.

Moreover, such a development would be important on the road to shaping European consensus in these vital areas of freedom of expression and association. Finally, to whatever extent Europe continues to deploy militant supervision, or a "rights balancing" approach, at the very least, minimal rule of law guarantees require that constitutional principles should be applied equally to diverse religions in the public sphere, certainly on a threshold basis for guaranteeing the legitimacy of whatever ultimate European normative scheme is established. "Evaluation of the High Contracting Parties to limit the right to freedom of expression depends on the nature and purpose of the restriction, and on limited nature of expression";[370] however, the contracting parties have been found guilty on a number of occasions.[371] In all of the scenarios set out earlier,

[368] William Abresch, 'A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya' (2005) 16 European Journal of International Law 741 p 748.
[369] Jeremy Lipschultz, Free expression in the age of the Internet: Social and legal boundaries (Routledge 2018).
[370] Ian Cram, *Contested words: legal restrictions on freedom of speech in liberal democracies* (Routledge 2016) p 78.
[371] C MacCallum Gerald, 'Negative and positive freedom', Power, Authority, Justice, and Rights (Power, Authority, Justice, and Rights, Routledge 2017).

the judiciary has a vital role to perform, which is firmly discussed in upcoming chapters. In a judicial system, judicial review is a tool to check the *ultra vires* acts of the government and uphold the Rule of Law. This system has many modes, which can be used to assess the irregularities made by the state. I do not intend to discuss all of these modes, but will use some of them for reference when comparing with proportionality as a tool of judicial review. The next chapter is essential in the context of the above arguments, as it is based on the issue of whether the doctrine of proportionality is one of the very important tools to create a balance between the interest of the society and the right of the individual. The significance of proportionality and its importance is analysed.

CHAPTER THREE:
The Legal History of the Doctrine of Proportionality: a Critical Analysis

3.1 Introduction

In the previous chapter, I established that using the doctrine of militant democracy to protect society from the threat of terrorism is vital, indispensable and timely Important. However, this doctrine is an interpretive instrument and sometimes states use it to fulfil their ulterior motives while damaging the fundamental rights of the individual. In Europe, the ECtHR and domestic courts at national level are duty bound to save these fundamental rights. Moreover, this analysis also revealed that the acceptance today of a robust conception of the rule of law and the legitimacy of the judiciary offers the potential for the emergence of an alternative to post-war vigilance, with extreme militancy and strong "republicanism" replaced by a more nuanced approach to the balance of values where individual rights meet the public space.

Principally, in this chapter, I assess the proportionality principle in the framework of EU law from a legal, theoretical and constitutional perspective with the aim of analysing further the function of this principle. It is pertinent to mention here that the UK has not accepted this doctrine of proportionality as a general criterion of review. Therefore, I will discuss the implications of the proportionality principle being a general principle of law, and what function it has, namely to secure legitimacy for judicial decisions. I suggest that there are several ways in which the principle can be interpreted. But first, this chapter analyses the doctrine of proportionality from its historical perspective as a tool that mediates between the Council of Europe (with its emphasis on the rights of the individual) and the UK (with its focus on protecting society from aggression). Thus, it addresses the question of how the doctrine of proportionality is used as a tool to simultaneously balance the protection of the rights of the individual and the interests of society.[372] The judicial system of the ECHR and the courts in the UK will be analysed to gauge the importance of the doctrine of proportionality. The claim that this doctrine forms a theoretical framework, which further helps to explain the exact relationship between human rights and the rationale that justifies their limitations in a

[372] Moshe Cohen-Eliya and Iddo Porat, 'American balancing and German proportionality: The historical origins' (2010) 8 International Journal of Constitutional Law 263.

democratic society, will be analysed. The question of 'burden of proof' is also considered to analyse its links to the doctrine of proportionality, as it is the essential part of this doctrine.

It is pertinent to mention here that the doctrine of proportionality is a methodological and analytical doctrine,[373] in addition to a legal construction.[374] Its purpose is to protect human rights from abuse and exploitation in a manner that is in accord with democracy.[375] Examining the works of different scholars, who have substantially analysed the doctrine from different perspectives, will give us a clear picture about this doctrine. Furthermore, the viewpoints of critics of the doctrine have also been taken into account, in order to argue on the doctrine of proportionality as a broadly acknowledged notion implemented as an assessment in judicial review, and aims to examine alternate interpretations of the implementation of proportionality. I thereby argue that the proportionality principle is widely perceived as the preferred procedure for managing disputes involving an alleged conflict between two rights claims, between a rights provision and a state or public interest (constitutional law), or between a private interest and a state or public interest (administrative law). In the extent of my knowledge and understanding of the philosophical contents of this principle it is possible this one's correct applying in jurisprudence. This study is aiming to be a pleading for the possibility and usefulness of the doctrine of proportionalities philosophy in this epoch dominated by juridical pragmatism and normativism. Moreover, I have argued in this study that the doctrine of proportionality is an inclusive and deliberative methodology, and in-spite of all the criticism, this doctrine takes into consideration all interests in the review and engages in a deliberative weighing and balancing between them, rather than excluding any of them at the outset. I have also raised some possible difficulties concerning this argument in later chapters and also suggests their potential answers.

3.2 The Historical Origins of the Doctrine of Proportionality as a Tool of Judicial Review

In order to understand the authenticity of the doctrine of proportionality, it is essential to establish its origin and stages of evolution, because this will enable me to explore the use of this doctrine, which is adopted by many nations, before analysing its use in the UK's legal system. The doctrine of proportionality is of European origin: it can be traced back to 18th

[373] Alec Stone Sweet and Jud Mathews, 'Proportionality balancing and global constitutionalism' (2008) 47 Colum J Transnat'l L 72.
[374] Eric Engle, 'The history of the general principle of proportionality: An overview' (2012) 10 Dartmouth LJ 1
[375] Ibid p 331.

century Prussia,[376] after which it can be found in the German judicial system in the 19th century.[377] After the Second World War, it became integrated into the constitution of Germany, and it was later adopted by the ECHR in 1959. This doctrine makes a significant contribution to human lives, since proportionality also denotes justice;[378] it can be seen in the hands of the statue of Justice holding the scales.[379] The doctrine of proportionality also reflects balanced thought.[380] Hence, demand from ourselves and other to act proportionally is logical and justifies the need for the punishment to be proportional to the offence.[381] Thus, the notion of "an eye for an eye" is considered to be a wise response.[382] This doctrine has inspired many political and legal scholars throughout the generations.[383]

In the development of the doctrine of proportionality as a balanced concept,[384] two Greek classical principles feature prominently. The first is the principle of corrective justice (*justitia vindicativa*), and the second is that of distributive justice (*justitia distributiva*). This principle can be found in the early Roman legal system[385] and was also present in the Magna Carta 1215: "For a trivial offence a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly but not so heavily as to deprive him of his livelihood".[386]

[376] Available at http://www.economist.com/news/books-and-arts/21664055-what-made-frederick-great-prussian-and-powerful accessed on 13 March 2016 .
[377] Thomas Poole, 'Proportionality in perspective' (2010) New Zealand Law Review 369.
[378] E. M. Thomas, The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles (Cambridge University Press, 2005), 337.
[379] Dennis E. Curtis and Judith Resnik, 'Images of Justice' (1987) 96 The Yale Law Journal 1727.
[380] KennethEinar Himma, Law and morality (Routledge 2017).
[381] See Graham v. Florida, 560 US (2010) (Slip. Op. at 8) ("The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'percept of justice that punishment for crime should be graduated and proportioned to [the] offence.'").
[382] Morris J. Fish, 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment' (2008) 28 Oxford Journal of Legal Studies 57.
[383] For a discussion of proportionality in Christianity, see Garth L Hallett, Greater good: the case for proportionalism (Georgetown University Press 1995).
[384] E. J. Weinrib, 'CORRECTIVE JUSTICE' (1992) 77 IOWA LAW REVIEW 403, Poole, 'Proportionality in perspective' p 372. CHANGE TO FOLLOW THE FOOTNOTES ABOVE
[385] Izhak Englard, Corrective and distributive justice: From Aristotle to modern times (Oxford University Press 2009).
[386] Jane McManamon, 'The Origin and Migration of Proportionality' (2016) p 19.

The work of S. Thomas reveals his significant contribution in the development of this doctrine.[387] The notion *international la doctrine* of a "Just War" is a concept of the Middle Ages which makes explicit a need for principled warfare.[388]

3.2.1 The Contribution of Carl Gottlieb Svarez

In understanding of doctrine of proportionality, Carl Gottlieb Svarez's[389] contribution is significant and vital, and in this regard, the historical roots of proportionality as a public-law standard can be found in eighteenth-century German administrative law.[390] Carl Gottlieb Svarez (1746-1798) made a substantial contribution to the development of the modern principle of proportionality,[391] although never using the actual term "proportionality" – "*Verhaltnismassigkeit"* in German – in his writings.[392] Svarez was the main drafter of the Prussian Civil Code of 1794 (*Allegmeines Landrecht fur die PreuBishen*). In a series of lectures between 1791 and 1792 (known as the *Kronprinzenvortage*), he noted that in accordance with the principle tenets of the Enlightenment, the state may only limit the liberty of a subject in order to guarantee the freedom and safety of others.[393] More specifically, he emphasized the "minimum relationship" that has to exist between a social hardship to be averted and the limitation on one's "natural freedom".[394] Svarez viewed the requirements above as expressions of both reasonableness and justice.

In my view, it is an established case law that derogation from the free movement of goods, persons, services and capital is warranted only if it pursues a legitimate objective based either on either a treaty or a case law.[395] Even if this is the case, the derogation will be regarded as

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[387] Thomas Aquinas, The treatise on the divine nature: Summa Theologiae I 1-13 (Hackett Publishing 2006) p 66.
[388] For the notion of Just War, Joachim Von Elbe, 'The evolution of the concept of the just war in international law', The Use of Force in International Law (The Use of Force in International Law, Routledge 2017), Yoram Dinstein, War, aggression and self-defence (Cambridge University Press 2017).
[389] Rudolf Stichweh, 'The history and systematics of functional differentiation in sociology' (2013) Bringing Sociology to International Relations World Politics as Differentiation Theory 50.
[390] Elisabeth Zoller, 'Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution' (2003) 78 Ind LJ 567.
[391] Sweet and Mathews, 'Proportionality balancing and global constitutionalism' p 173.
[392] Ibid p 191.
[393] Ibid p 217.
[394] Carlos Bernal Pulido, 'The migration of proportionality across Europe' (2013) 11 NZJPIL 483. He wrote: "Only the achievement of a weightier good for the whole can justify the state in demanding from the individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail … The [social] hardship, which is to be averted through the restriction of the freedom of the individual, has to be more substantial by a wide margin than the disadvantage to the individual or the whole that results from the infringement"
[395] Ibid p 487.

lawful only if it is appropriate to attain the intended aim and if it does not go beyond what is necessary in order to attain it. Although a full restatement of the Court's proportionality test is beyond the scope of this chapter, it is important to point out some key features of the ECJ's proportionality assessment.[396] First, it is important to keep in mind that "there is an autonomous concept of proportionality in EU law. Even if some authors have pointed to the dominant influence of some national models, especially the German *Verhiltnismassigkeitsprinzip*",[397] the EU law variant of the test does not seem to formally follow any particular national model.

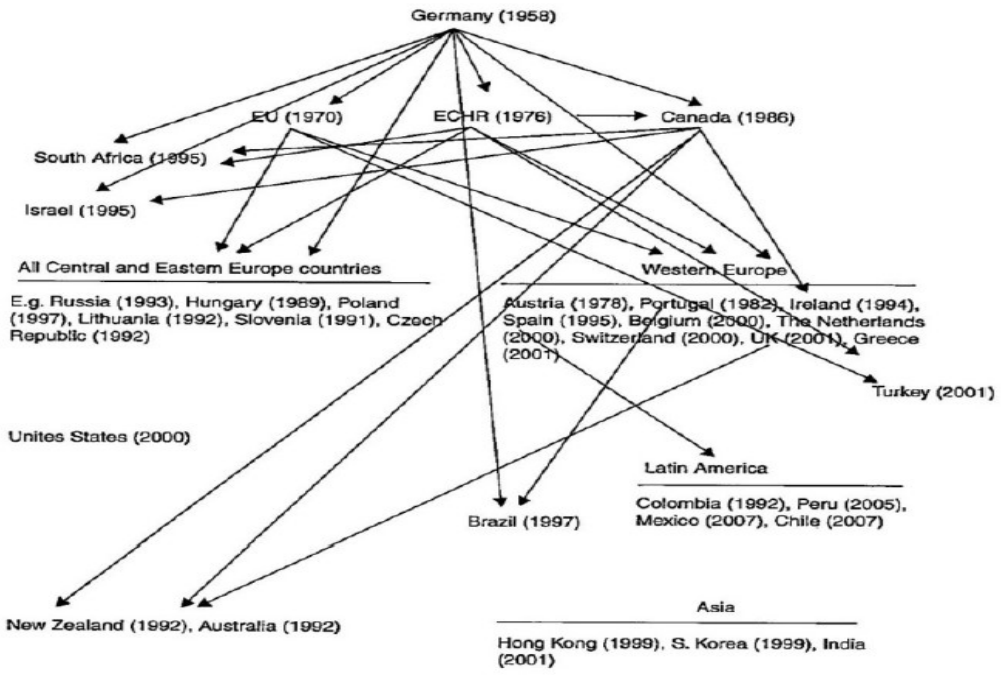

Figure No -1 **The Migration of Proportionality**

3.2.2 The Transition of the Concept of Proportionality in the European Law

As is well known, alongside the law of each of the European Union (EU) member states stands European law.[398] This law is exemplified by the European Convention for the Protection of

[396] Ibid P 493.
[397] Schwarze, J. 2006. European Administrative Law, London, Sweet and Maxwell; Van Gerven, W. 1999. The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe. In: Ellis, E. (ed.) The Principle of Proportionality in the Laws of Europe. Oxford, Portland and Oregon: Oxford University Press.
[398] Vicki C Jackson, 'Constitutional law in an age of proportionality' (2014) 124 Yale LJ 3094.

Human Rights and Fundamental Freedoms,[399] its amending protocols,[400] and several of the treaties establishing the EU.[401] There are courts which are specifically established and authorized to be the final interpreters of these documents. The European Convention for the Protection of Human Rights and Fundamental Freedoms established the ECtHR, which sits in Strasbourg.[402] The establishing treaties of the EU are interpreted and operated by the European Court of Justice, which sits in Luxembourg.[403] The relationships between the member states' courts and these European courts are complex and elaborate;[404] an examination of these relationships is beyond the scope of this work. Importantly, however, a reciprocal movement of ideas exists between the member states' courts and the European courts. Thus, legal doctrines developed by the European courts are often adopted by several of the member states, while doctrines developed by a member state court may later be adopted by the European Courts.[405]

3.3 The Rise of the Proportionality Doctrine

It is pertinent to mention that human rights are intertwined with the doctrine of proportionality.[406] The doctrine has received a great deal of respect by the various constitutional courts in the continent of Europe, the UK, Israel, Canada, New Zealand and Africa.[407] Many treaties based on the legal system have welcomed this doctrine into their constitutions, the ECtHR being one of the best examples.[408] The popularity of the doctrine as

[399] The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), ETS no,05.
[400] Protocol No. 2 (ETS No. 44), September 21, 1970; Protocol No. 3 (ETS No. 45), September 21, 1970; Protocol No. 5 (ETS No. 55), December 20, 1971; Protocol No. 8 (ETS No. 118), January 1, 1990; Protocol No. 9 (ETS No.140), October 1, 1994; Protocol No. 11 (ETS No. 155), November 1, 1998, available at http://conventions.coe.int/treaty/en/Treaties/Html/005.htm accessed on 24 Nov 2016.
[401] Treaty Establishing the European Coal and Steel Community (1951); Treaty Establishing the European Economic Community (1957); Treaty Establishing the European Atomic Energy Community (1957); Treaty on European Union (1992); Treaty Establishing the European Community (1997).
[402] Gráinne De Búrca, 'The principle of proportionality and its application in EC law' (1993) 13 Yearbook of European Law 105.
[403] Ibid p 177.
[404] Aida Torres Pérez, Conflicts of rights in the European Union: a theory of supranational adjudication (Oxford Studies in European Law 2009).
[405] Helen Keller and Alec Stone Sweet, A Europe of rights: the impact of the ECHR on national legal systems (Oxford University Press, USA 2008).
[406] Huscroft, Grant, Bradley W. Miller, and Gregoire Webber, eds. Proportionality and the Rule of Law: Rights, Justification, Reasoning. Cambridge University Press, 2014.
[407] Samuel Estreicher, 'Privileging Asymmetric Warfare (Part II): The Proportionality Principle under International Humanitarian Law' (2011) 12 Chi J Int'l L 143 p 79.
[408] Davor Šušnjar, Proportionality, Fundamental Rights and Balance of Powers (Brill 2010).

a global model[409] is increasing because of its constructive approach[410] and good practice standard of rights adjudication.[411] In the test of proportionality, the courts will quash exercise of discretionary powers in which there is no reasonable relation between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct.[412]

So, "administrative action which arbitrarily discriminates will be quashed by the court".[413] The implication of the principle of proportionality is that the court will "weigh for itself the advantages and disadvantages of an administrative action and such an action will be upheld as valid if and only if the balance is advantages".[414] If this action is disproportionate to the mischief, then it will be quashed. For the past few decades, this doctrine has received significant attention in the US judicial system, which had originally formally rejected it.[415] In an about-turn, the US Supreme Court began to apply the doctrine in a few cases.[416]

A practical, although not formally recognized, structure of the doctrine of proportionality is as follows:

"

1. Did the legislature in setting the restricting pursue a legitimate aim?[417]
2. Were the methods employed suitable for the achievement of the aim?[418]
3. Could the aim have been achieved by utilizing a less restrictive alternative?[419]

[409] John Adenitire, Kai Möller, The Global Model of Constitutional Rights (Oxford University Press 2014).
[410] Grégoire CN Webber, The negotiable constitution: On the limitation of rights (Cambridge University Press 2009).
[411] Jud Mathews and Alec Stone Sweet, 'All Things in Proportion-American Rights Review and the Problem of Balancing' (2010) 60 Emory lj 797.
[412] All Answers ltd, 'Proportionality As A Ground Of Judicial Review' (Lawteacher.net, January 2019) <https://www.lawteacher.net/free-law-essays/constitutional-law/proportionality-as-a-ground-of-judicial-review-constitutional-law-essay.php?vref=1> accessed 19 January 2019.
[413] Ibid p 63.
[414] Ibid p 67.
[415] Nicholas Emiliou, *The principle of proportionality in European law: a comparative study*, vol 10 (Kluwer Law Intl 1996) p 163.
[416] Liora Lazarus, Christopher McCrudden and Nigel Bowles, Reasoning rights: comparative judicial engagement (Bloomsbury Publishing 2014).
[417] Šušnjar, Proportionality, Fundamental Rights and Balance of Powers p 267.
[418] Emiliou, The principle of proportionality in European law: a comparative study p 166.
[419] Estreicher, 'Privileging Asymmetric Warfare (Part II): The Proportionality Principle under International Humanitarian Law'.

4. Overall, is the derogation justified in the interests of a democratic society?[420]

Proportionality as expressed by Moller, "is a doctrinal tool for the resolution of conflicts between the right and a competing right or interest at the core of which is the balancing stage which required the right to be balanced against the competing right or interest",[421] and "this conflict is ultimately resolved at the balancing stage".[422] Moller understood that different approaches existed to portray this notion by the courts in the structure of constitutional rights legislation.[423] Moller additionally acknowledged that the final conclusion to the opposition at the balancing assessment ought to be led by the court; he expressed that:

> …there exists a genuine conflict (suitability) between the right and a relevant (legitimate) competing interest (legitimate goal) which cannot be resolved in a less restrictive way (necessity).[424]

Moller was of the opinion that each step elicits a query, and requires an adequate response. Therefore, if the court wishes to establish the valid objective, the foremost duty of the court is to take into account "whether a policy or decision is objectively justifiable, no matter whether the persons who made it had the right considerations on their minds".[425] After outlining a valid objective for a certain act, the judiciary should then contemplate, "if the interference contributes to the achievement of the goal to some extent, however small, then the suitability test is satisfied because it has been established that there is indeed a clash of the two values".[426] Moller referenced the tertiary section to establish that "there must be no other, less restrictive policy that achieved the legitimate goal equally well".[427] However, he did not mention how to overcome the issue that might arise if the less limiting policy needs additional resources or finances.[428]

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[420] Alexander W Cappelen and Bertil Tungodden, 'Fairness and the proportionality principle' (2017) 49 Social Choice and Welfare 709 p 713.
[421] Takis Tridimas, 'Fundamental rights, general principles of eu law, and the charter' (2014) 16 Cambridge Yearbook of European Legal Studies 361.
[422] Kai Möller, 'Proportionality: Challenging the critics' (2012) 10 International Journal of Constitutional Law 709 p 711.
[423] Grant Huscroft, Bradley W Miller and Gregoire Webber, Proportionality and the Rule of Law: Rights, Justification, Reasoning (Cambridge University Press 2014) p 3.
[424] Möller, 'Proportionality: Challenging the critics' p 709.
[425] Ibid p 712.
[426] Ibid p 713.
[427] Ibid.
[428] Ibid p 714.

Finally, Moller expanded upon the final section of the proportionality assessment. This is also known as the equilibrating stance – "a moral argument to which of the competing interests take priority in the case at hand" – which, in the circumstance of the constitution, necessitates "balancing all the relevant considerations"[429] and governing "the sacrifice that can legitimately be demanded from one person for the benefit of another person or the public."[430] For Moller, this is the biggest challenge, as it demands the utmost degree of judgement: a substantive legal choice from the court over which of the opposing two interests is more required. Huscroft, Miller and Webber argue:

> What the principle of proportionality does promise is a common analytical framework, the significance of which is not in its ubiquity, but in how its structure influences (some would say controls) how courts reason to conclusions in many of the great moral and political controversies confronting political communities.[431]

The controversy is really about how to balance apparently incommensurable or abstract interests in an objective way. As has been indicated, there is no uniform mechanism with which to apply the doctrine of proportionality. Some courts articulate the balance stage as a comparison "of the harmful effects on a right against the importance of the objective, rather than against the beneficial effects of the limitation".[432] Other courts use this doctrinal framework without addressing the final stage;[433] while doing so, they stress that the question of "fair balance" is "inherent in the whole of a bill of rights", which can be read as being, "concerned both with the demands of the general interest of the community and the requirements of the protection of the individual's human rights".[434] The majority of the courts

[429] Ibid p 716.
[430] Ibid.
[431] Grant Huscroft, Bradley Miller and Grégoire Webber, 'Proportionality and the Rule of Law: Rights, Justification, Reasoning Introduction' (2014) .
[432] See, e.g., R. v. Oakes, [1986] 1 S.C.R. 103, at para. 71; cf. Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at 839.
[433] See de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing, [1999] 1 A.C. 6 (Judicial Committee, Privy Council), adopted by the Appellate Committee of the House of Lords in R (Daly) v. Secretary of State for the Home Department, [2001] UKHL 26; [2001] 2 A.C. 532 and Huang v. Secretary of State for the Home Department, [2007] UKHL 11; [2007] 2 A.C. 167.
[434] Soering v. United Kingdom, [1989] 11 E.H.R.R. 439 at para. 89. See also Wilson v. First County Trust Ltd, [2003] UKHL 40; [2004] 1 A.C. 816 at para. 181 (Lord Rodger).

use a systematic review approach, and while applying the doctrines of proportionality, they address each question of the doctrine. There are some courts which consider the standing of a judge to "arrive at a global judgement on proportionality and not to adhere mechanically to sequential checklist".[435] A number of judges have bound themselves to implement the current values of this notion and to only "entertain arguments relevant to one question in their answers to another".[436]

The query arises as to whether implementing restrictions on the liberty of expression can be validated by the benefit to society in highlighting tolerance and amending the damaged inflicted by racist expression. In this context, in the prevention of assisted suicide, can it be reasoned as an inherent right for people to select and choose the place and time of their death? Conversely, the law of state protection, rationalizes the creation of restrictions on the due course rights of alleged terrorist. All of these questions can be well answered by analysing them in the framework of the doctrine of proportionality. However, this does not mean that the doctrine of proportionality is a uniform principle; nor does it mean that this underestimates its significance.

> Even putting aside the difference in formulations of the doctrine and the disagreement on the importance of the framework questions, differences and disagreements that obtain not only between jurisdictions but also within any one jurisdiction, it is not clear that the different uses are mere variations on a common concept.[437]

To conclude, there are a variety of ways in which the doctrine of proportionality can be applied,[438] and essentially, there are different understandings of how proportionality functions. Proportionality is opposed and protected in multiple fashions. However, its main purpose is to check the balance between the interest of the society and the right of the individual.

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[435] S v. Manamela and Another (Director-General of Justice Intervening) (CCT 25/99) 2000 (3) SA 1 at para 32.
[436] The Supreme Court of Canada sometimes reviews the "balance of interests" in its evaluation of "minimal impairment". See, e.g., Eldridge v. British Columbia, [1997] 3 S.C.R. 624 at para. 93 and discussion in Gregorine Webber, Negotiable Constitution: On the limitation of rights (2009) p 7.
[437] For example, consider Julian River's thesis that there is a British "state-limiting" conception of proportionality and a European "optimizing" conception of proportionality: "Proportionality and Variable Intensity of Review," (2006) 65 Cambridge L.J. 174.
[438] Sweet and Mathews, 'Proportionality balancing and global constitutionalism' p 97.

3.3.1 The key elements of the doctrine of Proportionality

It is essential to understand the main components of the doctrine of proportionality first and then analyse its application. Principally, the doctrine of proportionality is based on the following components:[439] "(a) a rational connection between the appropriate goal and the means utilized by the law to attain it; (b) the 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 harm caused to the right (proportionality *stricto sensu* or the proportionate effect)".[440]

Hence, the doctrine of proportionality satisfies a binary purpose: on one side it recognizes the limitations on human rights if it is according to law, and on the other side, it subjects these limitations to certain conditions, namely those restricting from proportionality (see Figure No-2 below).

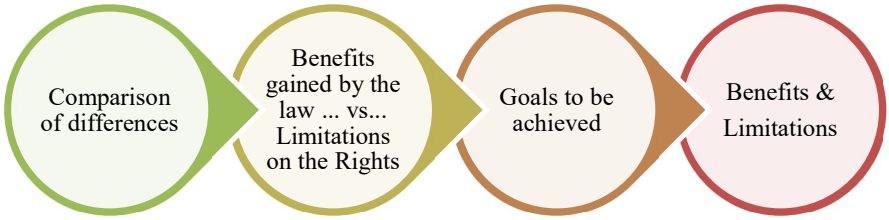

Figure No -2 The Role of proportionality

Essentially, the doctrine of proportionality reflects the principle that the constitutional rights and their limitations are the "flip sides of the same constitutional concept".[441] It demonstrates that human rights can be derogated in a prescribed manner and in accordance with the law.

[439] Gerhard Van der Schyff, 'Limitation of rights: A study of the European Convention and the South African Bill of Rights' (2005) p 125.
[440] Julian Rivers, Proportionality, discretion and the second law of balancing (na 2007), Pulido, 'The migration of proportionality across Europe' Julian Rivers, 'Proportionality and variable intensity of review' (2006) 65 The Cambridge Law Journal 174.
[441] See Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," 47 Columbia J. Trans. L. 72 (2008).

While looking into the structure of the doctrine of proportionality, I can say that it has two main elements.[442] The first is legality and the second is legitimacy.[443] In simple terms, legality denotes the limitations prescribed by the law and legitimacy means the fulfilment of compliance with the needs of proportionality.[444] It is more interested in knowing the legal situations and circumstances that allow limitation of the constitutional right.[445] In this scenario, there are two chief justificatory conditions. The first is an appropriate goal and the second is an appropriate means.[446] An appropriate goal is a threshold requirement, and in determining it, no consideration is given to the means utilized by the law for attaining the goal.[447] If the goal is proportional and it fulfils the purpose, it is acceptable and is considered to be appropriate, even if the method of achieving the goal is inappropriate.[448] The notion of proportionality consists of the following three elements: (a) "a rational connection between the appropriate goal and the means utilized by the law to attain it; (b) the 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 harm caused to the right (proportionality *stricto sensu* or the proportionate effect)".[449] Hence, the doctrine of proportionality has two key functions: the first is to legitimize the limitations on rights, and the second is to put conditions on them as directly derived from the proportionality. This doctrine demonstrates that fundamental rights and their limitations are the two sides of the same coin: i.e. the constitution.[450] It carries the message that human rights are not generally absolute but are non-derogable rights; however, it also makes clear that limitations themselves have limits.[451]

[442] Van der Schyff, 'Limitation of rights: A study of the European Convention and the South African Bill of Rights'
[443] Stephen C Neff, War and the law of nations: A general history (Cambridge University Press 2005).
[444] Judith Gail Gardam, 'Proportionality and force in international law' (1993) 87 American Journal of International Law 391.
[445] Thomas M Franck, 'On proportionality of countermeasures in international law' (2008) 102 American Journal of International Law 715.
[446] Sweet and Mathews, 'Proportionality balancing and global constitutionalism' p 76
[447] Andrew Legg, *The margin of appreciation in international human rights law: deference and proportionality* (OUP Oxford 2012)
[448] Tor-Inge Harbo, 'Introducing procedural proportionality review in European law' (2017) 30 Leiden Journal of International Law 25.
[449] Robert Alexy, 'Constitutional rights and proportionality' (2014) 22 Revus: J Const Theory & Phil Law iv p 76.
[450] See R. v. Oakes, [1986] 1 S.C.R. 103.
[451] Rivers, 'Proportionality and variable intensity of review'.

3.4 The formal role of proportionality in the constitutions of the states

This doctrine, following the evolutionary concept in Germany and in European law as demonstrated both by the ECJ and by the ECtHR, began to gain power in the laws of Western Europe's states.[452] Thus, the concept of proportionality was soon accepted in Spain,[453] Portugal,[454] France,[455] Italy,[456] Belgium,[457] Greece,[458] and Switzerland.[459] Turkey underwent a similar process.[460] In some of these countries the concept of proportionality was explicitly included as part of a constitutional limitation clause in the chapter on human rights.[461] Taking into consideration the international and national human rights law, proportionality is a general concept of international law.[462] It serves several functions; it is a central feature of the laws of self-resistance.[463]

This aspect of proportionality is unique in that it comprises part of the relations between nations, a part of the body of rights and duties owed by one nation to another. Accordingly, examining proportionality in international human rights law[464] is very important because

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[452] Keller and Stone, above note 85; A. Bortoluzzi, "The Principle of Proportionality in Comparative Law: A Comparative Approach from the Italian Perspective," in P. Vinay Kumar (ed.) Proportionality and Federalism (Hyderabad: ICFAI University Press, 2009).

[453] Article 10(2) of the Spanish constitution (1978), which reads as follow;

> "The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain".

[454] 1976, constitution S18 (2) 7th revision 92005); Thomas Fleiner, 'Switzerland: Constitution of the federal state and the cantons' (2000) Federalism and multi-ethnic states: The case of Switzerland 103.

[455] Anne Stevens, Government and politics of France (Macmillan International Higher Education 2017).

[456] Luigi Ferrajoli, 'Democracy and the Constitution in Italy' (1996) 44 Political Studies 457.

[457] Patricia Popelier and Koen Lemmens, The Constitution of Belgium: A contextual analysis (Bloomsbury Publishing 2015).

[458] S. Orfanoudakis and V. Kokota, "The Application of the principle of proportionality in the case of community and Greek Courts: Similarities and Differences" (Paper presented at the VIIth World Congress of the International Association of Constitutional Law, Athens, June 14, 2007).

[459] A general provision about proportionality may be found in Art. 5(2) of the Federal Constitution of Switzerland: "State activates must be conducted in the public interest and be proportionate to the ends sought." A more specific provision, relating to human rights, can be found in Art. 36(3): Any restrictions on fundamental rights must be proportionate".

[460] Thus, for example Art13 of the constitution of Turkey, following a 2001 amendment, provides: "fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the constitution and the requirements of the democratic order of the society and the Secular Republic and the Principle of Proportionality". See also Y. Ogurlu "A Comparative study of the Principle of proportionality in Turkish Administrative Law, "Kamu Hukuku Arsivi, kuk 5 (2003).

[461] Article 13 of the Constitution of Turkey; Art. 5(2) of the Federal Constitution of Switzerland.

[462] Michael J Wishnie, 'Immigration Law and the Proportionality Requirement' (2012) 2 UC Irvine L Rev 415.

[463] Oscar Schachter, Implementing limitations on the use of force: the doctrine of proportionality and necessity (1992), Franck, 'On proportionality of countermeasures in international law'.

[464] See A.L Svensson McCarthy, *The International Law of Human Rights and States of Exception* (*The* Hague: Kluwer Law International, 1998.) ; N. Jaama, *The Judicial Application of Human Rights Law: National, Regional, and International Jurisprudence* (Cambridge University Press, 2002)

international law is indeed one of the main contributors to the shaping of domestic law, mostly constitutional law relating to human rights. In this regard, the classic example is Article 39(1) of the South African Constitution, which reads "when interpreting the Bill of Rights, a court, tribunal, or Forum … (b) must consider international Law". Another example is Article 10(2) of the Spanish constitution (1978), which reads as follows:

> The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights[465] and the international treaties and agreements thereon ratified by Spain.[466]

Simultaneously, the domestic constitutional law regarding human rights affects the developing understanding of international norms. We are faced, therefore, with the cross-migration of human rights law. The concept of proportionality, in turn, was developed in much the same way.

3.5 The role of Proportionality in the European Convention of Human Rights

Notably, the word "proportionate" is not mentioned anywhere in the text.[467] However, some of the rights and fundamental freedoms contain the limitation clause, which recommends the protocol at the time when limiting the right.[468] Generally, this limitation clause has one principle, namely that the limitation should be proportionate to the extent "necessary in democratic society".[469] There are some rights that are not accompanied by the limitation clause which are also construed as qualified rights.[470]

[465] Universal Declaration of Human Rights1948.
[466] See the entry for "proportionality", in 7 *Encyclopedia of Public International Law* 396 (1984).
[467] Richard Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' (2001) European Human Rights Law Review 504.
[468] Barak A, 'Proportionality: Constitutional Rights and Their Limitations' (2012) 145.
[469] European Convention of Human Rights, Art 8,9,10,11, Dinah Shelton and Paolo G Carozza, Regional protection of human rights, vol 1 (Oxford University Press 2013).
[470] Golder v UK (1979 – 80) 1 European Convention of Human Rights 524, TRS Allan, 'Legislative supremacy and legislative intention: interpretation, meaning, and authority' (2004) 63 The Cambridge Law Journal 685, Rivers J, "Proportionality And Variable Intensity Of Review" (2006) 65 The Cambridge Law Journal 174.

In accordance with the Strasbourg court, the doctrine of proportionality, including its four essentials, is a key feature of human rights.[471] It first appeared in the ECtHR in a case famously known as Eissen,[472] and the judgement in which this principle was first applied was the Handyside case in 1976.[473] The court stated in this judgment that "Every formality, condition, restriction, or penalty imposed in this sphere must be proportionate to the legitimate aim perused".[474] The motivation for this wording came from rulings of the German Constitutional Court concerning the doctrine of proportionality.[475]

As previously noted, the term "proportionality" does not occur in the constituent documents that establish the law of the EU. The concept was developed by the ECJ[476] to evaluate EU institutions and matters where a member state court referred a legal question to the ECJ to be determined in consensus with the principle of European law.[477] This was done in the light of the ECJ's recognition following notions from French law of general principles of law that exist alongside the formal written texts.[478] Among those general principles of EU law are the safety of human rights, the fulfilment of "legitimate expectations",[479] basic principles of natural justice and the rule of law. The concept of proportionality was given a central place among those principles.[480] The significance of it being a general principle is that it applies throughout EU law.

According to several commentators, the concept was adopted by ECJ as influenced by German law.[481] It was initially explored by the ECJ in a series of cases from the 1950s and 1960s. However, it was fully developed in the 1970s in the case of International *Handelsgesellschaft.*[482] The Advocate General on the case, Dutheillat de Lamonthe, thoroughly

[471] George Letsas, 'A theory of interpretation of the European Convention on Human Rights' (2007) .
[472] R St J MacDonald, Franz Matscher and Herbert Petzold, *The European system for the protection of human rights* (Martinus Nijhoff 1993).
[473] Ibid Handyside, (N 88).
[474] Ibid Handyside, para 47.
[475] A. Stone Sweet and J. Mathews, "Proportionality, Balancing and Global Constitutionalism," 47 Colum. J. Transnat' I L. 72 (2009).
[476] Harry Brighouse and Marc Fleurbaey, 'Democracy and proportionality' (2010) 18 Journal of political philosophy 137.
[477] Davor Susnjar, 'Proportionality' (2010) Fundamental Rights, and Balance of Powers, Leiden: Brill p 121.
[478] Takis Tridimas, The general principles of EC law (Oxford University Press, USA 1999).
[479] Robert Thomas, Legitimate expectations and proportionality in administrative law (Hart Publishing 2000).
[480] Joseph HH Weiler and Nicolas JS Lockhart, 'Taking Rights Seriously Seriously: The European Court and Its Fundamental Rights Jurisprudence-Part 1' (1995) 32 Common Market L Rev 51.
[481] Emiliou, *The principle of proportionality in European law: a comparative study*.
[482] Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel [1970] ECR 1125; J. Schwarze, European Administrative Law (London: Sweet and Maxwell Ltd., 1992), 708

examined the concept of proportionality and found that it had its roots in documents which helped to establish the EU.[483] In the case, the Court examined a challenge to a direction of the European Economic Community that allegedly violated a human right.[484] It was also appraised early in the 1980s, when the court assessed the congruence between the legislation of the member states and the EU.[485] The doctrine of proportionality test was significantly applied in the case famously known as Watson and Belmann.[486] The Belgian government adopted Article 48 (3) of the treaty and passed a law to deport foreign workers who failed to register with the police. As mentioned earlier, the European Court of Justice applied the famous three principles test for the first time in this case, and it was concluded that:

> The government's aim is legitimate to extend to accountable the foreign workers to register; however, the court denoted that the punishment of deportation is overly severe and invalidated. The court has suggested a fine as a 'more appropriate deterrent'.[487]

The doctrine of proportionality, which has become an important part of the jurisprudence of ECJ and the ECtHR, denotes that the authorities should exercise powers which necessarily have an adverse effect on the rights of an individual. The authorities must take a good measurement at the time of using these powers and should use the least restrictive measurement so as to cause less damage to their rights. The doctrine of proportionality also intimates that sanctions, restrictions and penalties that are disproportionate in severity or extent to the aim pursued should not be imposed. As embodied in the convention,[488] when applying EU Law, the courts must give regard to the principle of proportionality.

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available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61970CJ0011 accessed on 7th March 2017.

[483] Estreicher, 'Privileging Asymmetric Warfare (Part II): The Proportionality Principle under International Humanitarian Law'.

[484] Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' p 517.

[485] Emiliou, The principle of proportionality in European law: a comparative study, Jan H Jans, 'Proportionality revisited' (2000) 27 Legal Issues of Econ Integration 239, Leonor Moral Soriano, 'How Proportionate should Anti-competition State Intervention be?' (2003) European Law Review 112.

[486] Re Watson and Belman Case 118 /75 (1976) ECR 1185.

[487] Ibid p 273.

[488] R v chief constable of Sussex Ex p International Traders Ferry ltd [1992] 2 AC 418).

It is essential to mention here that with a few exemptions,[489] the ECHR does not safeguard all rights every time.[490] Hence, in cases related to non-absolute rights, the doctrine of proportionality is an essential process for the Strasburg Court (ECtHR) to accommodate qualified rights in the community and other competing premiums.[491] The ECtHR, for instance, applies this doctrinal study to see whether interference with Articles 8, 9, 10 or 11 of the ECHR is "necessary in a democratic society".[492] This test is accepted "if the interference answers a *pressing social need* and if it is proportionate to the legitimate aim pursued".[493] In the same manner, the Strasburg Court has also adopted a similar approach in applying the doctrine of proportionality to observe whether the difference has an "objective and reasonable justification" as mentioned in Article 14 of the ECHR,[494] and to "examine whether a restriction under Article 1 of Protocol 1 respected a *fair balance*".[495] More generally, the ECtHR has recognized that this doctrine is "inherent in the whole of the Convention".[496] In 2004, a draft of the Treaty establishing a Constitution for Europe was accepted by representatives of twenty-five member states.[497] According to the draft, this attempt at a European Constitution contained a bill of rights. The rights were phrased as "absolute"; nonetheless, some were accompanied by specific limitation clauses, and all were governed by a general limitation clause (Article 112 (1) of the Treaty), which read:

> Any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principles of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general

[489] The prohibition of torture (Article 3), the prohibition of slavery and forced labour (Article 4), no punishment without law (Article 7) and the 'internal' dimension of freedom of religion (Article 9(1)).
[490] Cappelen and Tungodden, 'Fairness and the proportionality principle'.
[491] Jackson, 'Constitutional law in an age of proportionality' p 3096.
[492] Brighouse and Fleurbaey, 'Democracy and proportionality' p 143.
[493] For example, Nada v Switzerland Application No 10593/08, Merits and Just Satisfaction, 12 September 2013, at para 181.
[494] For example, Konstantin Markin v Russia Application No 30078/06, Merits and Just Satisfaction, 22 March 2012, at para 125.
[495] For example, Herrmann v Germany Application No 9300/07, Merits and Just Satisfaction, 26 June 2012, at para 74.
[496] For example, N. v United Kingdom Application No 26565/05, Merits, 27 May 2008, at para 44.
[497] Treaty Establishing a Constitution for Europe (2004).

interest recognized by the Union or the need to protect the rights and freedoms of others.[498]

Not all member states of the EU approved this draft.[499] Instead, the Treaty of Lisbon was prepared by the member states in 2007 and entered into force on December 1, 2009.[500] Article 3b (4) of the Lisbon Treaty reads "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objective of the Treaties".[501] The ratified clause demonstrates the centrality of proportionality in EU law today. Further, the Lisbon Treaty gave effect to the Charter of Fundamental Rights, and to its general limitation clause.[502]

3.6 Alternative Perspectives to the Doctrine of Proportionality

Analysis of the work of Martin Luther King[503] reveals that the doctrine of proportionality is essentially created from confusion between two conceptions, both of which are observable within academic and judicial writing and reasoning and both recognizable within academic and legal texts: "proportionality as balancing" and "proportionality between means and ends". King's work also debated that proportionality as equilibrium has many routes; subsequently, critics opposed proportionality's rational deficit. We can regard proportionality in terms of its objectives and means of achieving them in benefiting the "principled practice" of judicial review. Martin Luther King attempted to outline the absent definition of this concept in a theoretical encryption – "consequences that are intended" – and in the later edition, "consequences that are not intended".

Martin Luther King's work outlines the reason for the double effect in ethics (first associated with Thomas Aquinas), which is to acknowledge the requirements which are necessary and ought to be wholly met for human actions, including good and bad effects, called *double*

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[498] Available at https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf accessed date 21 June 2018.
[499] Brighouse and Fleurbaey, 'Democracy and proportionality' p 146.
[500] Treat of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (2007). For analysis, see P. Roza, "Rights of Their Limits: The constitution for Europe in International and Comparative Legal Perspective," 23 Berkeley J. Int'l L. 223 (2005).
[501] Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' p 59.
[502] Art. 6 (I) of the Treaty of Lisbon.
[503] Martin Luther King and others, The Papers of Martin Luther King, Jr., Volume VI: Advocate of the Social Gospel, September 1948 March 1963, vol 6 (Univ of California Press 1992) p 231.

effects, in order to be morally justified. Proportionality between goal and *modus operandi* is ordinarily the fourth and final precondition of double effect ideology. The individual should not be criminated on differing grounds; the deed may not be intended to produce a negative outcome or to extend a beneficial outcome. It is pertinent to mention here that King recommended reconstructing the concept of proportionality assessment, which ought to be focused on objectives and the steps to achieve them, as opposed to balancing. His reasoning is robust, giving means for resolving numerous types of constitutional opposition that are not witnessed in the general scope of balancing clashes of rights, welfares and principles. Furthermore, on occasions when balancing results in a non-conclusive verdict on one right, there is a reformulated proportionality assessment that provides established rules that are able to resolve at least some modes of conflict.

King's evaluation that the principle of proportionality is formed from more than one origin is also acknowledged by Alison Young.[504] Young extended this debate by evaluating the efforts of Julian Rivers;[505] she discovered that this principle can be seen as "state-limiting" or "optimizing". When appraising Young's arguments, it is apparent that the two notions act in harmony. Subsequently, when the state's "limiting conception attempts to determine the proper bounds of state action, and is focused primarily on the question of lawfulness; in turn, the optimizing conception seeks to determine the nature and scope of the right in question".[506] Young argues that "the state-limiting conception works with a conception of rights that affords rights priority, allowing legislatures to develop policy in pursuit of the public interest while ensuring that there is a judicial check on legislative action".[507]

In contrast, the optimizing conception of proportionality, as favoured by Robert Alexy and others sympathetic to his "theory of constitutional rights",[508] corresponds to an interest-based theory of rights: it does not automatically favour the right, but may allow public interest gains to prevail. Therefore, it is paramount to analyse the reason for constitutional actions before moving to test proportionality. This debate can additionally be extended in the instance that

[504] Alison Young and G de Burca, 'Proportionality' (2017) p 137.
[505] Rivers, 'Proportionality and variable intensity of review' P 133.
[506] Huscroft, Miller and Webber, 'Proportionality and the Rule of Law: Rights, Justification, Reasoning Introduction' p 5.
[507] Huscroft, Miller and Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* p 178.
[508] 15 Although Mattias Kumm and Kai M¨ oller both draw inspiration from Alexy's theory of constitutional rights, it is Matthias Klatt andMoritz Meister who have carried on Alexy's theory most faithfully: see *The Constitutional Structure of Proportionality* (2012).

there is a general ethos to define the right: in this case, the "state limiting conception" of proportionality can be granted alongside a "corresponding immunity theory of rights". Yet, if such an ethos is not present and variation ensues, an improvement strategy is necessary to include the right as a component of the common culture. George Pavlakos[509] highlighted the principled method of proportionality. His stance was that the present structure and use of this principle connected a "filter conception of proportionality". Using this source, legislature is fundamentally about the means and ends, and includes definite and complete whole ethical prohibitions only in exceptional cases. Yet, when these unique cases appear, the concept of proportionality stands in as a "moral filter" or "litmus paper" directed to ensure the justification of governing law. But the moral-filter conception of proportionality "gives rise to a paradox: in discharging its controlling function, proportionality drives a wedge between authoritative directives and the moral grounds that can legitimize them in the first place. Along these lines, proportionality seems to assume that authoritative legal directives obligate irrespective of their substantive legitimacy".[510] Subsequently, the definite exclusion comes from another area and not one stemming from internal law. Pavlakos argues that "the paradox arises from a positivist understanding of legal obligation that works in tandem with a conception of autonomy as negative freedom. Autonomy *qua* negative freedom assumes that the function of autonomy is to create a sphere that is free of intervention with respect to very important interests of individuals. All else that remains outside this sphere is a question not of freedom but of unprincipled politics". [511]

In this picture, it is revealed that the authoritative legal directives operate as standards of instrumental rationality by aligning the relevant means with whatever ends legislators have put into place. It is paramount to reference here that in the event that these objectives are greatly conflicting, they ought to be "corrected"[512] by *ad hoc* petition to categorical restrictions that are separate from law. In examining the conceptual norms of the "conception of proportionality", Pavlakos extends a "conception of autonomy" which connects a negative comprehension of legal power.[513] At this point, it is pertinent to understand that Pavlakos

[509] George Pavlakos, 'Constitutional Rights, Balancing and the Structure of Autonomy' (2011) 24 Canadian Journal of Law & Jurisprudence 129.
[510] Huscroft, Miller and Webber, 'Proportionality and the Rule of Law: Rights, Justification, Reasoning Introduction' p 131.
[511] Pavlakos, 'Constitutional Rights, Balancing and the Structure of Autonomy' p 133.
[512] Cappelen and Tungodden, 'Fairness and the proportionality principle' p 713.
[513] Estreicher, 'Privileging Asymmetric Warfare (Part II): The Proportionality Principle under International Humanitarian Law' p 153.

expressed this method in lawful obligations that can be based on moral reasons, and rights which are safeguarded by the constitution ought to be considered by their traditional meaning, defined as "defensive," as it mirrors the adverse restrictions.[514] Furthermore, space should be made for freedom, which must be examined under legal standards. To finalize his statement on the concept of proportionality, it ought not to act on the moral basis for the governing norms. He agreeably concludes that "proportionality ought to function not as a moral filter for authoritative norms but instead as an interpretative principle that organizes a legal system as a system of publicly authorized norms, which aim at the realization of the autonomy of those living under it".[515]

3.7 Relationship of the Doctrine of Proportionality with Rights

In order to examine the relationship amongst the rights and proportionality from a variety of perspectives, it is very important to understand their relationships and compatibility. I agree with the view of Gregoire Webber,[516] who preferred the concept that rights are hypothetically linked to justice and are therefore governing and exemplary in what should be. In my analyses, his argument stems from the foundation of 'rights', from the Latin '*ius'*, examining the conjectural connection of the objective right (justice) and subjective right (rights). Within this framework, in simple terms, human rights laws in true experience are lost rights.

The argument is that the conventional method for human rights in line with the concern for proportionality splits rights from what is morally correct, and in this manner, fails to secure the moral requirement of rights. In an effort to reclaim rights from this position of inconsequence, I can draw attention to the equivocation in the use of the term "right" in catchphrases such as "Everyone has a right to…".[517] In reasoning toward the states of affairs and sets of interpersonal actions, forbearances, and omissions that realize rights in the community, one merely begs the question, by affirming as conclusive, that one has a *right* to life, liberty, and so forth. Nevertheless, the real-world query should be what, exactly, needs to be determined and created for the realization of individual rights. The compound method of practical reasoning is needed to conclude that this query places the theoretical right-bearer in a setting of other real and

[514] Brighouse and Fleurbaey, 'Democracy and proportionality' p 145.
[515] Ibid p 147.
[516] G. Webber, Proportionality and the Rule of Law, Rights, Justification, Reasoning (CUP, 2014) p 177.
[517] Emiliou, The principle of proportionality in European law: a comparative study 167.

prospective right-bearers. The methods of justification are implemented by policymakers, who bear a great duty to their community to conclude, justly and authoritatively, right relations between individuals. Here, I must argue that proportionality is to be determined as much as possible by the legislature.

In regard to the question of weight in proportionality examinations, Schauer[518] outlines how the unique significance of rights surrounds proportionality examination. In Schauer's debate, I analyse that every non-absolute right is eligible to restriction, and that proportionality communicates amongst validated and non-validated constrictions.[519] But while "non-rights-protected goals or interests can be balanced, stronger arguments are necessary to limit a right because each right is weightier than non-rights-protected interests".[520] There is thus a presumption in favour of rights, which places the burden of proof on those who would limit these rights. That burden is absent in the normal cost-benefit policy analysis.[521] I must denote to the notion of a "rule of weight" to standardize proportionality assessment: a second-order decree issues the weight of the initial order thoughts regarding what ought to be carried out.[522] Proportionality therefore surrounds the decision-making process: the assumptions are opposed restricting a right; however, these assumptions can be disproven. The question raised by proportionality appraisal asks whether the degree to which a restriction on a right is valid in terms of an increase in social stability. Answer to this question can be found in Grant Huscroft's statement that "we must be concerned with not only what it means to have a right, as Webber argues, but also with the meaning of the particular rights that we have".[523] This means that we should look at the basic importance of the decision of a political community to sanction a law of rights.[524]

The notion of rights, for some writers, presumes that they are binding and irreversible and therefore not subject to proportionality (at least as conceived within the frame of "balancing"); for others, proportionality engages only with non-absolute rights. In my analyses, Moller and

[518] Frederick Schauer, *The Exceptional First Amendment*, *in* American Exceptionalism And Human Rights 29 (Michael Ignatieff ed., 2005) p 235.
[519] Harbo, 'Introducing procedural proportionality review in European law' p 39.
[520] Cappelen and Tungodden, 'Fairness and the proportionality principle' p 711.
[521] Ibid p 716.
[522] Harbo, 'Introducing procedural proportionality review in European law' p 39.
[523] Schauer F, "Proportionality and the Question of Weight" in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014).
[524] Allan Rosas and Lorna Armati, EU constitutional law: an introduction (Bloomsbury Publishing 2018).

Webber both hold the opinion that proportionality and rights rise are principally combined, but differ in the benefits of this linkage:" For Moller, the "gains in subjecting government authority to justification review" are important; for Webber, the loss of rights and the decision to divorce rights from what is right is morally burdened. Schauer and Huscroft maintain the significance of the presence of what rights stand for. For Schauer, the query is linked to the unique role of weight in implementing proportionality evaluation; for Huscroft, the query is a prerequisite to validating a decision to implement a proportionality review. In both of these instances, Moller would reject this approach.

In my analyses, political communities should choose whether or not to enact a bill of rights and choose which rights are to receive the special protection that a bill of rights affords. As in Huscroft's account, bills of rights are finite in nature; they protect some, but not all, possible rights and set out particular conceptions of some of the rights they include.[525] In short, bills of rights reflect a 'constitutional settlement' on rights questions, and this settlement must be respected before proportionality analysis can occur.[526] I agree with this statement from Huscroft that the "*rights inflation* advocated by Moller is unjustified, and so too are approaches to proportionality such as "Mattias Kumm's that renders the process of rights interpretation all but irrelevant".[527] In expanding the scope of rights and hence judicial review, some conceptions of proportionality effect radical changes to the constitutional order and should be rejected on this account,[528] however desirable an expanded requirement of justification for state action may be.

3.8 The Doctrine of Proportionality and the notion of Burden of Proof

In every case, the most important and crucial task is to establish the facts of the case, and for this reason, evidence is required. The standard position is that the defendant bears the burden of demonstrating a *prima facie* or evidential restriction of a right; however, once it is established, the onus falls on the government to show that the restriction has passed the four-stage proportionality test.[529] Notwithstanding this, in practice, courts sometimes require the

[525] Emiliou, The principle of proportionality in European law: a comparative study p 181.
[526] Cappelen and Tungodden, 'Fairness and the proportionality principle' p 713.
[527] Mattias Kumm, 'The idea of Socratic contestation and the right to justification: the point of rights-based proportionality review' (2010) 4 Law & Ethics of Human Rights 142.
[528] Ibid p 167.
[529] Recently affirmed in Aguilar Quila v Secretary of State for Home Department; Bibi v Same [2011] UKSC 45 [2012] 1 AC 621 at [44]. Widely endorsed in academic writing; see, e.g. Lester, Pannick and Herberg, Human

plaintiff to show how the actions of the state have made disproportionally confined the right.[530] The method of burden of proof varies when applied in the Wednesbury doctrine over proportionality. In the Wednesbury doctrine, the burden of proof is on the plaintiff to show that the action by the government was irrational.[531] The burden of proof is utilized in this chapter to elucidate the persuasive burden of proof. The party that shoulders "this burden bears the prospect of non-persuasion: i.e. he may fail if both flanks of the case are similarly solid, or the court is unsure of which side is stronger".[532] This burden is to be clarified from the evidential burden, which is the responsibility of offering to illustrate that an issue is a live issue in a case.[533]

It is pertinent to mention here that the burden of proof ought to be issued first by "reasons of principle societal judgments over the proper relationship between the parties and who should bear the risk of uncertainty in a case; and second, by practical considerations over the relative ease with which the parties can prove a point".[534] For example, in criminal cases, the burden on the prosecution to ascertain the defendant's guilt reflects society's views that the state must validate any use of coercion against citizens and that it is generally worse to convict an innocent man than to let a guilty man go free.[535] In the doctrine of proportionality, it is the authority that has to pass the four-stage proportionality test.[536] The HRA itself does not elucidate on which party the burden of proof falls.[537] Judiciaries have granted reverse onus in unique circumstances where the assumed worth of safeguarding the defendant is not as strong or does not uphold

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Rights Law and Practice, 3rd edn (Butterworths, 2009), paras 3.12–3.13; Clayton and Tomlinson, The Law of Human Rights, 2nd edn, Volume I (Oxford University Press, 2009), para. 6.188; Fordham and de la Mare, "Identifying the principles of proportionality", in Jowell and Cooper (eds), Understanding Human Rights Principles (Hart Publishing, 2002), pp. 27, 88. Leading case in Canada on this issue: R v Oakes [1986] 1 SCR 103.

[530] Courts usually couple such shift in burden with an attenuation of the standard of review. Examples of cases where courts presume a measure to be proportionate unless shown to be manifestly unreasonable are: Aguilar Quila v Secretary of State for Home Department; Bibi v Same [2011] UKSC 45 [2012] 1 AC 621, per Lord Brown (dissenting judge); British Telecommunications plc v Secretary of State for Business, Innovation and Skills [2011] EWHC 1021 (Admin) at [234]; Sheffield City Council v Personal Representatives of June Wall [2010] EWCA Civ 922 [2011] WLR 1342 at [33]; Sinclair Collis Limited v Secretary of State for Health [2010] EWHC 3112 (Admin) [2011] UKHRR 81 at [94]–[96].

[531] Nicola Padfield, 'The Burden of Proof Unresolved' (2005) 64 The Cambridge Law Journal 17.

[532] Vicki C Jackson, 'Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality' (2016) 130 Harv L Rev 2348.

[533] For the distinction between these two burdens, see, Ian H Dennis, The law of evidence, vol 604 (Sweet & Maxwell London 2007).

[534] For example Ashworth, "Four threats to the presumption of innocence" (2006) International Journal of Evidence & Proof 241 at 249–267.

[535] Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65 International & Comparative Law Quarterly 21.

[536] Michael A Newton, 'Reframing the Proportionality Principle' (2018) 51 Vand J Transnat'l L 867 .

[537] Jackson, 'Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality' p 143.

strongly, for instance in times where the penalties of persecution are fewer. Some academics have proposed that the state takes practical difficulties in outlining an assumption of proportionality in various situations, with the outcome of shifting the burden onto the plaintiff to illustrate lack of necessity or imbalance. Rivers highlights four practical difficulties faced by the state.[538] The first is the restriction which is made to pursue the legitimate aim, while the second is rationally associated to the aim, the third is proportionate and the last one is balanced.[539] It is pertinent to mention here that sometimes the implementation of the doctrine of proportionality as a yardstick to review human rights cases put the court in a complex situation and amounts to unnecessary delays.[540] Here, the courts are quite reasonable about relaxing the intensity of review in different ways; they can bypass one or two stages of the proportionality test or merge all stages together, keeping in view the question of whether the said measure is reasonable or permissible.[541] The reality in practice is that sometimes[542] the court makes it obligatory for the plaintiff to exhibit disproportionality of the constraint of rights.[543] Julian Rivers has explained this practical difficulty faced by the plaintiff: once the State passes the final two stages of the proportionality analysis – that the action was legitimate and rational – the burden of proof is on the plaintiff to establish that it was overall imbalanced.[544] Hence, this section of the chapter fully defends and supports the position that the state should accept the burden of proof in establishing that a *prima facie* limitation of a right passes all stages of the proportionality examination.

[538] Rivers (N 729) he also highlighted institutional concerns about imposing an absolute burden of proof on the state.

[539] Huang v Secretary of State for the Home Department [2007] UKHL 11 [2007] 2 AC 167 at [19]; recent application in R (F (A Child)) v Secretary of State for the Home Department [2010] UKSC 17 [2011] 1 AC 331 at [17].

[540] Thomas Wischmeyer, 'Generating Trust though Law: Judicial Cooperation in the European Union and the Principle of Mutual Trust' (2016) 17 German LJ 339 .

[541] For example, Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19 [2007] 1 WLR 1420 at [16], per Lord Hoffmann; Farrakhan v Secretary of State for the Home Department [2002] EWCA Civ 606 [2002] QB 139; R v Shayler [2002] UKHL 11 [2003] AC 247 at [80]–[85], [99]–[118].

[542] Cora Chan, 'Winner of the SLS Annual Conference Best Paper Prize 2012: Proportionality and invariable baseline intensity of review' (2013) 33 Legal Studies 1.

[543] Bibi v Same [2011] UKSC 45 [2012] 1 AC 621, per Lord Brown (dissenting judge); British Telecommunications plc v Secretary of State for Business, Innovation and Skills [2011] EWHC 1021 (Admin) at [234]; Sheffield City Council v Personal Representatives of June Wall [2010] EWCA Civ 922 [2011] WLR 1342 at [33]; Sinclair Collis Limited v Secretary of State for Health [2010] EWHC 3112 (Admin) [2011] UKHRR 81 at [94]–[96].

[544] These contexts are cases involving clash of rights, arbitrary but unavoidable distinctions of degree, and minor limitations of rights in pursuit of important but diffuse public goods, decisions made under proportionate legal rules or procedurally rigorous judgments of proportionality by well-qualified bodies. See Rivers, "The Presumption of Proportionality" Modern Law Review (forthcoming).

3.8.1 Proportionality and the Balancing of Competing Interests

One way of understanding proportionality analysis in the narrower sense is thus as imposing a "rule of weight" on the process of evaluating competing interests.[545] Competing obligations, duties, goals, interests, factors and facts are evaluated in numerous aspects of our decision-making lives.[546] These are "rules of weight" and their use is relatively common (especially in the past) in the law of evidence in common law jurisdictions.[547] Viewed through the lens of rules of weight, we can understand proportionality analysis, as commonly practiced in the jurisdictions in which it predominates, as itself a rule of weight.[548] As applied to freedom of expression, for example, a proportionality analysis (and especially the final step of the analysis in those regimes in which the proportionality analysis is subdivided into multiple steps)[549] will ask whether the restriction on freedom of expression is proportionate to the policy goal that supports the restriction: for example, the goal of preserving public order.[550] In some cases, the restrictions on freedom of expression will be superfluous, in the sense that a smaller restriction on freedom of expression will produce no less ability in preserving public order.[551] In such cases, however, the very term "proportionality" seems unfit, because it is not that the restriction on freedom of expression is disproportionate, but simply that it is entirely superfluous and thus irrational. It would thus fail at the first or second stage of the standard proportionality test.[552] If the same goal can be served to the same extent without restricting the right, then the problem is not that the restriction is disproportionate; rather, it is that the restriction is unnecessary.[553] More commonly, however, and consistent with the very emergence of the term "proportionality" in the first place, it is commonly (and correctly) understood that, to continue with the same example, fully serving the goal of preserving the public order will entail some restriction on freedom of expression, and, conversely, curtailing the ability to restrict freedom of expression will come at the price of at least some restrictions of the state's ability to preserve

[545] Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) Human Rights Law Review ; Frederick Schauer, *The Exceptional First Amendment*, *in* American Exceptionalism And Human Rights 29 (Michael Ignatieff ed., 2005) p 371.
[546] Valentina Vadi, Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration (Edward Elgar Publishing 2018).
[547] Mirjan Damaska, 'Evidentiary barriers to conviction and two models of criminal procedure: A comparative study' (1972) 121 U Pa L Rev 506.
[548] Harbo, 'Introducing procedural proportionality review in European law'.
[549] Jeremy Kirk, 'Constitutional Guarantees, Characterization and the Concept of Proportionality' (1997) 21 Melb UL Rev 1.
[550] Cappelen and Tungodden, 'Fairness and the proportionality principle' p 715.
[551] Newton, 'Reframing the Proportionality Principle' p 656.
[552] Robert Spano, 'The Future of the European Court of Human Rights Subsidiarity, Process-Based Review and the Rule of Law' (2018) Human Rights Law Review p 137.
[553] Ibid p 152.

public order.[554] Here the genuine question on proportionality arises: that of whether the amount of restriction on freedom of expression is justified in light of the amount of the increase in public order that the restriction on freedom of expression is expected to bring.

Framing the issue in this way not only explains why "proportionality" is the correct term in cases such as these, but also exposes the fact that engaging in the appropriate proportionality analysis requires that we assign weights to the gains and losses on each side of the equation. However, the very fact that the analysis is run in one direction and not the other reveals the weighting process. The courts do not "typically say that the loss in public order can be no more than necessary in light of the goal of pursuing freedom of expression, but they do say that the restriction on freedom of expression can be no more than necessary in light of the goal of pursuing public order".[555] The unevenness reveals that there is a presumption at work that the burden of proof is on those who would restrict freedom of expression and not on those who would jeopardize public order, and that lurking beneath the presumption and the allocation of the burden of proof is a rule of weight, giving more weight to the right to freedom of expression than to the goal of public order, which the right to freedom of expression will arguably threaten,[556] i.e. River's and Young's optimising conception. However, this is not a matter of high moral or political principle, but simply because this rule of weight is implicit in the very idea of a right and in the very structure of the way in which non-absolute rights intersect with non-right interests.[557] If it were otherwise – if there were a right to live in a safe environment but no right to freedom of expression, for example – then the rule of weight would be just the opposite, placing on any action that would jeopardize a safe environment merely to further the non-rights interest in increased expression. But it would still be a rule of weight. Thus, the idea of a rule of weight is implicit in the common structure of proportionality analysis, and, indeed, the rule of weight that is implicit in any rights-based proportionality analysis is a rule of disproportionate weight.[558]

[554] Brian J Grim and Roger Finke, The price of freedom denied: Religious persecution and conflict in the twenty-first century (Cambridge University Press 2010).
[555] Vadi, Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration.
[556] Paul P Craig, 'Proportionality and Judicial Review: A UK Historical Perspective' (2016)
[557] Ibid p 193.
[558] Newton, 'Reframing the Proportionality Principle' p179 .

3.9 The Doctrine of Proportionality a tool of Judicial Review

As the doctrine of proportionality is a broadly acknowledged and commonly implemented notion in the judicial appraisal of social acts at state level,[559] it subsequently has strong ties in legal writings with broader discussions on the significance of validating the use of governmental authority to legal authority for the reason of mirroring and providing evidence for a devotion to the rule of law.[560] In respect of the latter and more recently in the light of increasing legal requirements imposed on governments, in my view there has been a rise in what is anticipated of parliamentary directives when using state power.[561] More specifically, as Eliot emphasizes, for parliamentary states "what the law requires is taken to have become increasingly demanding".[562] "Proportionality and its links with the wider debates on the importance of justifying the exercise of power has particular importance when considering how judges review the exercise of governmental authority which impacts on the rights of the legitimate expectations of the individual as the sufficiency of any justification may fall to be assessed against additional, more demanding criteria".[563] Therefore, in my analyses, Elliott's arguments necessitate that when evaluating the actions of governmental powers, judiciaries must be transparent about firstly, "that it too would have proceeded in the way that the administrator did. Second, even once the issue of the standard of justification, or review, has been settled, questions will arise about whether that standard has been met-which, in turn, triggers questions about the court's role in evaluating the quality of any justifications offered by the decision-maker".[564] In order to reach an organized method when evaluating the actions of governmental powers, I refer to Elliot's suggestion that the judges ought to focus their efforts towards two separate queries. The first is "to determine what should constitute the operative standard of justification in the particular circumstances of the case. What, in other words, should be the justificatory burden under which the decision-maker is placed, and which will have to be discharged if the decision is to be found by the reviewing court to be lawful"?[565] Second , as Elliott's quote illustrates, I can submit the ways in which the court should take into

[559] The concept of proportionality also has doctrinal importance as a key feature of global constitutionalism. For further discussion see David Law, Generic Constitutional Law, 89 MINN. L. REV. 652 (2005) coins this as a term for generic constitutional law. See also See M.Klatt and M.Meister, The Constitutional Structure of Proportionality, (2012, OUP).
[560] Brian Z Tamanaha, On the rule of law: History, politics, theory (Cambridge University Press 2004).
[561] Jackson, 'Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality'.
[562] Mark Elliott, 'Justification, Calibration and Substantive Judicial Review: Putting Doctrine in its Place' (2013) (17th September 2013) < http://ukconstitutionallaw.org)> accessed on 13 September 2016.
[563] Ibid p 371.
[564] Elliott, 'Justification, Calibration and Substantive Judicial Review: Putting Doctrine in its Place' p 373.
[565] Ibid p 377.

account the rationality of the decision in relation to whether an unbiased balance has been made amongst conflicting interests.[566] The query Elliott admits reduces, at least to some extent, to a value judgment, the acceptability of the balance struck between two incommensurable variables being impossible to determine unless those variables are first invested with values that are inherently contestable.[567] The dispute regarding legitimacy is based on this: Why should the court produce other policy options to the legislature here (i.e. amongst unlike principles)? A frequent theme emphasized in the scriptures relating to the implementation of proportionality by the court is due to judges being forced to set equilibrium amongst two incommensurable variables.[568] To illustrate, Endicott says, "The incommensurability problem: if there is no rational basis for deciding one way rather than the other, then the result seems to represent a departure from the rule of law, in favour of arbitrary rule by judges".[569] Barak, conversely, seeks to support the use of proportionality by stating,

> …that it is a common base for comparison, namely the social marginal importance and that the balancing rules—basic, principled, concrete—supply a rational basis for balancing. A democracy must entrust the judiciary—the unelected independent judiciary—to be the final decision-maker—subject to constitutional amendments—about proper ends that cannot be achieved because they are not proportionality *stricto sensu*.[570]

I agree with the Barak that there is a general foundation for relating and an organized method of balancing that the court ought to have the capability to make the final judgment here. Referencing the instance of a judge choosing a case, assessing the right to family life as opposed to the state's right to restrict immigration, each option is socially significant, and subsequently, the judge can choose which way the case should be concluded, as only one condition is taken into account.[571] The only condition referred to is "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 benefits gained by realization of the law's goals

[566] Newton, 'Reframing the Proportionality Principle' p 712.
[567] Ibid p 717.
[568] Jackson, 'Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality'.
[569] Huscroft, Miller and Webber, 'Proportionality and the Rule of Law: Rights, Justification, Reasoning Introduction' p 316.
[570] A. Barak, 'Proportionality and Principled Balancing', (2010) 4 Law and Ethics of Human Rights 15-16.
[571] Huscroft, Miller and Webber, 'Proportionality and the Rule of Law: Rights, Justification, Reasoning Introduction' p 317.

as opposed to the importance of society of preventing the limitations of human rights".[572] Other literature[573] too has focused on whether proportionality as a concept is a normatively desirable one in the context of the relationship between the state and the individual at national level. Specifically, the principle has been understood in various ways due to the appearance of alternate theories of rights rules: for instance, Alexy has argued that proportionality is a method of equilibrating between the interest of the society and the right of an individual.[574]

In my analyses, Alexy depicts, rightly, that the principle of proportionality in its narrow sense follows from the fact that principles are optimization requirements relative to what is legally possible. The principles of necessity and suitability follow from the nature of principles as optimization requirements to what is factually possible.[575] There is dissimilarity amongst formal principles, such as lawful certainty, and substantive doctrines, including justice; and there are cases "in which a formal principle can, and even must, be balanced against the substantive principle".[576] Alexy deduces that in the past, such balancing activities have been dealt with, such as in "Germany after the collapse of the German Democratic Republic 1989, by applying Radbruch's formula of 'extreme injustice is no law'".[577] Alexy maintains that proportionality is unavoidable in the judicial review of limitations on constitutional rights. He argues that this principle provides the only rational way to make a judgement that takes into account both the reasons for limitations on rights and the limited rights as such.[578] A formula, he points out, is the result of balancing the substantive principle of justice against the formal principle of legal certainty, and according to the law of colliding principles:

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[572] Ibid p 345.

[573] Conversely, Endicott elucidates, identifying a single criterion does not eliminate incommensurability if the application of the criterion depends on considerations that are themselves incommensurable. If we are trying to decide whether to go to a restaurant with excellent food that is expensive, or a restaurant with less-than-excellent food that is cheaper, you would be right to say that there is a common base for comparison (we could call it preferability); and you would be right to insist that there may be rational ground for judging that one restaurant is preferable to another (because, for example, there can be definite reason to choose a much-less-expensive restaurant where the food is almost as good) But you would have no reason to claim that the considerations that determine which restaurant is preferable are commensurable, and no reason to think that, for every pair of alternatives, there is determinate reason in favour of one choice between the two. In human rights cases, the availability of the covering value, importance does not give us any reason to think that the grounds on which judgments are to be made are commensurable. Major in commensurabilities need to be resolved in order to make the judgment that Barak recommends as to whether it is more socially important to interfere with family life (or freedom of speech or of religion) in a particular way, or more socially important not to do so.

[574] Sweet and Mathews, 'Proportionality balancing and global constitutionalism' p 93.

[575] R. Alexy Robert Alexy, *A theory of constitutional rights* (Oxford University Press, USA 2009) p 67.

[576] Robert Alexy, 'Formal principles: Some replies to critics' (2014) 12 International journal of constitutional law 511 p 517.

[577] Ibid p 519.

[578] Robert Alexy A Theory of Constitutional Rights (Julian Rivers (translator)) (Oxford University Press, Oxford, 2002) at 74.

> …the consequence of the procedure of the principle of justice over the principle of legal certainty under the conditions of extreme injustice is that under this condition the consequences required by the prevailing principle of justice applies and this is exactly what the Radbruch formula states.[579]

In my analyses, the use of such a formula "involves giving a higher concrete weight to justice than to certainty in situations which involve extreme injustice".[580] According to Mattias Kumm, along with judicial review, proportionality is "the most successful legal transplant of the twentieth century".[581]

3.10 Conclusions

This chapter demonstrated that the normative or jurisprudential dimension of proportionality, as a law principle, has its content in the concepts and philosophical categories that make up the contents of the principle of proportionality, in the law philosophy's main periods and currents. Hence it is proved that the proportionality doctrine is a central part of a two-stage structure of human rights adjudication. In the first stage one must establish that a right has been infringed by governmental action. In the second stage the government needs to show that it pursued a legitimate end and that the infringement was proportional. I consider that such a scientific attempt is useful, taking into consideration the importance of this principle for contemporary law. Having undertaken a thorough discussion of the issue of the implications of proportionality in Europe, here I acknowledged that the principle of proportionality is an important guaranty in the observance of human rights, mainly in situations in which their exercising is being restricted by the actions ordered by the state's authorities, being at the same time an important criterion to delimit the discretionary power from the power excess in the activity of state's authority.[582] The aforementioned results can also be simply tied together within the conclusion that the principle of proportionality needs the Court to decide whether

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[579] G.Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, (translated by B.Litschewski Paulson and S. L Paulson) in (2006) 26(1) Oxford Journal of Legal Studies 1-11.
[580] Ibid.
[581] Mattias Kumm "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice" (2004) 3 ICON 595.
[582] Victor Ferreres Comella, 'Beyond the principle of proportionality', *Comparative Constitutional Theory* (Comparative Constitutional Theory, Edward Elgar Publishing 2018) p 97.

the steps implemented were necessary, and whether they remained within the scope of the agreed direction of action, which could sensibly be tracked. Proportionality has more interest in the objectives and purpose of the legislator and whether the authority has met the proper balance. It is also concluded that proportionality functions on the presumptions that state action should not extend beyond what is required to meet the adequate objective (in everyday terms, that one should not use a sledgehammer to crack a nut), and in contrast to irrationality, is often understood to bring the courts much closer to reviewing the merits of a decision. I must say that proportionality in itself indicates reference to variables or comparison; it allows the court to implement the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons projected by the decision-maker.

The chapter also revealed that proportionality is a general principle of law, signifying the ideas of balance, justice, responsibility and the adequate suitability of the measures adopted by the State to the situation in fact and to the purpose desired by the law. The principle is expressly formulated in the EU documents but also in the constitutions of other states in Europe. The normative or jurisprudential regulation of the principle explains the numerous preoccupations at scientific level to identify its dimensions. Hence, the courts given the responsibility of judicial review must analyse whether the decision undertaken by the state is proportionate: i.e. in equilibrium and in sync. Courts ought to formulate an indefeasible and doctrinal method to assess proportionality, and until this is achieved, there will constantly be overlap amongst the traditional grounds of evaluation and the notion of proportionality, and cases would remain to be resolved in the current fashion of whichever doctrine is used. This chapter also expressed proportionality as a content element of the principle of justice because it implies the ideas of reasonableness, fairness and tolerance. This is one of the important element that the proportionality is increasingly required as a universal principle, enshrined in most contemporary legal systems, explicitly or implicitly governed by norms constituted and recognized national and international jurisdictions.

The UK judicial system prefers the doctrine of unreasonableness when making a judicial review and has not yet accepted the doctrine of proportionality as a general criterion for judicial review. The UK's Legal system is based on the common law system; hence, the next chapter will examine the compatibility of the principles of the common law system (the principle of democratic society and the principle of the rule of law) with the principles of the doctrine of proportionality. The analysis of proportionality, in doctrine, legislation, international treaties

and jurisprudence must be answered some essential questions whether the doctrine of proportionality is a principle of law and if so, what are its sources whether there is any compatibility of this principle with the rule of law or principles of democratic society. Whether there can be any consecration and application of the principle of proportionality in common law system. Accordingly, in this next chapter, I will first argue the legal sources of proportionality, and then the doctrine of "proportionality and the rule of law" follow by the doctrine of "proportionality and democratic constitutionalism", to find out the compatibility of the doctrine of proportionality in the UK's legal system.

CHAPTER FOUR: Legal Sources of the Doctrine of Proportionality and, its Role in Democratic Constitutionalism

4.1 Introduction

The previous chapter analysed the doctrine of proportionality, demonstrating that it is a legal standard used around the 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 the doctrine of proportionality in the UK's legal system, as the United Kingdom legal system is based on common law. Hence, it is essential to critically analyse the basic features of both the systems. In the common law system there are two main features which are very basic to it. One is democratic constitutionalism and the other is the principle of rule of law. Hence, this chapter is focus on these two features and compare it with the doctrine of proportionality to find out the similarity.

However, there is a common denominator within the concept of migration, namely that proportionality is normatively necessary for the adjudication of constitutional rights. To begin with, this chapter first endeavours to analyse the legal sources of the doctrine of proportionality and then examines its affinity with the common law system. This chapter will argue about the main components of the doctrine of proportionality and contend that it is very much compatible with the two basic elements of common law. It is essential so that the UK legal system should adopt this doctrine as a common principle when applying a judicial review. Furthermore, this critical analyses will also demonstrate the mechanism of these two systems when bloc together in order to protect the freedom of expression. The outcome of this analyses will advance my argument on the compatibility of doctrine of proportionality in the UK judicial system. In this frame work and moving forward, the question how and why this doctrine can be integrated in to the UK Judicial system as a common norm of judicial review is further argued. Moreover, the conclusion of this chapter will lay down the foundation of the next chapter and that is to critically analyse the function of the doctrine of proportionality in the framework of its two basic components doctrine of necessity and balance to further analyse its application when applied in the judicial review.

4.2 The legal sources of proportionality

As by now we know that the Proportionality as a principle for the understanding of constitutional rights and the need for a constitutional entrenchment is imminent. 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 recognise its advantage over other restricting criteria, such as *Wednesbury* irrationality. It would also be insufficient for the common law to recognize it, or even for statuary 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. A review of the literature and judicial opinions relating to proportionality suggest that proportionality's constitutional basis may be explained by the following.

4.2.1 A - Proportionality and democracy

To proceed further and addressing the main question on the compatibility and relationship between democracy which is main component of common law system with the proportionality, is to see how these concepts are closely interconnected with each other. The requirement of proportional limitations of constitutional rights by a sub-constitutional law (e.g. a statute or a common law) is derived from an interpretation of the notion 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 includes (other than the notions of representative democracy and majority rule) 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 the human rights and their limitations. *Fourth*, that balance, required by the very nature of the notion of democracy, is performed through limitation clauses (general or specific, explicit or implicit), which renders the limitation of constitutional rights possible by sub-constitutional law. *Fifth*, these limitation clauses, to properly fulfil their role, are based on the principle of proportionality. In order to understand these features it is essential to further make their critical analyses.

4.2.1.1 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 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 of democratic nature. The German Basic Law states that the Federal Republic of Germany is a representative country.[583] This stance is also reflected in other constitutions, including Spain.[584] The Charter of Rights and Freedoms used in Canada outlines that it "Guarantees the rights and freedoms set out in its subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[585]

The question of whether the rights mentioned in a constitution can be limited and in a manner "justified by a democracy" is interpretative in nature. 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.[586] 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?[587] Therefore, the notion of democracy is a constitutional operative notion; hence, it is possible to derive from this notion the concept of proportionality. In my opinion the concept of proportionality is used as a criterion of fairness and justice in statutory interpretation processes, especially in constitutional law, as a logical method to assist in

[583] Basic law for the Federal Republic of Germany, Art 20(1).
[584] The constitution of Spain, Art 1 (1); Constitution of Italy, Art .1; Constitution of Ireland, Art 5, the constitution of Portugal, Art 2.
[585] The Canadian Charter of Rights and Freedoms, Section-1.
[586] Hanafin v. Minister For Environment [1996] 2 IR 321.
[587] Reference re Secession of Quebec [1998] 2 SCR 217.

discerning the correct balance between the sanction or punishment imposed and the severity of the prohibited act.

4.2.1.2 Second assumption: Democracy includes Human Rights

In this section I would like to start my arguments by stating that the democracy has many features like there are many views of democracy from popular democracy to Western democracy; from a formal democracy to substantive democracy; and, within substantive democracy, there is different understanding as to the substance of democracy.[588] One of the key distinctions in that context is that between a formal democracy and a 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 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 in accordance with the majority rule, and on the notions of equality and liberty, which prevent any possibility of either rule by force or of an arbitrary and capricious tyranny.[589]

[588] Theunis Roux, 'Principle and pragmatism on the Constitutional Court of South Africa' (2008) 7 International Journal of Constitutional Law 106, Roberto Gargarella, 'Theories of democracy, the judiciary and social rights' (2005) .

[589] Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany: Revised and Expanded* p 178.

I would like to add here that if we want to promote the discourse and cause of Human rights, it is necessary to reach an agreement, at global scale, on what the goal really is - is it to promote justice, fairness, equality, is it to provide conditions for an autonomous life and freedom or is it to maximize gains at the expense of human lives? Indeed, the link between democracy and Human Rights is inexorable.[590] 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 in accordance with the majority rule[591] (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.[592]

In order to find out the connection between the democracy and proportionality it is essential to analyse that how proportionality principle sees "any" decision as raising issues of fairness, in the distribution of power and to suggest proportionality as a superior alternative, even if one simply tries to make sense of prevailing practices and principles. To examine how the proportionality principle could be incorporated in a normative theory of democracy and articulated to a general theory of justice. I argued that the proportionality approach to democracy is supported by procedural considerations respect for persons and for their autonomy as well as by consequentialist considerations the maximization of a *prioritarian principle*[593] social objective. It radically reduces the tension between democracy and justice by incorporating the evaluation of individual interests and social priorities into its fabric. Hence, the doctrine of proportionality principle might be added to the principles of these theories of justice.

[590] Víctor Ferreres Comella, Constitutional courts and democratic values: a European perspective (Yale University Press 2014).
[591] Van der Schyff, 'Limitation of rights: A study of the European Convention and the South African Bill of Rights'.
[592] CA 6821/93 United Mizrahi Bank Ltd v. Migdal Cooperative Village [1995] IsrLR 1, 228.
[593] *Prioritarianism* or the priority view is a view within ethics and political philosophy that holds that the goodness of an outcome is a function of overall well-being across all individuals with extra weight given to worse-off individuals. *Prioritarianism* resembles utilitarianism.

4.2.1.3 Third assumption: democracy is based on a balance between constitutional rights and the public 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. The constitutional rights are therefore relative. This relativity means that a constitutional license to limit those rights is granted where such a limitation may be justified to protect the public interest or the rights of the individual. 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 principle of human rights takes priority over other norms for action and also to the interrelationship of the rights within the human rights system. The interrelationship is the balancing between the realization of one right at a certain expense of another. There will always be a question of priority in the implementation process of rights, as in all political processes. This does not mean that one or several rights take priority as such; nor does it mean that the fulfilment of one right necessitates the violation of other rights or the creation of a hierarchy of rights. The principle of the human rights system is that all rights are to be held equally, but the reality of the implementation process necessitates a certain form of priority.[594]

The exceptions to this are the so-called "absolute rights": rights that have to be fulfilled in their totality as they are expressed. These are the rights to life, freedom from torture and slavery, and justice before the law. Here, the important point is that realizing a right is always dependent on the context in which it is to be implemented, and the realization of a right will therefore vary a great deal from context to context may be note the idea of substance of right.[595] The implementation of one right can also depend on the implementation of another right. It is important to mention here that some constitutional rights are not absolute. The fact that there is a constitutional right to carry out a certain action does not mean that the action is always permitted, but rather that the limitation of the right to perform it must be proportional. Doctrine

[594] Leslie John Macfarlane, *The theory and practice of human rights* (Temple Smith 1985) p 98.
[595] Ibid p 101.

of Proportionality is a set of rules determining the conditions for a limitation of constitutionally protected rights. This doctrine refers to a set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right to be constitutionally permissible. Hence, this doctrine is based on a fundamental distinction between the scope of constitutional rights and their protection, with in the frame work of democracy.

4.2.1.4 Fourth assumption: balancing through limitation clauses

The key concept of the constitutional democracy is to achieve 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[596] were taken into consideration at the time of drafting the general limitation clause appearing in the Constitution of the Republic of South Africa: The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[597] Proportionality review - in particular the third balancing test - necessitates the assessment of the right in question in order to compare and balance it with the importance of achieving the governmental goal. On the other hand, an exclusionary reasons review would not have the same effect.

4.2.1.5 Fifth assumption: limitations clauses are based on proportionality

In order to develop and interpret the criterion for an adequate equilibrium between the two areas of democracy, which aids in stabilising the advantageous rule with human rights and

[596] R .V Oakes [1986] 1 SCR103, 136.
[597] Constitution of Republic of South Africa, Art 36(1).

creates an instrument needed by a democratic civilisation 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.[598] 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 requires that state action that limits rights be justified in judicial review proceedings. Proportionality analysis is the best means of determining justification for rights limitations especially when comparing with unreasonableness doctrine. Courts are uniquely well positioned to conduct proportionality analysis and should not defer to the other branches of government. Judicial review is democratic and courts should not be concerned about its legitimacy.

4.2.2 B - Proportionality and the Rule of Law

In Germany, many researchers – including judges – believe that the idea of proportionality should stem from the notion of *Rechsstaat.* [599] The term, when translated into English, is "Rule of Law", and "*Etat de Droit*" [600] in French. The use of the rule of law as a reason for adopting

[598] Lorraine E Weinrib, 'The Supreme Court of Canada in the age of rights: constitutional democracy, the rule of law and fundamental rights under Canada's constitution' (2001) 80 Can B Rev 699.
[599] Rechtsstaat is a doctrine in continental European legal thinking, originating in German jurisprudence, that can be translated as "legal state", "state of law", "state of justice", "state of rights", or "state based on justice and integrity". ... A country cannot be a liberal democracy without being a Rechtsstaat, available at https://www.google.co.uk/search?site=&source=hp&q=rechtsstaat+english&oq=Rechtsstaat&gs_l=hp.3.3.0l10136.136.0.5915.2.1.0.0.0.0.82.82.1.1.0....0...1.1.64.hp..1.1.82.0.qpkXlgjg7Uk accessed on June 5, 2017.
[600] Rainer Grote, 'Rule of Law, Rechtsstaat,/y Etat de Droit' (2001) 8 Pensamiento Constitucional 127.

proportionality as a factor for limiting constitutional rights via the constitutionality of sub-constitutional law has also been implemented by other legal organisations.[601]

To understand the relationship between the rule of law and the doctrine of proportionality, it is essential to determine whether the proportionality could have a compatibility with the principles of rule of law[602] in five steps. First, it is essential to examine whether the rule of law principle has a constitutional status. Second, it must be determined whether, as a constitutional principle, the rule of law includes a feature of Human Rights. Third, we must determine whether the rule of law, as a constitutional principle, is based upon a balance between constitutional rights and their limitations. Fourth, it must be determined that such a balance is conducted through the use of limitation clauses (statues or the common law). Fifth, it is essential to establish an opinion on whether limitation clauses, which advance the principle of the rule of law, are based on proportionality.

4.2.2.1 First assumption: The Rule of Law has a constitutional status

The rule of law principle plays a central role in the laws of most democracies. It has a constitutional status in those cases where the constitution itself declares that explicitly. There are a number of constitutions which affirm the superiority of the rule of law. For instance, the Portuguese Constitution (1976) states clearly that the Portuguese Republic is a democratic state "based on the rule of law" (*estado de direito*).[603] Similarly, the Spanish constitution (1978) declares that Spain is a social and democratic state, "subject to the rule of law" (*estado de derecho*).[604] In those legal systems where the constitution refers explicitly to the rule of law, those provisions are viewed as having a constitutional operative effect and not merely that of a declaratory nature.[605] However, in those cases where the constitution is silent, then more responsibility comes on the shoulders of the judiciary. For example, here I must state that the German Constitutional Court has recognized the principle of the rule of law (*Rechtsstaat*) as

[601] M Fordham and T de la Mare, 'Identifying the Principle of Proportionality In: Jowell' (2001) Understanding Human Rights Principles, Oxford and Portland: Hart Publishing 55.
[602] In simple terms, democracy focuses on how societies select those who will hold power, while the rule of law is concerned with how political power is exercised. ... In its truest sense, rule of law governance is called a "nomocracy", from the Greek nomos (law) and kratos (rule).
[603] Constitution of Portugal, Art. 2.
[604] Constitution of Spain, Art. 1(1).
[605] Dawood v. Minister of Home Affairs, 2000 (3) SA 936 (CC).

having constitutional status. The court arrived at this conclusion after reading the provisions of the basic law as one whole text,[606] while paying attention to Germany's democratic nature.[607]

4.2.2.2 Second assumption: The Rule Of Law Includes Human Rights

Similar to the concept of democracy,[608] the principle of the rule of law has several meanings.[609] Its content may change in accordance with the users' tradition. All agree that the principle contains both formal aspects (the "formal rule of law") and jurisprudential aspects (the "jurisprudential rule of law"). Both aspects define the principle of legality. According to both aspects, the "rule of law" is "the law of rules".[610] This assertion immediately raises the difficult question of whether Hitler's Germany, or Apartheid South Africa, were legal systems governed by the rule of law. Obviously, the answer is in the negative, but is not very easy to deliver. This is the most controversial part of the rule of law. However, all of them agree on the point that the rule of law is the recognition and protection of human rights.

Here, it is essential to understand the substantive aspects of the rule of law. Presidential pardon is a substantive aspect, but it must comply with the provisions of the constitution. A law in conflict with the constitution is void, and the courts are authorized to declare it as such. Similarly, judicial review on the constitutionality of the statute, therefore, also derives from the substantive aspect of the rule of law principle. The constitutional basis for judicial review of administrative actions may also be derived from the substantive aspect of the rule of law. Moreover, if the executive branch violates its obligations under the constitution, or under statute, the victims of such violations may be entitled to a remedy even if the executive action was carried out without fault (without negligence or intent). Finally, and above all, the substantive aspect of the rule of law strives to ensure several justice-related values: primarily the recognition and protection of Human Rights.[611] The rule of law is not merely the law of rules; the Indian Supreme Court premised the concept of judicial review on a rule of law

[606] Kommers and Miller, The Constitutional Jurisprudence of the Federal Republic of Germany: Revised and Expanded p 179.
[607] Volkmar Gotz, 'Legislative and Executive Power under the Constitutional Requirements entailed in the Principle of the Rule of Law' (1991) New Challenges to the German Basic Law, Baden-Baden: Nomos Verlagsgesellschaft
[608] Barak, the judge in a Democracy (Princeton University press, 2006), p 236-240.
[609] Ibid p 239.
[610] A. Scalia, "The Rule of Law as a Law of Rules," 56 U. Chi. L.Rev. 1175 (1989).
[611] Ulrich Karpen, 'Good Governance Through Transparent Application of the Rule of Law'(2009)' 11 European Journal of Law Reform 213.

foundation, and ruled that the rule of law means the rule of liberty.[612] On a brief overview of the above discussion I can argue that for the supremacy of law is the aim, than rule of law is the best tool to achieve this aim, with the intention to protect the human rights of the people. It can only be achieve if the court with this aim link Rule of Law with Human Rights of the people. The court has to evolve now and make a strategy by which it can force the government not only submit to law but also create conditions where people can develop capacities to enjoy their rights in proper and meaningful way.

4.2.2.2.1 Distinction between Formal and Substantive Conceptions of the Rule of Law

It is very important to analyse the formal and substantive conceptions of the rule of law. The theoretical formation of the rule of law can be pared down to two basic categories, known as the "formal" and the "substantial" version, which has three separate forms. These alternative formulations run from thinner to thicker accounts, meaning that they move from formulations with fewer requirements to those with more requirements. It is essential in legal theory to separate the rule of law conception into formal and substantive branches. "Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm (was it prospective or retrospective, etc.). Formal conceptions of the rule of law do not, however, seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met.

Those who espouse substantive conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between "good" laws, which comply with such rights, and "bad" laws, which do not".[613]

[612] Mahabir Prashad Jain, Indian constitutional law (Wadhwa & Company 2003).
[613] Craig P, 'Formal and substantive conceptions of the rule of law: an analytical framework' *The Rule of Law and the Separation of Powers* (The Rule of Law and the Separation of Powers, Routledge 2017) p 176.

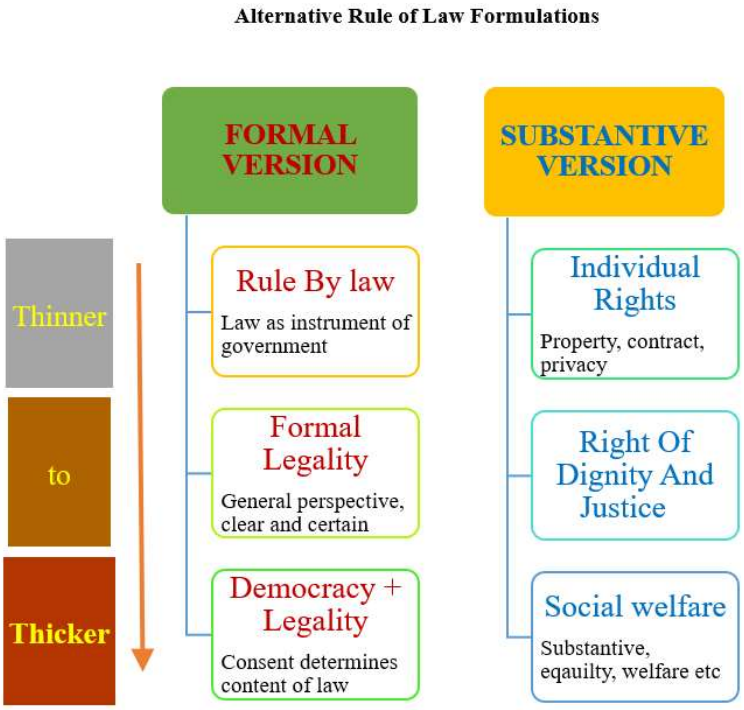

Figure 3

Hence we can conceive that the formal theories focus on the proper sources and form a legality, while substantive theories also include requirements about the concept of the law (must cooperate with principles of morality or justice). This difference should not be taken strictly, because the formal versions incorporate the substantive requirements."

Rule of Law: Formal version

4.2.2.2.1.1 Rule by law

This is the thinnest formal kind of rule of law, which means that the law is the source through which any state conducts its affairs, such that whatever a government does, it should do through law.[614] In this mode, the rule of law has no real meaning, for it collapses into the notion of rule by the government.[615] This can be further elaborated to mean that "the rule of law means that all government action must be authorized by law the…".[616] Every modern state has the rule of

[614] Noel B Reynolds, 'Grounding the rule of law' (1989) 2 Ratio Juris 1 p 77.
[615] Ibid p 81.
[616] Franz Neumann, 'The change in the function of law in modern society' (2014) 109 Revista Brasileira Estudos Politicos 13 p 87.

law in this narrow sense. The formal rule of law view is that for there to be government under the law, laws must adhere to certain procedural requirements. This view says nothing about the morality of law but rather that the subjects should be guided so that each knows their position in the state. Hence, I argue that in this formal kind of rule of law, to achieve the desired certainty, laws should be 'prospective, clear, adjudged by an independent judiciary and must allow its citizens access to the courts'. Formal Legality is another main feature of the Formal kind of rule of law which means that the law must be prospective, general, clear and relatively stable,[617] which means that the law should be an independent judiciary, hold open and fair hearings without any bias, and review of legislative and administrative officials and limitations on the discretion of police to insure conformity to the requirements of the rule of law.[618] Supporters of this mode of the rule of law are in substantial agreement about its requirements and its implications, except for two points: on how to understand the equality requirement, and on whether the rule of law itself represents a moral good.[619]

Democracy and formal legality is the next and the last version of the rule of law adds democracy to formal legality.[620] In this mode, democracy is silent in that it describes nothing about what the content of law must be. It is a decision procedure that specifies how it determines the content of law,[621] which can be further elaborated to show that freedom is to live under laws of one's own making. This is the notion of political liberty.[622] According to Jurgen, "the modern legal order can draw its legitimacy only from the idea of self-determination; citizens should always be able to understand themselves also as authors of the law to which they are subject as addresses".[623] Law obtained its authority from the consent of the government. Judges, government officials and citizens should always follow and apply the law as enacted by the people (through their representatives). Under this reasoning, formal legality, especially in its requirements of certainty and equality of application, takes its authority from and serves democracy.[624] This feature of the rule of law are parallel and very

[617] Joseph Raz, 'The rule of law and its virtue', *The Rule of Law and the Separation of Powers* (The Rule of Law and the Separation of Powers, Routledge 2017) p 214.
[618] Robert S Summers, 'A formal theory of the rule of law' (1993) 6 Ratio Juris 127 p 79.
[619] Ibid p 87.
[620] Jørgen Møller and Svend-Erik Skaaning, 'Systematizing thin and thick conceptions of the rule of law' (2012) 33 Justice System Journal 136.
[621] Ibid p 93.
[622] Ibid p 101.
[623] William Rehg and James Bohman, 'Discourse and democracy: the formal and informal bases of legitimacy in Habermas' Faktizität und Geltung' (1996) 4 Journal of Political Philosophy 79 p 111.
[624] Ibid p 113.

much compatible with the principles of democracy and the doctrine of proportionality, as they also contain the features of certainty and equality.

4.2.2.2.1.2 Rule of Law: Substantive version

All substantive versions of the rule of law include the elements of the formal rule of law, and then go further. This version includes individual rights within the rule of law. Ronald made a sophisticated case for this:

> …the 'rights' conception assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type.[625]

Substantive rule of law requires laws to be compatible with principles of equality, to protect fundamental rights, to adhere to principles of procedural fairness and natural justice and to comply with obligations deriving from international law. The substantive "rule of law" is eroded both by the reduction in the protection of civil liberties, as well as through reducing legal authority and accountability of those exercising power in such a way that they erode civil liberties and human rights. It is pertinent to mention here that a more substantive understanding of the rule of law is more controversial because the content of rights is more contested than is a formal account of the rule of law: what are the different ways in which proportionality can be related to i. the formal rule of law and ii. the substantive rule of law. The principle of legality does not merely demonstrate the way in which ideals stemming from substantive theories of the rule of law are maintained, but it is itself regarded as a means by which the rule of law is promoted.

The substantive version of rule of law also safeguards the right to dignity and justice in another words it means that anti-democratic implications of rights. It is pertinent to mention here that

[625] Ronald Dworkin, *POLITICAL JUDGES AND THE RULE OF-LAW* (1979) p 262.

the individual rights inevitably have anti-democratic implications. Every Western liberal democracy struggles to find a balance. This struggle has been shaped by battles over the rule of law.[626] There are two interrelated but distinguishable facets to this: the limits imposed on a democracy, and the power according to judges. The rule of law is more concerned with and committed to individual liberty than democratic governance.[627] Democracy still rules, it might be said, when individual rights are explicitly contained within popularly enacted constitutions or bills of rights, because such clauses are themselves the products of democratic forces.[628]

On the question, if judges consult their own subjective views to fill in the content of the rights, the system would no longer be the rule of law, but the rule of law of the men and women who happen to be the judges,[629] Dworkin denied that judges consult their own subjective views of the governing principles but instead should seek to find the community's latent or emergent principles immanent within the complex of legal rules.[630] The court, like the legislature, is a political institution participating in and reflecting the political process.[631] Judges should step in to enforce rights epically under circumstances where democracy is failing to accurately represent the principles underlying the policy, or to achieve justice. The last version of the substantive rule of law is social welfare; democracy and individual rights. Allan once argued that "the rule of law is an amalgam of standards, expectations and aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed".[632] Hence, legality is the dominant understanding of the rule of law. The thickest substantive versions of the rule of law incorporate formal legality, individual rights, and democracy, but add a further qualitative dimension that might be roughly categorized under the label "social welfare rights". It is pertinent to mention here that the rule of law cannot be about everything good that people desire from government. The persistent temptation to read it in this way is a testament to the symbolic power of the rule of law, but it should not be spoilt.

The difference between formal and substantive theories of the rule of law is well-known; Substantive theories of the rule of law are concerned with the content of the law. Therefore,

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[626] Ibid p 279.
[627] Allan C Hutchinson, 'Democracy and the Rule of Law' (1987) p 100.
[628] Ibid p 131.
[629] Tamanaha, *On the rule of law: History, politics, theory* p 76.
[630] Ibid (N-41) p 101.
[631] Ibid (N-41) p 100.
[632] Tamanaha, *On the rule of law: History, politics, theory* p 101.

when determining whether the UK constitution adheres to the values of substantive conceptions of the rule of law, we have to analysed the extent to which the UK law upholds fundamental human rights and civil liberties. Formal theories of the rule of law focus not upon the content of the law, but upon the way in which the law is enacted. For example, it proscribes that the law be clear, prospective as opposed to retrospective, able to be followed, and apply in the same manner to all individuals. Formal theories analyse the way in which the law is good at its job of governing, setting no requirements as to the content of the laws enacted.[633] As such, they are criticised as to their worth, given that the criteria of formal theories of the rule of law can be adhered to in a legal system the content of whose laws systematically undermine human rights and civil liberties.[634] It is generally agreed that the formal rule of law is a necessary minimum.

Substantive conceptions of the rule of law, on the other hand, are criticised for being devoid of content. Fundamental rights are protected by a substantive conception of the rule of law if the values the 'rule of law' proscribes for the content of law are those which promote fundamental rights and civil liberties. The values which underpin the substantive conception of the rule of law are more important than the principle of the rule of law itself,[635] and these are also the main objective of the democracy, and eventually the principles of the common law system.

4.2.2.3 Third assumption: the rule of law is based on a balance between constitutional rights and public interest

The substantive aspect of the rule of law, much like the substantive aspect of democracy, is not made up entirely of the protection of constitutional rights.[636] Rather, the rule of law principle is a result of a proper balance between all its aspects. This is the prevailing view to date across contemporary constitutional democracies.[637] Justice Khanna, an Indian Supreme Court Judge, stated that:

[633] See P.P Craig, 'Formal and Substantive concjeptions of the Rule of Law: an analytical framework' [1997] Public Law 467.
[634] David Ludovic Dyzenhaus, 'Hard'cases in'wicked'legal systems', University of Oxford 1989).
[635] J Raz, 'The Rule of Law and its Virtue' (1977) 93 Law Quarterly Review, 195.
[636] Jürgen Habermas, *Between facts and norms: Contributions to a discourse theory of law and democracy* (John Wiley & Sons 2015).
[637] Kommers and Miller, The Constitutional Jurisprudence of the Federal Republic of Germany: Revised and Expanded p 36.

> The rule of law is now the accepted norm in all civilian societies …. Everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notion of individual liberty and public order.[638]

Hence, when the constitutional rights are relative, both the right and the license to limit it are found in the constitution.

In reference to this I can argue that both rights and collective interests can be the subject matter of principles required that the interests they protect be realised to the greatest extent possible given the legal and factual possibilities i.e Alexy. An important feature of the rule of law balancing model is that it treats rights and the public interest as commensurable with each other. It assumes that there is a single scale on which the value of protecting rights and that of protecting the public interest can be measured, compared and balanced.

4.2.2.4 Fourth assumption: the balancing is conducted through limitation clauses

The key concept of the "constitutional democracy is balancing, the balancing between the formal and substantive aspects of democracy".[639] Such balancing presupposes the simultaneously 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.[640] Chief Justice Dicksons' words[641] were taken into consideration at the time of drafting the general limitation clause appearing in the Constitution of the Republic of South Africa:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[642]

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[638] A.D.M Jabalpur V. S.Shuka, AIR 1976 SC 1207, 1254, 1263.
[639] Karpen, 'Good Governance Through Transparent Application of the Rule of Law'(2009)' p 169, 178.
[640] Stephen Gardbaum, 'A Democratic Defense of Constitutional Balancing' (2010) 4 Law & ethics of human rights 79.
[641] R .V Oakes [1986] 1 SCR103, 136
[642] Constitution of Republic of South Africa, Art 36(1).

Hence, when the relevant context is the tension between the formal facet of democracy and constitutional rights, that balancing is resolved through the use of 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.

4.2.2.5 Fifth assumption: limitation clauses are based on proportionality

Generally, the contents of limitation clauses properly balance the different aspects of the rule of law. Hence, the sub-constitutional law limiting the constitutional right should be proportional. In a more specific sense, proportionality may be derived directly from the principle of the rule of law, as we know that the rule of law in both formal and substantive aspects is in a state of constant tension.[643] The doctrine of proportionality is a solid and concrete solution for this tension to strike balance, as it recognizes both formal and substantive aspects while balancing both proportionally. Such a balance would have to recognize, on the one hand, the need to realize the will of the majority as expressed by the legislative body, and on the other, the proportional limitations on such power by the majority. Such an approach was adopted in Germany by constitutional commentators and the courts. According to this approach, proportionality is derived from the rule of law.[644] It can be justified that the democracy is the source of proportionality, which applies *mutatis mutandis* to the principle of rule of law, as a legal source of proportionality. Hence, the close connection between democracy and the rule of law makes this principle into a special source of proportionality.

4.2.3 C - Proportionality as essential to the conflict between legal principles

The third argument regarding proportionality focuses on the fact that most human rights are legally structured as principles rather than rules.[645] 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

[643] Guy Mhone and Omano Edigheji, 'Globalisation and the challenges of governance in the new South Africa: Introduction' (2003) Governance in the New South Africa: The Challenges of Globalisation p 59.
[644] Donald P. Kommers, 'The Federal Constitutional Court: Guardian of German Democracy' (2006) 603 The Annals of the American Academy of Political and Social Science 111.
[645] Petra Dobner and Martin Loughlin, The twilight of constitutionalism? (Oxford University Press 2010).

principle as the "*Victor*" while excluding the other forms of the constitutional framework.[646] 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 something be realized to the greatest extent possible given the legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible.[647]

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 chapter the principle of rule of law and democracy are having the similar codes.

4.2.4 D - Proportionality and Interpretation

Democracy, the rule of law, and legal principles (or principle theory) are not the only possible sources upon which to establish proportionality. Another very important source is the constitution itself and its interpretation.[648] This view has been adopted by several legal systems, in which Germany, Canada, Spain and Israel are prominent. Constitutional interpretation approaches the text generously.[649] It aspires to achieve constitutional harmony. It adopts a holistic view of the constitution, and different parts of the constitution are deemed interconnected.[650] Together, they establish constitutional unity based on fundamental values which inspire the interpretation of the constitutional text and create an objective hierarchy of values.[651] According to this hierarchical order, constitutional rights constitute the objective

[646] A. Barak, The Judge in a Democracy (Princeton University Press, 2006) p 291.
[647] Alexy, *A theory of constitutional rights* p 251.
[648] Pulido, 'The migration of proportionality across Europe' p 508.
[649] R. v. Big M Drug Mart [1985] 1 SCR 295, 344 ("The interpretation should be …. A generous rather than legalistic one, aimed at fulfilling the purpose of the guarantee and securing for the individual the full benefit of the Charter's protection."
[650] Kommers and Miller, The Constitutional Jurisprudence of the Federal Republic of Germany: Revised and Expanded p 45.
[651] Karl Heinrich Friauf, Techniques for the Interpretation of Constitutions in German Law (1968).

values upon which the constitution is built. These objective values, and the values that limit them, are a central feature of the objective constitutional structure.[652] As the German Constitutional court noted in Luth:

> The basic Law is not a value neutral document … Its section on basic rights establishes an objective order of values, and this order strongly strengthens the effective power of basic rights.[653]

The different values that together constitute the objective constitutional order tend to conflict with one another. For each principle, it may be possible to find an opposing principle.[654] Conflict resolution is found by forming a synthesis between the different principles and creating internal harmony between them. All these may be achieved by using the concept of proportionality, which helps to maintain the unity of the constitution. The interpretive approach views proportionality as part of the constitution because of the interpretation of the entire constitution. At times, proportionality may be derived directly from the explicit text of the constitution. At other times, it may be derived from its implicit text. In both cases, however, we are dealing with a constitutional level doctrine that stems from the desire to ensure constitutional unity and harmony.[655] The operative effect of proportionality, as mentioned, is not at the constitutional level but only at the sub-constitutional level. This kind of effect may determine the constitutionality of sub-constitutional law trying to limit a constitutional right.

Hence, constitutional proportionality determines the legislative validity or compatibility of a sub-constitutional law (a statute or a common law) that limits a constitutional right. It does so while fully developing the concept of proportionality and its components. On the other hand, interpretive balance deals not with the question of validity, but also with that of meaning. It provides meaning to the text of the legal norm. The balance it carries out uses, by analogy, only one of the components used by proportionality: that of proportionality *stricto sensu*. Democracy, the rule of law, the Principle theory, and constitutional interpretation are all legal sources from which proportionality may be derived as a constitutional concept. When the

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[652] Dieter Grimm, The Protective Function of the State, Georg Nolte, European and US Constitutionalism (Cambridge University Press 2005).
[653] Kommers and Miller, The Constitutional Jurisprudence of the Federal Republic of Germany: Revised and Expanded p 363.
[654] Larry Alexander and Ken Kress, 'Against legal principles' (1996) 82 Iowa L Rev 739.
[655] David M Beatty, The ultimate rule of law (Oxford University Press, USA 2004).

conflicting principles are of constitutional status and a question arises as to the legal validity of the limiting sub-constitutional law, each of those four sources, and all four of them combined, can establish the constitutional status of proportionality.[656]

4.3 Proportionality and democratic constitutionalism

This section critical analysis the compatibility between the principles of democratic constitutionalism with the principles of 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".[657] Within this culture, all governmental conducts and the basic arrangement of society must be permissible in relation to 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. [658]

While the culture of justification interprets proportionality as being additive through independent autonomy or constitutional legitimacy, the ethos of democracy considers proportionality in terms of whether or not "it enhances the specifically democratic legitimacy of a constitutionalized rights regime".[659] It is a culture that puts democratic, not justificatory, goals at its centre. Using this construct, the use of proportionality is to factor in certain democratic concerns while considering higher judicial law rights. There are three modes of support that demonstrate proportionality as enhancing democratic ideals within constitutionalised rights. First, it creates equilibrium between the demands of the politically

[656] Alexy, A theory of constitutional rights p 67.
[657] The term originated with Etienne Mureinik in 1994, who contrasted it to "a culture of authority," as a way of characterizing the aims of the new South African Constitution. "If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command", see also Etienne Mureinik, 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 South African Journal on Human Rights 31, David Dyzenhaus, 'Law as justification: Etienne Mureinik's conception of legal culture' (1998) 14 South African Journal on Human Rights 11.
[658] Mattias Kumm, 'Democracy is not enough: Rights, proportionality and the point of judicial review' (2009) p 279.
[659] Ibid p 287.

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 still remains the question of a constitutional right and the degree to which it is able to 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. But the general concept does not necessarily require that the particular limit take this form. 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 – "balancing, proportionality, and the limited override power – as the distinctive features of this conception reflect a less extreme limit on politically accountable decision-making".[660] In the face of a valid constitutional rights claim as determined by the courts, the political institutions are neither totally disabled nor totally empowered. Rather, they are hampered by reasoning that restricts both the purposes pursued and the means of tracking them, and cannot be sufficed by a widely held desire to not uphold that right. This is the opposite for ordinary circumstances where no constitutional right is involved; in these circumstances, political establishments are lawfully entitled to act for any purpose. Hence, the constrained overruling force runs a course between two poles: (1) The total empowering force of democratic majority dealings when a constitutional right is not being implemented; and (2) The outright immobilising of democratic actions when a constitutional right is in force. By thus employing a special, non-ordinary constraint on majoritarian decision-making, it satisfies the essential requirement of a constitutional right, but does not totally disable popular self-government.[661] A slightly different way of expressing this argument is that by rejecting the peremptory status of constitutional rights, the principle of proportionality acknowledges the democratic weight attaching to other competing claims asserted by the politically accountable institutions.[662] i.e. proportionality treats some rights as not absolute?

[660] Ibid p 111.
[661] Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 The American Journal of Comparative Law 463 p 119.
[662] Ibid 127.

This conception of constitutionalized rights can better reflect democratic values than the absolute, disabling conception. To be sure, those specific things we believe governments should never lawfully be able to do regardless of the circumstances or conflicting objectives can be singled out for absolute protection without accepting that this inheres in all constitutional rights at all times or that constitutional rights have no relevance to other situations . It is unreasonably constraining of both the role of constitutional rights and the democratic policy-making measures for the former to possess a completely immobilising 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 evaluatively). 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. [663]

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 present and preceding people. As explained by Michael Perry:

> Democracy requires that the reasonable judgment of electorally accountable government officials, about what an indeterminate human right forbids, trump the competing reasonable judgment of politically independent judges.[664]

I argue and further enhance this concept to the level that first it should be democratic constitutionalism and should also consist with a compound of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from and is limited by a body of fundamental law. That is, up to this point the argument, proportionality does not

[663] Of course, (1) the more recent the constitution and (2) the easier the constitution is to amend – i.e., the closer to ordinary democratic decision-making procedures amendment is – the less important or relevant this argument becomes, Alexy, A theory of constitutional rights.
[664] Michael J Perry, 'Protecting human rights in a democracy: what role for the courts' (2003) 38 Wake Forest L Rev 635.

depend on the existence of reasonable disagreement about what rights there are and what they include among and between judges, legislators, and citizens.[665] Rather, it is about the power to limit or override a right *as or however interpreted* in the face of conflicting non-rights claims.

4.3.1 The centrality of the distinction

One of the objective of this thesis is to argue why doctrine of proportionality is more intimate with the common law system than the unreasonableness. This is because the modern distinction between the scope of the constitutional right and the extent of its protection at the sub-constitutional level is of major importance for several reasons.[666] 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 needs for justification each time a limitation is imposed upon that right through statute or common law.[667] The burden of proof of such a justification falls on the state.[668] Second, the distinction highlights the difference between the constitutional level, where rights are determined and their scope is prescribed, and the sub-constitutional level, where the extent of the right's realization (application) is determined and its limitations prescribed. Such a dichotomy between the constituent body (which determines the constitutional nature of the right), and the legislative body (which determines the means for realizing these constitutional rights) is of cardinal importance.

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.[669] This dichotomy may also assist in properly shaping the public discourse about constitutional rights and set up boundaries regarding the areas where society's daily politics can intervene. 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

[665] Ibid.
[666] Barak A, 'Proportionality: Constitutional Rights and Their Limitations ' (2012) Cambridge University Press p 494.
[667] Ibid p 458.
[668] Ibid p 439.
[669] Ronald C Den Otter, Judicial review in an age of moral pluralism (Cambridge University Press 2009).

legislative and judicial branches.[670] 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.[671] In the context of the above mentioned discussion I can argue that the application of the doctrine of proportionality is timely important to at the time of making distinction between the constitutional and sub constitutional right.

4.4 The scope of freedom of expression and its protection in the framework of the doctrine of proportionality

This section examines the scope of freedom of expression and the lawful restrictions which may be imposed upon it, together with the law relating to breach of confidence. In the United Kingdom, before the Human Rights Act 1998, there was no right to free speech, but, in a negative way, there was freedom of expression subject to the limitations imposed by law. Freedom of expression is now regulated under Article 10 of the European Convention on Human Rights, and is incorporated into domestic law under the Human Rights Act 1998. However, this right is limited by restrictions. Freedom of Expression under Article 10 includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.[672] The right is subject to such legal restrictions as are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.[673] Lawful constraints on the right are further permitted regarding members of the legal profession, the armed forces and constabularies. The result of Article 10 remains that all constraints on the right need to be warranted in conjunction with other limited articles; furthermore, they must be *proportionate* and *necessary*[674] conditions. The main difference between the range and expression of the constitutional right is recognised by Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This extract below reads:

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[670] A. Barak, 'the Judge in the a Democracy ' (2016) Princeton University Press p 236-240.
[671] HCJ 6427/02 The Movement for Quality Government Of Israel v The Knesset [2006] Isr SC 61(1) 619.
[672] Human Rights Act 1998, Article 10 does not prevent state licensing of broadcasting, television or cinemas.
[673] *R v Sherwood ex parte telegraph Group Plc* (2002). The Court ruled that the ban was necessary in the interests of justice.
[674] Gary Slapper and David Kelly, The English Legal System: 2011-2012 (Routledge 2011).

> Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.[675]

Therefore, Article 10(1) is responsible for producing the range of the right to autonomy of expression. As illustrated by its interpretation, the range it entails is extremely diverse and covers a range of forms (verbal, written, advertisements) plus content (including racist hate speech, libel or obscenity).[676] In spite of this great diversity, the convention retains a clause that enables restriction of the freedoms used. The application of this freedom, since it entails accountabilities and obligations, may be held to certain constraints, formalities, provisions or penalties as issued by the legal system which stems from a democratic civilisation. These conditions are in the general interest of protecting society's ethics, national safety, and the right of people's confidential information, and ensuring an unbiased and commanding judiciary. Thus, as stated by the article, the right to freedom of expression is subject to constraints by law for the general protection of people's rights, preventing the occurrence of hate crime or to restrict pornographic communication.[677] The restrictions are "fundamental in a democratic society" or to put it simply, must be proportional.[678]

4.5 Conclusions

The arguments in this chapter is to critically analyse the compatibility of doctrine of proportionality with the common law system and the arguments in the chapter has demonstrated that there is a necessary conceptual connection between democratic norms, the rule of law, constitutional rights and principles of proportionality, such that proportionality must be used whenever and wherever constitutional rights adjudication exists. In my

[675] Convention for the protection of Human Rights and Fundamental freedoms, November 4, 1950, 213 UNTS 222.
[676] C Ovey and R White, 'European Convention on Human Rights' (2003) 54 NORTHERN IRELAND LEGAL QUARTERLY 336.
[677] A, 'Proportionality: Constitutional Rights and Their Limitations' p 22.
[678] Ibid p 23, see also conflict of rights, which means There are many situations in which rights, interests, and values seem to conflict or compete. When evaluating situations of competing rights, human rights and other legally codified rights will usually hold a higher status than interests and values.

conclusion there are two basic reasons concerning the relationship between constitutional rights and proportionality analysis. The first maintains that there exists a necessary connection between constitutional rights and proportionality, the second argues that the question of whether constitutional rights and proportionality are connected depends on what the framers of the constitution have actually decided, that is, on positive law. The first thesis may be termed 'necessity thesis', the second 'contingency thesis'. According to the necessity thesis, the legitimacy of proportionality analysis is a question of the nature of constitutional rights, according to the contingency thesis, it is a question of interpretation. A variety of reasons can also justify the significance of proportionality to a new context, leading to the debate on the freedom of expression and its protection in the framework of the doctrine of proportionality. This chapter has also shown 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.[679] As proportionality possesses both the qualities, democracy is based on human rights and any limitation on human rights requires a legal justification.[680] Proportionality is also based on the notion of structured discretion.[681] A person applying this principle must think in stages.[682] 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.

This chapter also argued that doctrine of Proportionality has direct connection with human rights theories – in fact, it is a vessel for these theories.[683] There are many theories regarding human rights and their limitations.[684] Most of them can be found in the doctrine of proportionality. Proportionality is an analytical and a legal tool and is fed by external data. It is meant to protect both human rights and public interest at the same time. I must say that this

[679] Ibid p 211.
[680] Kavanagh, Constitutional Review under the UK Human Rights Act p 234.
[681] Paul Craig, Unreasonableness and proportionality in UK law (na 1999)85; see also Kavanagh, Constitutional Review under the UK Human Rights Act 255.
[682] Michael Fordham, 'Common law proportionality' (2002) 7 Judicial review 110.
[683] Kai Möller, 'Two conceptions of positive liberty: towards an autonomy-based theory of constitutional rights' (2009) 29 Oxford Journal of legal studies 757.
[684] Terry Collingsworth, 'The key human rights challenge: Developing enforcement mechanisms' (2002) 15 Harv Hum Rts J 183.

doctrine is highly compatible with most human rights[685] theories: for example, Alexy's theory of principle shaped rights, which describes that a principle always strives for optimal realization. It can also be concluded that proportionality gains not only the legal source for its constitutional status but also a substantive justification for its operation. If the proportionality is derived from the democracy and the rule of law, then both can serve as justifications for proportionality.[686] Indeed, democracy, the rule of law and human rights are inseparable.[687] This relationship between democracy, the rule of law and human rights is based on the understanding that when a number of legal conditions are met, the restrictions on human rights are not undemocratic. It means that a proper balance is struck between the rights on the one side and the reason for limitation on the other.

In the same manner, proportionality has shown significant results when applied in the process of judicial review.[688] Having conducted transparent analyses on the structure and composition of the doctrine of proportionality, it is essential to investigate the principles of necessity and balance, which are the main features of this doctrine. It is important to understand their function before going towards the application of this doctrine. Therefore, the next chapter will shed light on these principles and their applications within the framework of the doctrine of proportionality.

[685] Amartya Sen, 'Elements of a theory of human rights', *Justice and the Capabilities Approach* (Justice and the Capabilities Approach, Routledge 2017).
[686] Gardbaum, 'A Democratic Defense of Constitutional Balancing' p 92.
[687] A, 'Proportionality: Constitutional Rights and Their Limitations' p 465.
[688] Jeremy Waldron, Law and disagreement (OUP Oxford 1999) p 189.

CHAPTER FIVE: The Principles of "Necessity" and "Balance": the most important elements of the Doctrine of Proportionality in the judicial review process: A critical analyses

5.1 Introduction

The "previous chapter exposed that the doctrine of proportionality relates to the principle of interpretation of statutory provisions maintaining fairness and justice. This doctrine is fully compatible with the common law system adopted by the UK constitution. The previous chapter also suggested that the doctrine of proportionality and its principles are very well-matched with the principle of democratic society and the rule of law. The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between his particular goals and the means he employs to achieve those goals, so that his action impinges on the individual rights to the minimum extent to preserve the public interest. This means that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred."

In this chapter I argue that the doctrine of proportionality contains two very important elements and in the human rights context, this doctrine involves tests of balance and necessity. This analyses will further advance my argument by differentiating and giving the edge to the doctrine of proportionality from unreasonable which is 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. This argument will make a foundation for my next analyses on differentiating the doctrine of proportionality from unreasonableness as many claims that both are same and proportionality doctrine is the branch of unreasonableness doctrine.[689]

The second questions what is a "balancing test" and how does it work in the judicial review process, as the forth element of proportionality. What does it means "scrutiny of excessively onerous penalties" or infringements of rights or interest and a manifest imbalance of relevant considerations, are the basic issues I raised in this chapter. Furthermore, the second element is

[689] Margit Cohn, 'Legal transplant chronicles: the evolution of unreasonableness and proportionality review of the administration in the United Kingdom' (2010) 58 The American Journal of Comparative Law 583.

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 that are addressed in this chapter to understand the main objective of applying this doctrine and check the balance between the two rights. In this chapter, I have focused more on the principle of balance compared to the principle of necessity: the rationale for this is that the principle of balance is also the last pillar of the doctrine of proportionality, *stricto sensu,* which makes this doctrine distinguished and prominent among all other tools of judicial review.

The first two components of proportionality 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[690] and are not based on balance.

5.1.1 The Nature of the Necessity Test

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. 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.[691] The requirement established by the necessity test, therefore, is that, in order to achieve the law’s purpose, rational means should be chosen such

[690] S. Woolman, “Riding the Push-me Pull-You: Constructing a Test That Reconciles the Conflicting Interests Which Animate the Limitation Clause,” 10 SAJHR 60, 89(1994).
[691] Alfred J Ayer, 'Freedom and necessity', Philosophical essays (Philosophical essays, Springer 1972).

that the intensity of the realization is no less than that of the limiting law,[692] and those means limit the constitutional right to a lesser extent.[693]

The main point of the necessity test, which is an expression of the notion of efficiency – or more specifically, of Pareto efficacy[694] – 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. The necessity test does not require a minimal limitation of the constitutional right. It only requires the smallest limitation of the constitutional right; it also requires the smallest limitation to achieve the law's purpose. At times, even the smallest limitation may be harsh. Indeed, the necessity test compares two rational means that equally realize the law's purpose. In this situation, the legislature should select the means whose limitations of the constitutional right are smallest. The necessity is triggered only when the fulfilment of the purpose is possible through the use of several alternative rational means, each of which limits the constitutional right to a different extent. In this situation, the necessity test demands that the legislator choose the means which limit the constitutional right to the least extent.[695]

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."

[692] Rivers, 'Proportionality and variable intensity of review'.
[693] Ibid, "The test of necessity asks whether the decision, rule or policy limits the relevant right in the least intrusive way compatible with achieving the given level of realization the legislative aim. This implies a comparison with alternative hypothetical acts. (Decisions, rules and policies etc.), which may achieve the same aim to the same degree but with less cost to rights".
[694] Alexy, *A theory of constitutional rights* p 198, Pareto efficiency is important because it provides a weak but widely accepted standard for comparing economic outcomes. ... A policy or action that makes at least one person better off without hurting anyone is called a Pareto improvement. The term is named for an Italian economist, Vilfreo Pareto.
[695] RJR- MacDonald Inc. v. Canada (Attorney General) [1995] 3 SCR 199 Ss 96: "The minimal impairment requirement does not impose an obligation on the government to employ the least intrusive measures available. Rather, it only requires it to demonstrate that the measures employed were the least intrusive, in light of both the legislative objective and the infringed right".

5.2 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. 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.

5.2.1 The First Element

The first element of the necessity test examines the question of whether alternative means can fulfil the law's purpose at the same level of intensity and efficiency as the means determined by the limiting law. If such an alternative does not exist, the law is necessary and the necessity test is met.[696] The alternative exists only if the (hypothetical) means would advance the law's purpose at the same level of intensity as those determined in the limiting law. It is therefore required that the alternative means fulfil the law's purpose quantitatively, qualitatively and probability-wise equally to the means determined by the law itself.[697]

5.2.1.1 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.

[696] Juan Cianciardo, 'The Principle of Proportionality: The Challenges of Human Rights' (2010) 3 J Civ L Stud 177.
[697] Harold Jeffreys, The theory of probability (OUP Oxford 1998).

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 chapter. 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.[698] 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 limiting law is unnecessary only in cases where the fulfilment of the law's purpose is achieved through less limiting means when all the other parameters remain unchanged. 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.[699]

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. The remaining conditions, as well as the remaining operational results, should not be altered. Thus, the goal advanced by the lesser limiting means should be the same goal at the foundation of the law's limitation. The financial means dedicated to the advancement of that proper purpose should not increase. The rights limited by the alternative means should be the same rights that the original law limited, while the extent of the limitation is diminished.

Questions arise when these assumptions are not met, or when reduction in the limitation of the constitutional right entails a limitation on other human rights of the same person, or a limitation on the rights of others not limited by the original arrangement. The answer to these questions is that they do not come under the domain of the necessity test, but rather come within the framework of proportionality *stricto sensu.*[700]

[698] Friedrich August Hayek, Law, legislation and liberty: a new statement of the liberal principles of justice and political economy (Routledge 2012).
[699] S. v. Manamela, 2000 (3) SA 1 (CC).
[700] Alexy, A theory of constitutional rights p 400.

5.2.2 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 analyses.

5.2.2.1 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. 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.

5.2.2.1.1 "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".[701] Personal circumstances should not be a factor in determining

[701] Emiliou, *The principle of proportionality in European law: a comparative study* p 31.

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.[702] 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)*[703] 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.[704] However, that choice will be examined further in the framework of the next stage of the examination; that of proportionality *stricto sensu.*

5.2.2.2 Complete Restriction Versus Individual Examination.

The limitation of a constitutional right is of lesser extent (fact vs. abstract) if it requires an individual examination of the right-holder instead of a blanket restriction of the right's realization.[705] Therefore, acceptance into the police force on the basis of an individual examination would limit the constitutionally protected right to freedom of occupation less than a complete restriction on anyone who is over the age of thirty-five to do the same. In the same way, it was held that individual examination of a prisoner's mail based on specific security alerts limits prisoners' right to privacy less than a general provision requiring an examination of all mail received by prisoners.[706] A general individual examination is more limiting than an individual examination based on advanced information or some sort of categorization. Under this approach, revoking one's passport based on an individual security check limits the person's right to travel less than a total ban which prevents the granting of passports. The same is true in cases where an exception determines the complete restriction at issue. Thus, a total ban fails

[702] A, 'Proportionality: Constitutional Rights and Their Limitations' p 412.
[703] Available at HCJ 7052/03 Adalah – The Legal Center for the Right of the Arab Minority v. Minister of Interior (May 14, 2006, unpublished), available in English at http://elyon1.court.gov.il/fileseng?03?520?070?a47?03070520.a47.pdf,para.89 (Barak,P). Accessed on 13 June 2017.
[704] A, 'Proportionality: Constitutional Rights and Their Limitations' p 67.
[705] Philip Sales and Ben Hooper, 'Proportionality and the form of law' (2003) 119 Law Quarterly Review 426.
[706] See Campbell v. United Kingdom, App. No 13590/88, 15 EHRR 137 (1993).

the necessity test if an individual examination fulfils the law's purpose to the same extent as a total ban. The same is not true if the individual examination does not fulfil the law's purpose to the same extent.

5.3 The Test of "Necessity" and the Test of "Time"

The rational connection requirement must be met both during the enactment of the limiting statue (*ex ante)* and during the constitutional review (*ex post)*.[707] Should the same requirement apply to the necessity test, the answer is "yes": therefore, the necessity test must be satisfied during enactment as well as during a constitutional review of the limiting law by the courts.[708] The reason for this approach stems from the understanding that a limitation on the right in question is maintained throughout the law's life. The justification for limiting a constitutional right should be continuous rather than momentary. Thus, for example, if a technological breakthrough following the enactment of the limiting statute enables the advancement of its purpose at the same level of intensity but with a lesser limitation of the right, the legislator should take advantage of the advancement. A statute may otherwise lose its constitutionality, since it is no longer necessary.

5.3.1 The Necessity Test and The Purpose's Level of Abstraction

The necessity test examines the means that the law uses to fulfil its purpose. It is required that the means both advance the law's purpose and limit the right in question less. From that premise, we may infer the close relationship between the necessity test and the law's purpose. The necessity test focuses on the purpose and the ways in which it may be fulfilled. This focus leads to difficulties when the law has several purposes. These purposes may be at the same level of abstraction, or at several levels of abstraction. In both cases, the degree of necessity of the means chosen is derived from the manner in which the purpose is determined.[709]

An example may be the *Manamela* case,[710] decided by the Constitutional Court of South Africa. Here the court reviewed a statute establishing a reverse onus of proof in matters regarding stolen goods. In this case, the majority of the judges held that the law was unconstitutional, since it did not meet the necessity requirement, while the dissent was of the

[707] A, 'Proportionality: Constitutional Rights and Their Limitations' 313.
[708] Ibid p 312.
[709] Stu Woolman and Henk Botha, 'Limitations' (1998) 12 Constitutional Law of South Africa, par p 87.
[710] S.v. Manamela, 2000 (3) SA 1 (CC).

opinion that the necessity test was met. The statute was meant to create tools to limit the market in stolen goods and the majority view of the statutory purpose at a high level of abstraction. Based on this purpose, it was held that the same purpose may be achieved through the use of less limiting means, such that the reverse onus presumption would apply only in cases of high value stolen goods.[711] In the minority view, the judges were of the opinion that the purpose acts as a warning to the public not to take part in any activity related to the market of stolen goods. In order to fulfil that purpose, there was a need to adopt the means chosen by the legislator, as a less limiting means would not be able to fulfil that goal.

Hence, it can be concluded that the higher the purpose's level of abstraction, the more likely it is that alternative means will 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.[712] 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.[713] 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.

5.3.2 Means "Narrowly Tailored" To Fulfil the Law's Purpose

Taking into account the metaphor of the *Cannon and the Sparrow*, as expressed by Fritz Fleiner, who famously wrote that the "police cannot shoot a sparrow with a cannon",[714] the necessity test also requires that the means chosen be "narrowly tailored" to achieve the law's purpose. Lord Diplock used a similar metaphor when he noted, in one of his cases, that one "must not use a steam hammer to crack a nut".[715] These metaphors are meant to drive home

[711] A, 'Proportionality: Constitutional Rights and Their Limitations' p 331.
[712] HCJ 7052/03 Adalah – The Legal centre for the Rights of the Arab Minority v. Minister of Interior (May 14, 2006, unpublished). Available in English at http://elyon.court.gov.il /files_eng/03/520/070/a47/03070520.a47.pdf, para 89.
[713] HCJ 7052/03 Adalah – The Legal centre for the Rights of the Arab Minority v. Minister of Interior (May 14, 2006, unpublished). Available in English at http://elyon.court.gov.il /files_eng/03/520/070/a47/03070520.a47.pdf, para 75 accessed on 22 June 2016.
[714] A, 'Proportionality: Constitutional Rights and Their Limitations' p 333.
[715] R. Goldsrein [1983] 1 WLR 151, 155. PL 92 (2000).

the point that the means should fit the purpose. Whenever the purpose can be fulfilled through the use of less limiting means, this approach should be used. There is no sense in using a hammer when all you need is a nutcracker.[716]

The requirement that the means be "narrowly tailored" to achieve the law's purpose fails in two sets of circumstances. In the first, the means do not completely achieve the purpose and there are matters required to fulfil the purpose that are not covered by the means. This arises in cases of under-inclusiveness and is not related to the necessity test. Under-inclusiveness may highlight an improper motive on the part of the legislator and thus affect the purpose component.[717] It may indicate that the principle of equality has been violated, or it may affect the suitability of the means used to realize the law's purpose;[718] either way, it does not affect the question of necessity.

In the second set of circumstances, the means chosen do achieve the law's purpose, but they are not "narrowly tailored" to fulfil that goal in that they limit the right in question beyond what is necessary. This is the case of over-inclusiveness, according to Justice Ngcobo. In cases of over-inclusiveness, the legislator has cast too wide a net.[719] In this aspect, the failure to be "narrowly tailored" is pertinent to the necessity test.

5.4 The Basic Principle of the "Balancing Rule"

The basic balancing rule can be divided into two aspects in order to understand its normative approach.

5.4.1 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

[716] HCJ 2334/02 Shtanger v. The Speaker of the Knesset [2003] IsrSC 58(1) 786, 797.
[717] Richard H Fallon Jr, 'Strict judicial scrutiny' (2006) 54 Ucla L Rev 1267.
[718] A v. Secretary of State for the Home Department [2004] UKHL p 56.
[719] Prince v. President of the Law Society of the Cape of Good Hope, 2002 (2) SA 794 (CC).

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).

5.4.2 The Components of the Basic Balancing Rule and its Justification

Within the constitutional writings, Alexy's method is directed toward the significance of meeting an adequate reasoning and the prohibition of damage to the right. Therefore, "the constitutional equilibrating guideline", as expressed by Alexy, "ought to contrast amongst the degree of importance of satisfying on principle and the satisfaction/non-satisfaction (non-infringement/infringement) of the other".[720]

It is essential to mention here that the basic rule of balancing actually provides a set of general constitutional criteria; these criteria, in turn, determine the scope and set the boundaries of the state's ability to realize its proper purposes and to limit its constitutional rights. The basic balancing rule therefore "takes rights seriously" in that the public interest is insufficient as an excuse to limit a constitutional right. In that respect, the basic balancing rule can be viewed as a "shield" of constitutional rights.[721] The basic balancing rule is able to prevent harm to socially important constitutional rights that constitute, to use a Dworkinian term, "Trumps".[722] It is essential to mention here that Dworkin's notion is not based on the concept of balancing; in fact, it is meant to prevent it.

5.4.3 Balanced Scales

In those cases where the scales are completely balanced, the marginal social importance of preventing harm to constitutional right is equal to the marginal social importance of the benefit in fulfilling the public interest or protecting another constitutional right. In these cases, does the limiting law satisfy the requirements of the test of proportionality *stricto sensu?* Though

[720] Alexy, A theory of constitutional rights p 102.
[721] Frederick Schauer, 'A Comment on the Structure of Rights' (1992) 27 Ga L Rev 415.
[722] Ronald Dworkin, *Taking rights seriously* (A&C Black 2013) p 184.

cases of this kind are very few, a good argument can be made that the solution is procedural in nature. The burden of persuasion to prove proportionality, including proportionality *stricto sensu,* lies with the party arguing for the proportionality of the limitation as a whole. When the scales are balanced, the conclusion should be that the interested party has failed to lift that burden and we have a proven limitation of a constitutional right while a justification for this limitation was not proven. Here, the law must be declared void and the claim is wrong. The burden of persuasion is relevant to the factual aspect of the case; it does not concern issues of law.

Completely balanced scales present, first and foremost, a legal issue. The court already has all the facts at this point. Some of these facts have been proved through standard evidentiary tools. Others were demonstrated through presumptions, including the presumption that the burden of persuasion to show the proportionality of the limiting law (i.e., a proper purpose, rational connection, necessity, and proportionality *stricto sensu*) lies with the party arguing in favour of a proportionality limitation. Now, in order to determine the rule of the balanced scale, which means that the limitation at issue is no greater than is required, the legislation should satisfy the requirements of proportionality *stricto sensu.*[723]

5.5 The Nature of the Proportionality Test in the Framework of the Principle of Balance *"Stricto Sensu"*

The principle of proportionality is founded on the balance between laws, means and the requirement to meet those means. The judiciary must decide upon any avenues: those that may exceed the objective of the restricting law and those that would impinge the least on human rights. If there were other means that could achieve the law's function whilst remaining less restricting, there would be no requirement for the law. The policymaker should select an alternative law if it has fewer or no limits on human rights. The limiting law should not supersede its constraint of the constitutional right above what is required to establish and develop the objective.

A specific component of proportionality is seen in situations where there is no restriction of a right by statute. An example of one of those components is the implementation of

[723] Federal Constitution of Switzerland, Art. 36(3).

proportionality in construal.[724] The commentator is often in the situation of needing to elucidate the range of governmental influence, such as when there is a need to establish the range of government personnel's power to issue or negate a certificate as given in law. In the debate on authority, the assessor must deduce the legal writings with its reasoning and objectives. In establishing the objective, the assessor should weigh up the civilian perspective with the professional scope, which, in combination, form the grounds of a law and its reasoning at a great degree of abstraction. This equilibrium is met by using the *stricto sensu* derived from proportionality. This is known as interpretive equalizing. It is distinctive from other components of proportionality, as it is only restricted by the *stricto sensu* element of proportionality, which is involved with the definitions of law (meaning) and not with the legality (constitutionality).

The principles that underpin proportionality are a legal concept which echoes a constitutional approach mitigating restrictions on constitutional rights.[725] The perspective that proportionality has is not neutral in respect to constitutional rights. The notion of proportionality is not averse to the restriction of rights. More so, it is founded on the requirement to safeguard them. Certainly, the restrictions that proportionality imposes on the recognition of a constitutional right,[726] including the right itself, draw their power and content from an identical resource.[727]

Therefore, proportionality determines the appropriate degree of protection for constitutional rights, in a democratic society governed by constitutional rights. Proportionality highlights the significance of the purpose and rationalizing restrictions on constitutional rights.[728] Proportionality *stricto sensu* is a resulting assessment and entails an adequate relationship between the benefit gained by the law restricting the human right and the detriment resulting from the right's constraint. The main element in this case is "relationship" (as depicted in Figure 4) and an equilibrium between the two is essential.[729]

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[724] Yaacov Trope and Nira Liberman, 'Construal-level theory of psychological distance' (2010) 117 Psychological review 440, The concept of construal is not a new one, and the components of construal can be seen in the works of many past psychologists including Kurt Lewin's recognition of the importance of a subjective reality and its effect on one's personal significance; Construal used to be viewed as an obstruction in one's perception of the world, but has evolved into a mechanism used to explain how or why a person thinks the way they do. They focus on the idea that we rely on other sources to form our ideas of our surroundings.
[725] A, 'Proportionality: Constitutional Rights and Their Limitations' p 317.
[726] Ibid p 340.
[727] Ibid p344.
[728] Ibid p458.
[729] Aharon Barak, 'Proportionality and principled balancing' (2010) 4 Law & Ethics of Human Rights 1, S. v. Makwanyane 1995 (3) SA 391 (S. Afr.), Coetzee v. Government of the Republic of South Africa 1995 (4) SA 631, 656 (S. Afr.).

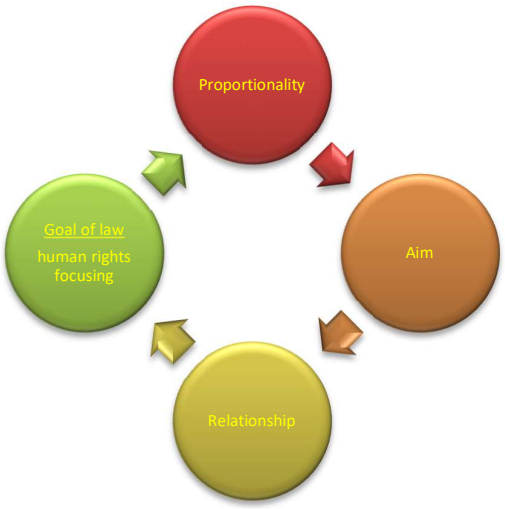

Figure No -4 **Proportionality *stricto sensu***

Proportionality *stricto sensu* is not aimed at analysing the connection amongst the objective of legislation and the method chosen to reach it. Rather, it analyses the connection amongst the objective of the law and human rights, concentrating on the connection between the advantage attained through the law's recognition rather than on its restriction of the rights. It is based on finding the equilibrium, which forms a result that mirrors the concept of society and the restrictions it enforces onto the authority to restrict the human rights. The balancing notion sets conditions for creating the equilibrium within the concept of proportionality *stricto sensu.* However, what method could be adopted to implement this balancing? This query is a central debate which will be concluded in the balancing concept within the next section.

The proportionality doctrine, *stricto sensu,* is also known as the balancing stage. Whenever constitutional balancing is triggered or whenever a constitutional right is limited by a sub-constitutional law, the probability that the benefit that would be gained from fulfilling this proper purpose would be realized (and the benefit that is gained by fulfilling the proper purpose) is in accordance with its urgency (the scale for fulfilling the purpose). On the other end of the scale should be the limited constitutional right, the harm it incurs and the probability that such harm would occur (the scale of limiting the right). We should establish a normative rule which determines the relative weight of each side of the scale.[730] Based on the weight, we

[730] Knowing more about the scale metaphor, see the opinion of Justice O Regan in S. v. Bhulwana, 1996(1) SA 388 (CC), SS 18.

could determine which end of the scale is heavier.[731] Thus, it is necessary to balance the scale of fulfilling the purpose with the scale of limiting the right. At the centre of the rules of balancing and at the centre of proportionality *stricto sensu* is the search for legal rules that determine the condition in which a limitation of a constitutional right by a sub-constitutional law are proportional *stricto sensu.* The proportionality *stricto sensu* assessment is a result-oriented test. It has combined relevancy in decrees restricting constitutional rights, formed as rules, and laws constraining constitutional rights, formed as notions. It correspondingly applies to the laws limiting constitutional rights formed as rules and laws limiting constitutional rights formed as principles. It is paramount that any law imposing restriction on a safeguarded constitutional right adheres to the proportionality *stricto sensu* assessment. This investigation assesses the relationship between the law and the outcome on the concerned constitutional right.

This is a vital tool for comparative analysis,[732] and is able to determine whether the balance between the benefit and the harm is proper. The moral character of this assessment with its significance is clearly conveyed in an example from Grimm.[733] Imagine that the law gives permission to the law-enforcing authority to shoot a person (and this shot leads to his death), and this is the only mode of prohibiting him from damaging another person's property. In this instance, the law is opting to safeguard private property, and hence has a valid objective. As stated by the passage itself, it can only be triggered in circumstances where there is no other method of safeguarding the other individuals' property without endangering a person's life. Consequently, the law is also able to appease the necessity check.

The "test of proportionality *stricto sensu* is different.[734] It does not examine the relation between the limiting law's purpose and the constitutional right. Rather, it focuses on the relation between the benefit in fulfilling the law's purpose and the harm caused by limiting the

[731] Frederick Schauer, 'Prescriptions in three dimensions' (1996) 82 Iowa L Rev 911.
[732] HCJ 7052/03 Adalah – The Legal centre for the Rights of the Arab Minority v. Minister of Interior (May 14, 2006, unpublished). Available in English at http://elyon.court.gov.il /files_eng/03/520/070/a47/03070520.a47.pdf, para 107. Accessed on 17 Oct 2017 ("proportionality 'in the value-laden sense,' [since] the main focus of this test is morality, and this focus should be reflected by its name" (Cheshin, J.).
[733] Grimm, *The Protective Function of the State, Georg Nolte, European and US Constitutionalism* p 291.
[734] Cohen-Eliya and Porat, 'Proportionality and the Culture of Justification' p 467.

constitutional right.[735] It is based on balancing: noting the difference between the necessity test and proportionality *stricto sensu*, Rivers has written:"

> It is vital to realize that the test of balance *Stricto Sensu* (has a totally different function from the test of necessity. The test of necessity rules out inefficient human rights limitations. It filters out cases in which the same level of realization of a legitimate aim could be achieved at less cost to rights. By contrast, the test of balance is strongly evaluative. It asks whether the combination of certain rights-enjoyment combined with the achievement of other interests is good or acceptable.[736]

At the constitutional level, balancing qualifies the continued existence, within a democracy, of conflicting principles or morals, while identifying their inherent constitutional conflict.[737] At the sub-constitutional level, balancing provides a solution that reflects the values of democracy and the limitations that democracy imposes on the majority's power to restrict individuals and minorities in it.

So in this section, I argued that Creating a balance is paramount to law and being;[738] it is vital to achieve balance between the interest of the society[739] and human rights.[740] Balancing reflects the multi-faceted nature of human beings, of society generally, and of democracy in particular.[741] It is an expression of the understanding that the law is not "all or nothing".

5.6 Balancing-Based Approach to the Importance of Benefits and Preventing Harm

This sub-section on the rule of balancing can be further codified into two parts. The first is known as the social importance and the second provides clarification of the scope of balancing.

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[735] Kavanagh, *Constitutional Review under the UK Human Rights Act* p 173.
[736] Rivers, 'Proportionality and variable intensity of review' p 203.
[737] A, 'Proportionality: Constitutional Rights and Their Limitations' p 87.
[738] Crim A 537/95 Ganimat v. State of Israel [1995] IsrSC 49(3) 355, 397.
[739] Crim A 537/95 Ganimat v. State of Israel [1995] IsrSC 49(3) 413.
[740] CA 6024/97 Shavit v. Rishon LeZion jewish Burial Society [199] IsrSC 53(3) 600, 649.
[741] Barak A, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 218.

5.6.1 Social Importance

The relevant rule according to which the weight of each of the scales should be determined is that of the "social importance of the benefit gained by the limiting law and the social importance of preventing harm to the limited constitutional right at the point of conflict.[742] The answer is simple: the determination is not scientific or accurate. The balancing between conflicting principles is not conducted through scientific instruments. On the contrary, it is founded, *inter alia*, stemming from various political and economic ideologies, from the unique history of each country, from the structure of the political system, and from different social values. The legal system at issue should be observed. The examination of the social importance of every of the opposing values ought to be carried out against the context of normative structure of legal system. This type of equilibrium ought to be influenced by the whole principle framework of the specific legal system.

This kind of balancing should be affected by the entire value structure of the particular legal system. We should consider the constitutional statue of the conflicting principles. Principles found in the constitution are *prima facie* of greater social importance than those external to the constitution. That is insufficient: the importance of principles and the importance of the prevention of their harm is not determined solely by their normative status. Principles at the same normative level can be considered to be of different social importance. These kinds of values may be influenced by both *extrinsic* and *intrinsic* factors.[743]

The intrinsic factors are of normative nature:[744] they reflect the internal relations of the different principles. Thus, for example, a right that constitutes a precondition to another right may be considered more important.

5.6.2 Clarifying the Scope of Balancing

This section can be further divided into the following parts.

[742] Cohen-Eliya and Porat, 'American balancing and German proportionality: The historical origins' p 277.
[743] A, 'Proportionality: Constitutional Rights and Their Limitations' p 350.
[744] Ibid p 351.

5.6.2.1 Generally

On the surface, the task of comparing the benefits and harms seems almost impossible. How can one compare the benefits inherent in national security and the harm incurred to the right of freedom of expression? Such clarification has two parts: the first is to note the importance of the comparison, "which is not between the importance of fulfilling the purpose of the limiting law and preventing the harm to the constitutional right. Rather, the comparison focuses only on the marginal effects on both the benefits and the harm caused by the law. In other words, the comparison is between the margins".[745] Second, in order to conduct the balance properly, we must consider the hypothetical proportional alternative to the limiting law. If, indeed, such an alternative exists, then the comparison between the marginal benefits and the marginal harm is made in light of that proportional alternative. In order to better understand these two clarifications, they have to be discussed separately.

5.6.2.1.1 First Clarification: Comparing the Marginal Benefit to the Marginal Harm.

In determining the balance, "one can compare the weight of the social importance of the benefit gained by fulfilling the proper purpose and the weight of the social importance of preventing the harm that this fulfilment may cause to the constitutional right. This comparison focuses on the state of affairs prior to the law's enactment and the changes caused by the law; accordingly, the issue is not the comparison of the general social importance of the purpose (security, public safety etc.), on the one hand, and the general social importance of preventing harm to the constitutional right (Freedom of Expression etc.) on the other. The issue is more important than limiting: it refers to the comparison between the states of the purpose before and after the law's enactment, and the state of the constitutional right prior to the law's enactment compared with its state after enactment. Accordingly, it is the comparison of the marginal social importance of preventing the harm to the constitutional right caused by the limiting law. Here, the question arises as to whether the weight of the marginal social importance of the benefits is greater than the weight of the marginal social importance of preventing the harm. This issue has been discussed in one Israeli case and thoroughly discussed by *Barak.*[746] On presenting the issue of

[745] Ibid 353.
[746] A, 'Proportionality: Constitutional Rights and Their Limitations' p 355.

whether the law's regulatory framework is proportional *stricto sensu,* he stated in one of his judgments:"

> The issue before us is not the national security of the residents of Israel but the respect of the human dignity of the Israeli spouses. The issue is not about life, or quality of life. Rather, the issue before us is much narrower. Does the additional security achieved by the transition from the strictest individual examination possible by law of the non-Israeli spouse to a blanket restriction on entry into Israel have an adequate relation (that is, is proportional) to the addition harm caused to the human dignity of the Israeli spouse as a result of such a transition?[747]

The issue therefore focuses on the constitutionality of the weight of the marginal social importance of the benefit and harm. In most cases, the analysis presupposes a state of affairs – i.e. "*factual vs. in abstracto proportionality"* – whose constitutionality is not an issue. The question is whether the change brought by the new law in the narrow scope in which it occurs is constitutional. Obviously, this narrow scope may become wider if the current state of affairs is unconstitutional and the constitutional argument applies to the existing condition as well. In a case such as this, we should once again narrow the scope of the review as much as possible so that it applies to the analysis only from the point where no argument exists regarding its constitutionality.

5.6.2.1.2 **Second** Clarification: Considering the Proportional Alternative.

A close examination of the comparison of the weight of the marginal social importance of the benefits gained by the limiting law and the marginal social importance of preventing the harm to the constitutional right teaches us that in most cases, the scope of the comparison is even narrower. Thus far, we have compared the state of affairs before the law was enacted to the state afterwards. However, we must recall that, while examining the necessity test, possible

[747] See HCJ 7052/03 Adalah – The Legal centre for the Rights of the Arab Minority v. Minister of Interior (May 14, 2006, unpublished). Available in English at http://elyon.court.gov.il /files_eng/03/520/070/a47/03070520.a47.pdf, para 91 accessed on 13 March 2017.

hypothetical alternatives were examined.[748] At times those alternatives include options that would be able to gain the main marginal social benefit while causing less harm to the constitutional right. These alternatives do not meet the necessity test, as they do not fulfil completely the purpose of the limiting law.[749] These alternatives can be reintroduced into the constitutional discussion within the test of proportionality *stricto sensu,* if one of these alternatives, if enacted into law, can meet the requirements of the test of proportionality *stricto sensu*. Accordingly, the starting point for the comparison in this type of situation is not just the state of affairs prior to the law but also the state of affairs should the hypothetical alternative solution be adopted by law.

Hence, "on the first scale – that of "fulfilling the proper purpose" – one can place the marginal social importance of the benefits gained by rejecting the possible alternative and adopting the proposed law, while on the scale of "harming the constitutional right" one can place the marginal social importance of preventing the harm caused to the constitutional right from rejecting the possible alternative and adopting the proposed law. The question examined in this scenario is which has the heavier weight on the scale."

It is obvious that this basis for comparison exists only if the alternative itself is proportional. If the alternative is not proportional and no other proportional alternative exists, then one must return to the comparison between the marginal benefit and marginal harm caused by the legislation, without considering a possible alternative. The examination of this basic premise requires a comparison between that alternative and the state of affairs before the law came into effect. The beginning of this examination was the test of necessity, where the comparison between the purposes that the law fulfils and the purpose fulfilled by the alternative law, when the result of this comparison is that the alternative cannot completely fulfil the original purpose, the examination of necessity ends. The examination may continue within the test of proportionality *stricto sensu.* In this stage, examination of the issue of "advancing the purpose" on the scale can also be made.

In this way, the benefit will be gained and the harm reduced in comparison to the situation before the law's enactment. It should be noted that the degree of the benefits obtained would

[748] A, 'Proportionality: Constitutional Rights and Their Limitations' p 326.
[749] Rivers, *Proportionality, discretion and the second law of balancing* p 205.

probably be less than that obtained by the original law. Indeed, the very existence of the alternative option is of great importance. It assists in conducting the constitutional examination within proportionality *stricto sensu* in that it provides an answer to the question of the proper relation between the benefits and harm.

5.6.2.1.3 The Importance of Clarification.

Clarification allows us to realize that the value-laden issue before the decision-maker (be it a legislator, a judge or the executive branch) is not as "expansive" as the balancing between the general principles of security, liberty, life, privacy and most important freedom of expression. Rather, clarification helps us to understand that the balance is much narrower in scope and that it balances the marginal social importance of the benefits gained by one principle (beyond the proportional alternative) and the marginal social importance of preventing the harm to the constitutional right (beyond the proportional alternative). That in turn helps us to realize the rational nature of balancing[750] as well as its structural integrity.[751] In addition, this can assist in responding to critics of the proportionality *stricto sensu* balancing test.[752] The limits of judicial discretion are drawn more clearly and therefore contribute to the justification of balancing as a judicial measure, aimed at protecting constitutional rights and justifying the act of judicial review itself.[753]

5.6.2.2 The Marginal Social Importance of the "Advancing the Purpose" Scale.

At one side of the balance is the objective that the law seeks to recognize. The objective is appropriate only when it appeases the threshold of prerequisite.[754] When establishing the significance of the objective, there should be a greater focus on the advantages of its completion than on the previous predicament or the option of an alternative process. Hence, when the objective is related to safeguarding human rights, the edge of public significance of that objective is established in relation to safeguarding the rights, which were given prior to the law, and the protection received after implementation of the law. This also applies to laws

[750] A, 'Proportionality: Constitutional Rights and Their Limitations' p 357.
[751] Ibid p 359.
[752] Ibid p 361.
[753] A, 'Proportionality: Constitutional Rights and Their Limitations ' p 363.
[754] Ibid p 365.

created for the benefit of public interests. The social significance of such objectives is evaluated in relation to the marginal social significance attained with their completion relative to the prior circumstance or other approach. Hence, the marginal social significance of completing the objective is persuaded by the damage inflicted to other human rights or to the public interest in the event that the law's objective is not met. The greater the harm incurred, the more important the goal of preventing this harm becomes.

5.6.2.3 Social Importance of the Right in General

Not all constitutional rights are equal in their social importance; the social importance of the constitutional right, as well as the marginal social importance of preventing its limitation, is determined by the society's fundamental perceptions. These perceptions are shaped by the culture, history and character of each society. They are derived from the purposes of the constitution. These considerations can be called external considerations. With these, one can find other considerations of a more "internal" nature. These are considerations related to the internal relations between different constitutional rights. Thus, for example, a right used as a precondition for the realization or act of another right is understood as more socially important.[755] From this premise, one may deduce the increased social importance of the right to life, to human dignity, to equality, and to freedom of expression, all of which constitute preconditions to the realization of other rights. The distinction regarding the importance of a right may also apply within the rights themselves (as opposed to between the different rights). Thus, the marginal social importance of preventing harm to political speech is unlike the marginal social importance of preventing harm to the right to commercial speech. From that premise we can also drive the marginal social importance of the social rights, which, at their most basic level, are meant to provide minimal living conditions to the members of a given community.

Hence, the peripheral public importance of a constitutional right is established via various perceptions. "Rights that advance the legal system's most fundamental values and that contribute to the personal welfare of each member of the community differ from rights that reply upon general welfare considerations as their only justification. Likewise, "suspect" rights,

[755] C.B. Pulido, "The Rationality of Balancing," 92 Archiv fur Rechts-und Sozial Philosophie 195 (2007).

which in the past have been constrained for invalid purposes, differ from non-suspect rights in this way.[756] The different perspectives at time suit one another."

5.6.2.4 The Intensity of the Limitation of the Right.

The weight bestowed upon the "limitation of the right" scale is stems not just from the peripheral public significance of the right, but also from the range of the right's restriction, its size and its strength. The sensitivity of the restrictions alters its weight. A restriction and limitations involving one right (the limited right) differs from the constraint on further additional rights (in addition to the limited right); comparatively, a restriction on the mainframe of the right is unlike the restriction on the right's uncertainty. Hence an absolute restriction and limitation is different from a temporary one.

5.6.2.5 The Probability of the Right's Limitation

Much as the probability of achieving the proper purpose is an important factor in deterring the weight of the marginal social importance of the benefit it involves, the probability of the occurrence of a limitation on the constitutional right is an important factor to consider in determining the weight of the marginal social importance of preventing the harm that may be suffered by that right. A limitation whose probability of occurrence is high differs from a limitation whose probability of occurrence is much lower.

In the legal literature, this aspect of the "limiting right" scale is not emphasized. The reason for this is that in most cases, the probability of the realization of the limitation is certain. When the limiting law is legislated, the limitation occurs instantaneously. However, in some cases where the occurrence of the limitation is not certain (the amount of uncertainty, in other words), the probability of its realization may affect the weight of the right's limitation. A law determining certain conditions in which a constitutional right should not be realized differs from a law that provides the executive branch with discretion relating to the statutory authority to limit that same right.

[756] Dworkin, *Taking rights seriously* p 266.

5.7 Balancing approach and its underpinnings

Balancing is a symbol, which adopts the shape of a scale: see Figure - 6[757] "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[758] 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". 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."

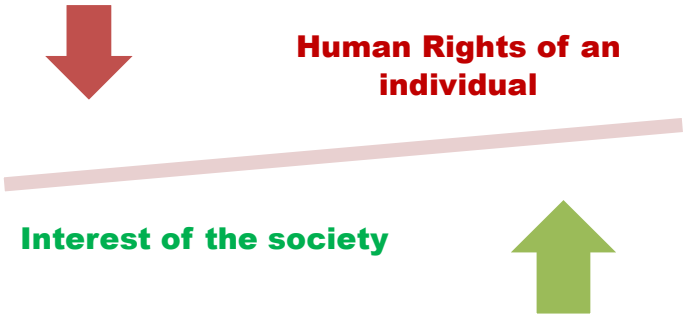

Figure No – 5 **Principle of balance**

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

[757] See HCJ 14/86 La'or v. The Israel Film and Theatre Council [1987] IsrSC 41(1) 421, Iddo Porat, 'The dual model of balancing: a model for the proper scope of balancing in constitutional law' (2005) 27 Cardozo L Rev 1393.
[758] Miller and Sabir, 'Counter-terrorism as counterinsurgency in the UK 'war on terror'' p 56.

constraining law:[759] 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.[760]

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.

5.7.1 The Importance of the Realization of the Goal.

On this side of the scale is the objective that the law purports to realize: a proper objective meets threshold demands of its substance and of its urgency. Furthermore, it should also be the part of the category accepted (expressly or impliedly) that validates the restriction of the human right. Within this perspective, alternate assessments have been adopted by various countries. When the right is associated with high significance, the subsequent condition for establishing the urgency of the restriction is that of a timely or fundamental public concern. [761] In situations where the right is of less significance, likewise the degree of urgency is lower. To establish

[759] Dieter Grimm, 'Proportionality in Canadian and Geraman Constitutional Jurisprudence' (2007) University of Toronto Law Journal 383, Steven J Heyman, Free speech and human dignity (Yale University Press 2008).
[760] HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] IsrSC 58(5) 807, an English translation, available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf accessed on 12 December 2017.
[761] HCJ 5016/96 Horev v. The Minister of Transport [1997] IsrSC 51(4) 1, at 197-98, para. 53, an English translation, available at http://elyon1.court.gov.il/files_eng/96/160/050/A01/96050160. Accessed on 14 Nov 2016.

whether the significance of the advantage gained by the completion of the objective validates the restriction of the right, the analysis of the level of urgency ought to be reinforced by the examination of the likelihood of realizing the objective if the law remains functional[762] and is hinged on the real data and the prognosis relating to the possibility of completing the adequate objective.

5.7.2 The Importance of Preventing the Limitation of the Right

The "significance of prohibiting the marginal restriction of the right stems from the significance of the right itself, the extent of the limitation, and the probability that the limitation will materialize. Are all rights equally important? Do rights vary in level of importance? The answer to this question 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".[763] In the absence of any constitutional guideline to the contrary, one can presume that every constitutionally set right exercises balanced constitutional standing. But, rights of 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 within the framework of society's fundamental conceptions. Comparative law may back up the notion that not every constitutional right is of the same significance." The separation amongst different rights in relation to their specific significance gives the foundation for the boundary amongst the tertiary degree of criticism allowed in American Law.

The South African Constitution (1996) expressed that the constitutionality of a law that restricts constitutional rights is reliant *inter alia on the character of the right* under deliberation.[764] The current method in South Africa is that the rights directed towards respect, freedom and equality and the foundations of these rights are of utmost significance to the South African

[762] Alexy, A theory of constitutional rights, Rivers, Proportionality, discretion and the second law of balancing.
[763] Ibid p 131.
[764] Arthur Chaskalson, 'Human dignity as a foundational value of our constitutional order' (2000) 16 South African Journal on Human Rights 193, South African constitution 1996 Ss 36 (1)(a).

civilisation.[765] Yet, in light of this, relative law, specifically Canadian[766] and German[767] constitutional legislature, provides an alternate method: The offering of the same significance to all constitutional rights. In this context, some rights do not hold the same standing as others. The significance given to a right and the significance of prohibiting its restriction are established in relation to the general ideologies in that society. Both are altered by the society's own history and specific character, and each stems from the aims of the constitution.

A right that provides a criterion for the presence and exercising of another right ought to be perceived as being of the greater significance. Subsequently, we can judge the general significance of the right to life, liberty, expression, equality and respect, as each are criteria for the realisation of 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"[768] (as shown in Figure 6) below.

[765] Stuart Woolman and Henk Botha, 'Limitations: Shared Constitutional Interpretation, an Appropriate Normative Framework and Hard Choices' (2008) Constitutional Conversations (Pretoria University Law Press Pretoria 2008) p 70.
[766] Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; Trinity Western University v. British Columbia College of Teachers, [2001] 1 S.C.R. 772; Lavoie v. Canada, [2002] 1 S.C.R. 769; R. v. Brown, [2002] 2 S.C.R. 185; Chamberlain v. Surrey School District No. 36. [2002] 4 S.C.R. 710; Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698; Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238; WIC Radio Ltd. V. Simpson, [2008] S.C.J. 41.
[767] David M Beatty, Human rights and judicial review: a comparative perspective, vol 34 (Martinus Nijhoff Publishers 1994) p 395.
[768] Ibid p 397.

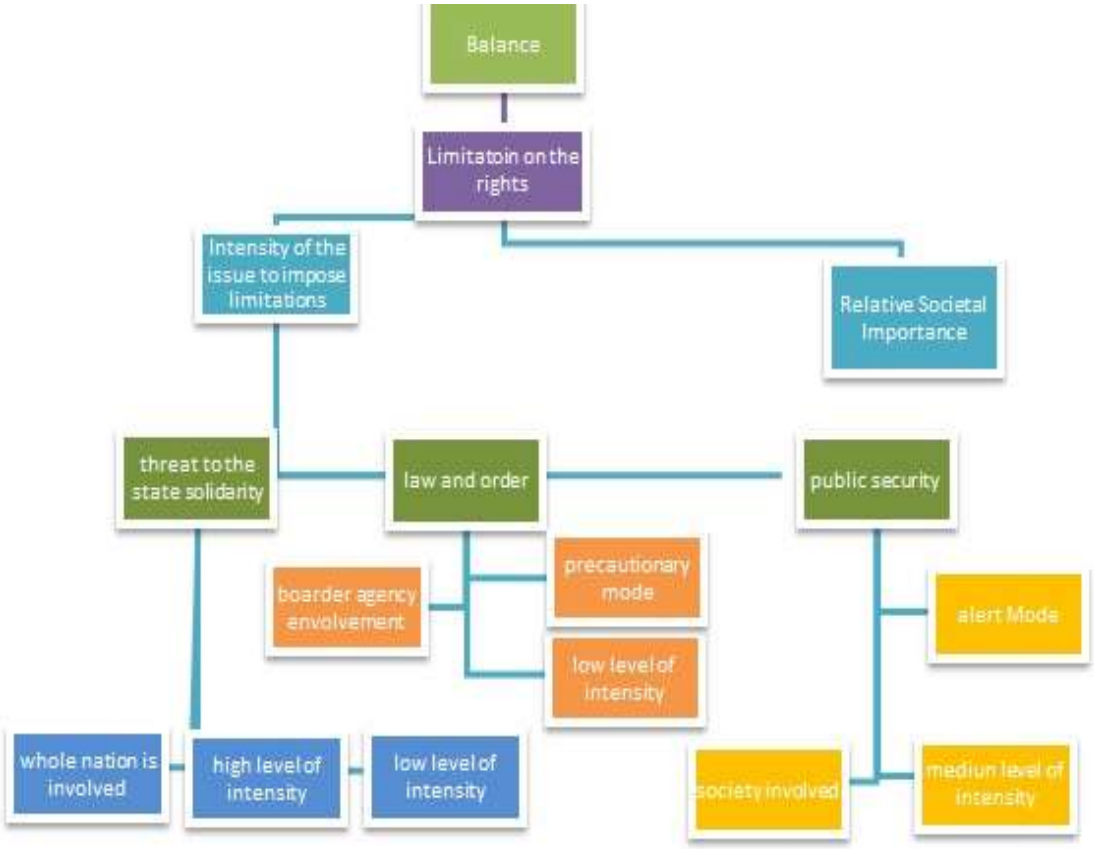

Figure No – 6 **Principle of balance**

Hence, "within the scope of the right of freedom of expression, we can differentiate between freedom of 'political expression' and freedom of 'commercial expression', with greater significance attributed to political freedom of expression. The standing that is fixed to the rights on the scale is stemmed from both the significance of the right and the degree of its restriction, its intensity and dimensions".[769] A constraint of one right varies from the restriction of additional rights. A restriction close to the margins of the right varies from restrictions nearing its core.[770] A temporary restriction is less harsh than a perpetual restriction. Therefore, the

[769]HCJ 5016/96 Horev v. The Minister of Transport [1997] IsrSC 51(4) 1, at 197-98, para. 53, an English translation, available at http://elyon1.court.gov.il/files_eng/96/160/050/A01/96050160. Accessed on 14 Nov 2016, at 850, para. 40; also HCJ 7052/03 Adalah—the Legal Center for Arab Minority Rights v. The Minister of Interior [May 14, 2006] (unpublished) (President Barak), an English translation, available at http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf. At 93-95, para. 74. Accessed on 16 Nov 2016.

[770] HCJ 5016/96 Horev v. The Minister of Transport [1997] IsrSC 51(4) 1, at 197-98, para. 53, an English translation, available at http://elyon1.court.gov.il/files_eng/96/160/050/A01/96050160. Accessed on date 14 Nov 2016, para. 32.

consequences of restrictions on a human right and the outcomes on those eligible to the right alter the standing of the right itself. Just as the probability of reaching an adequate objective is a major criterion in deciding the relative standing, so too is the probability of a real restriction on the right a significant component in establishing the influence attached to prohibiting the restriction. In circumstances where the probability of a constraint on the right is great, the weight attached in prohibiting the restriction itself is more than in situations where the probability of an actual restriction is lower. This feature of the restriction of the right has not been fully reported in legal writings, probably because in the majority of situations, the restriction of the right is definite when the imposing law is implemented, so the right is instantaneously restricted. This is the case for most situations, but not all.

So far I have argued that, in situations where there remains a question over whether the right will be restricted, then the degree of uncertainty will have a direct influence on the weight attached to the right concerned. In light of this statements, the fundamental balancing principle can be illustrated.[771] To the degree that higher significance is fixed to prohibiting the marginal restriction to a human right and to the extent that the probability of the right being constrained is greater, the marginal advantage to public welfare attained by the restriction ought to be of higher significance, and should have a superior probability of materializing.

5.7.3 The Concrete (Ad Hoc) Balancing Rule

The general balancing principle sets the conditions for choosing between the marginal advantage to society and the restriction of human rights. Subsequently, leading on from this rule, there is in place a solid balancing, which is influenced by the context of the case.[772] Known as "*ad hoc* balancing", this balancing principle casts a wide scope on the general conditions of equality.[773] Comparatively, the actual balancing principle entails balancing in the unique context of each case. Whilst the general balancing principle is formed upon rough

[771] This rule was influenced substantially by Prof. Alexy's repatriated by Julian Rivers, Proportionality, Discretion and the Second Law of Balancing, in Law, Rights And Discourse: The Legal Philosophy Of Robert Alexy 167 (George Pavlakos ed., 2007), "Law and Balancing" p 102).
[772] Sales and Hooper, 'Proportionality and the form of law' p 437.
[773] A classic example a basic balancing rule is the Law of Balancing, formulated by Robert Alexy: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other." Alexy, A theory of constitutional rights.

generalization and a great degree of abstraction, actual balancing is founded on low abstraction and recognizes the context in each case.

5.7.4 The Principle of Balance

At one side, the movement from more abstraction to specific contexts of each instance is direct, acute and adverse, and in this way the basic balancing principle is far too abstract. It neglects to consider the unique aspects that categorize numerous human rights, whether as an objective for restriction or an entity for defence. It has no attention toward the general principles forming the several human rights, and in the case of validation for their protection or constraint, it negates to emphasize reflections that characterize the adequate protection of the right. However, the concrete balancing principle is too specific.

As an example, consider the case of *Adalah v. The minister of interior,* from Israel, in which the Israeli Supreme Court held that an act that prevents relative unification amongst Israeli Arab peoples and their non-Israeli partners from the West Bank due to the safeguarding concern related with non-Israeli partners, who have been responsible for over twenty radical assaults, is imbalanced and unconstitutional, as it disproportionally restricts the entitlement to respect. "Proportionality would remain intact even in the total absence of judicial review. It would definitely be pertinent amongst the structure of the judicial review under the Human Rights Act, 1998". [774] Hence, an analysis of the proportionality concept illustrates that the comparable degree of judgement allowed by the "Legislator or administrator and the judge will vary in accordance with the components of proportionality. When deciding whether to act, legislative or administrator discretion is extremely broad and judicial discretion is extremely limited. When determining the goals, the means, and the prediction of their effect, the legislator or administrator has broad discretion, whereas judicial discretion is narrow".[775]

[774] Human Rights Act, 1998, c. 42.
[775] Aharon Barak, *Human dignity: the constitutional value and the constitutional right* (Cambridge University Press 2015).

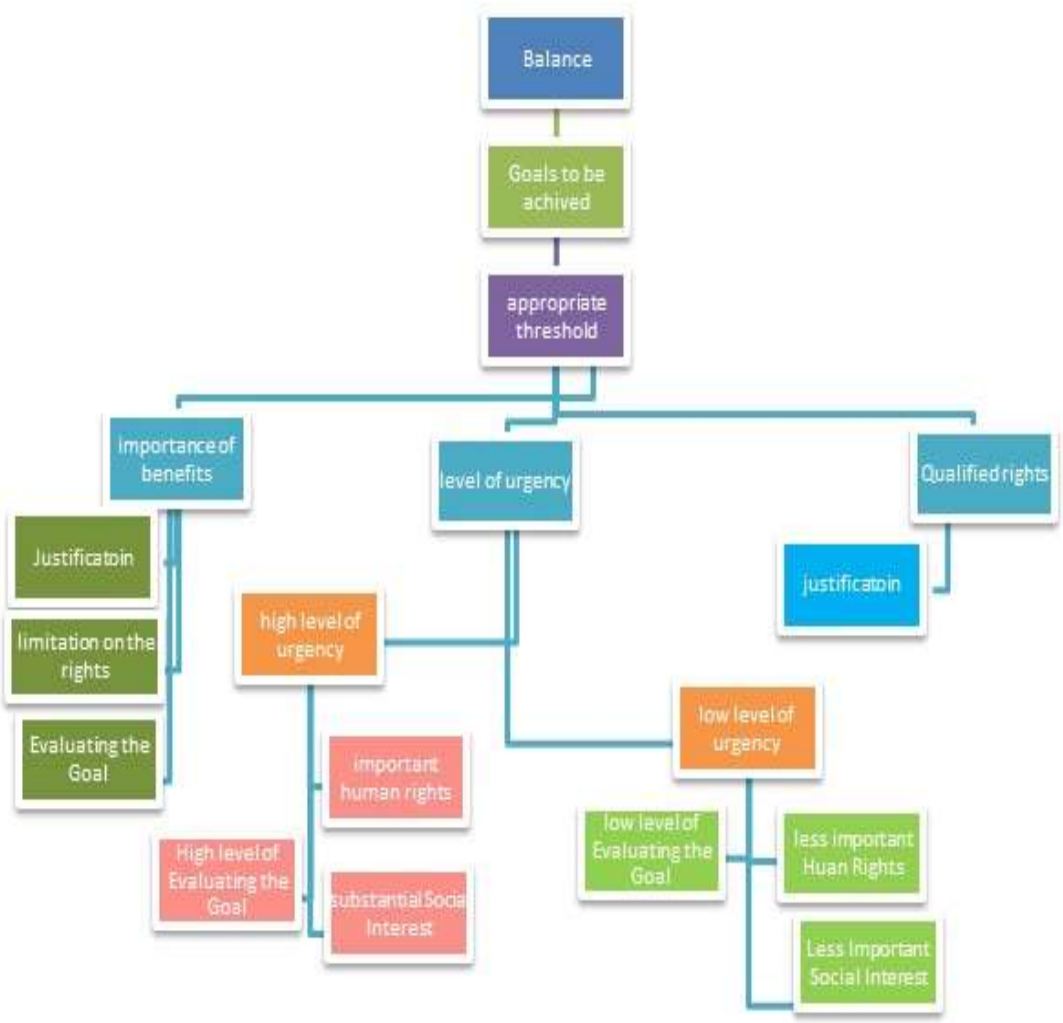

Figure No – 7 **Balance and proportionality**

This impasse conjured the formation of a middle ground: "between the basic and concrete balancing. Is it required for there to be a principled balance that depicts the basic balancing principle into an array of validated balancing decrees created at a much lower degree of abstraction in relation to the basic balancing principle, carrying a higher degree than that of the concrete balancing principle? This degree of abstraction would convey reflections of the value at the foundation of that right and the validation for its limitation. How could an intermediate level be achieved? What separates this level from that of concrete balancing and what justification is in place? The principled balancing value would alter the basic rule into a constructed method that links in with the restricted right on one side, and the objective of restricting law on the other side."

This would create the environment to be placated by the restricting law, so that the restriction of the right adheres to the demands of proportionality *stricto sensu* and would echo normative reflections that validate the marginal constraint to a human right, for the purpose of generating a slight positive outcome for society's welfare. Analysis of the restricted right would highlight its significance, the degree of the restriction, its intensity, probability and dimension. The analysis of the "objective" aspect of the scale should consider the significance of the objective in relation to its contents, and the necessity of this objective is mirrored in the damage that would be inflicted in the absence of the restriction, and the probability of that damage. Let us consider, for instance, that a law that restricts the right to political freedom of speech is a right carrying great value. We can presume that the objective of the restriction is safeguarding of people's rights against hate speech. The principled balancing law may establish that it is only acceptable to restrain the freedom of political speech when the objective is to protect the peace of the society from the consequences of hate speech, which is pivotally significant for the realization of a critical social welfare need that is essential to prohibit further and imminent damage to public tranquillity. The principled balancing law is therefore recognized by a degree of abstraction that provides a voice to the motives supporting the right and validations for its restriction. There are a multitude of different rights, which each specialize in different areas.

An analysis of the comparative law suggests that a minority of legal structures have created principle balancing equations. Why is this the case? Perhaps this may mirror the method implemented by most legal systems, in which all constitutional rights are granted the same value.[776] Consequently, the only component to be examined would be regarding whether the restriction on the right is of low, moderate or grave significance.[777] In this scenario, to answer this question, there would be an assessment of the level of standing combined with the realization of the objective. Arguably, the correspondence in the significance placed on restricting every right prohibits a normative abstraction from ranging outside the verges of that case.

While deliberation is definitely applied to the significance of completing the objective, it appears that many legal systems have faced problems in determining principled balancing rules

[776] Steven Greer, The European Convention on Human Rights: achievements, problems and prospects (cambridge university press 2006).
[777] Alexy, 'Constitutional rights and proportionality' p 405.

in which one aspect of the balancing of that restriction of the right fails to "rise" beyond the solid (concrete) case. This notion was voiced by Alexy as follows:

> Abstract weights only have an influence on the outcome of balancing if they are different. If they are equal, which in the case of competing constitutional rights is often the case, the only relevant factor is their concrete importance.[778]

It is debatable whether the principle of balance stemming from the basic balancing law is required. It directs the balancer (legislator, administrator, and judge), limits broad discretion in balancing, and helps to provide a clearer, controlled and predictable balancing process. This type of balance is unlike the principled balance recognized in the US.[779] Therefore, it can be stated that the principled balance is founded on a balance formed within the construct of a right of prescribed range. In the US, the principled balance outlines the constraints of the range of the right and does not function within these limits.

5.8 Balancing and validity

The conversation relating to balancing, and the consequential discussion of weight, is a metaphor.[780] 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".[781] 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

[778] Ibid p 406.
[779] Melville B Nimmer, 'The right to speak from times to time: first amendment theory applied to libel and misapplied to privacy' (1968) 56 Cal L Rev 935.
[780] Porat, 'The dual model of balancing: a model for the proper scope of balancing in constitutional law'.
[781] Alexy, 'Constitutional rights and proportionality'.

are kept intact".[782] 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.

Balancing rules have different roles in the law; in the present context, it is important to distinguish between interpretive balancing and constitutional balancing.[783] In interpretive balancing, the balancing is used to determine the purpose of the interpreted law. It outlines its normative boundaries.[784] Constitutional balancing, in contrast, is designed to determine the constitutionality of sub-constitutional law. It is not designed to interpret the sub-constitutional law, but rather to determine its validity. Constitutional balancing, and the balancing rules it develops, are meant to resolve the tension between the benefit obtained in the realization of the law's purpose and the harm caused to the constitutional right. For instance, the balancing rules are meant to determine the constitutionality of a sub-constitutional law (a statute or a common law) that realizes the constitutional right to free speech and therefore limits the constitutional right of privacy. Equally, the constitutional balancing rule determines the constitutionality of a sub-constitutional law that limits a constitutional right (such as freedom of speech or privacy) in order to realize the public interest (such as national security). The conflicting principles exist at the constitutional level and operate at the sub- constitutional level; therefore, the balancing rule should also be found at the constitutional level.[785] The constitutional rule of balancing is therefore "housed" within the limitation clause; more particularly, it can be found within the test of proportionality *stricto sensu*. Whenever a state's constitution contains a specific limitation clause, the constitutional balancing rule can be found within that specific clause. If the constitution does not desire (unless the right is not absolute) an explicit limitation clause regarding rights conflicting amongst them or with the public interest, the constitutional balancing rule can be found within an implied limitation clause or one created by a judge.[786] Either way, the rules of proportionality *stricto sensu* are found in constitutional law. They exist at the constitutional level and determine whether a sub-constitutional law that limits a constitutional right satisfies the requirements of the limitation clause. If the answer to this question is yes, then the limitation of the constitutional right is constitutional, and therefore

[782] Barak A, Proportionality: Constitutional Rights and Their Limitations (Cambridge University Press 2012) 87.
[783] A, 'Proportionality: Constitutional Rights and Their Limitations' p 72.
[784] Aharon Barak, Purposive interpretation in law (Princeton University Press 2011).
[784] A, 'Proportionality: Constitutional Rights and Their Limitations' p 72.
[785] Ibid P 89.
[786] A, 'Proportionality: Constitutional Rights and Their Limitations' p 134.

valid. If the answer is no, then the limitation of the right is unconstitutional, and therefore invalid.[787]

In this regard, an important case is found in the UK's Human Rights Act 1998 (HRA).[788] In relation to this law, both the right and the limitation law are found at the same normative level (that is, the statute level). In the UK, the courts have been authorized solely to determine whether there is an incompatibility between the conflicting laws, and, if such laws are incompatible, to give a declaration of incompatibility.[789] Under these legal regimes, there is room to apply the rules of proportionality in general, and in particular, the balancing element within them.[790]

5.9 Conclusions

In this chapter, 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 chapter 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.[791] 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.[792]

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[787] Ibid p 159.
[788] Human Rights Act 1998, c. 42.
[789] Human Rights Act 1998, Section 4(2).
[790] Kavanagh, Constitutional Review under the UK Human Rights Act p 307.
[791] See HCJ 7052/03 Adalah – The Legal centre for the Rights of the Arab Minority v. Minister of Interior (May 14, 2006, unpublished). Available in English at http://elyon.court.gov.il /files_eng/03/520/070/a47/03070520.a47.pdf, para 89.
[792] See HCJ 7052/03 Adalah – The Legal centre for the Rights of the Arab Minority v. Minister of Interior (May 14, 2006, unpublished). Available in English at http://elyon.court.gov.il /files_eng/03/520/070/a47/03070520.a47.pdf, para 75.

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 chapter 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,[793] 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.[794] Here, my proclaim while making a critical analyses 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[795] 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.[796]

After examining the principles of the doctrine of proportionality, and knowing its compatibility with the common law system, it is essential to critically analyse this doctrine in the judicial system of the UK. Hence, the next chapter investigates the extent to which the doctrine of proportionality can be used in the UK's judicial system. The main purpose of this study is to focus on question whether the doctrine of proportionality is a separate entity or has evolved from Wednesbury unreasonableness in the UK.

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[793] Laurent B Frantz, 'Is the First Amendment Law--A Reply to Professor Mendelson' (1963) 51 Cal L Rev 729.
[794] EJ Palti, 'Juergen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy' (1998) 54 Thesis Eleven 117.
[795] President (Emeritus) the Supreme Court of Israel; Radzyner School of Law, Interdisciplinary (IDC) Centre, Herzliya, Israel.
[796] HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] IsrSC 58(5) 807, an English translation, available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf accessed on 12 December 2017 at 846.

CHAPTER SIX: The Significance of the Doctrine of Proportionality in protecting the Freedom of Expression: case law of UK Courts

6.1 Introduction

The previous chapters concluded that the doctrine of proportionality is a valuable tool in the protection of the fundamental rights of the individual. Furthermore, EU laws have also recognized this doctrine and many states have included it in their legal systems. The application of this principle has been supported by the presence of the EU and the ECHR: hence, the application of proportionality into UK legislation has been extended by the European Convention of Human Rights and EU intervention. However, the UK's judicial system has not yet recognized the doctrine of proportionality as a general norm of the judicial review and limited this doctrine to cases related to the ECHR only.

The critical analyses in the fourth chapter revealed that proportionality is derived from the same source as the principle of democracy and the rule of law: hence, they are very compatible with each other.[797] Indeed, I would argue that democracy, the rule of law and human rights are inseparable.[798] This relationship is based on the understanding that when a number of legal conditions are met, the limitation of human rights is not undemocratic. It further means that a proper balance is struck between the rights on the one side and the reason for limitation on the other side. In the same manner, proportionality has shown significant results when applied in the process of judicial review.[799]

The previous chapter established that the two main components of the doctrine of proportionality – the principle of necessity and the principle of balance – function very well when two rights collide, and this doctrine plays a significant role in the protection of freedom of expression. Furthermore, these two components also work simultaneously in protecting the fundamental rights and interest of the society. Enemies of the democracy are not allowed to misuse these fundamental rights to gain their personal interests: for example, hate speech, which can bring hatred in a society, is not allowed.

[797] S. Gardbaum, "A Democratic Defense of Constitutional balancing," 4(1) *Law and Ethics of Hum.* Rts. 77 (2010).
[798] Barak A, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 465.
[799] J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999).

This chapter will analyse the question on the doctrine of proportionality and the protection of freedom of expression in the UK, and the future of unreasonableness when equated with the doctrine of proportionality. We have established that the doctrine of proportionality is highly compatible with the UK's legal system, which is based on the common law mode. However, the UK's legal system has adopted the doctrine of Unreasonableness as a tool of judicial review, which has been implemented by the UK's judicial system since its birth. This chapter also investigates both the tools of judicial review and examines their strength and precision. Article 6 of the UK's Human Rights Act 1998, which safeguards the right to a fair trial, is also addressed in the reference to the UK's effort to protect the fundamental right of freedom of expression. Lastly, this chapter endeavours to briefly analyse the application of the doctrine of proportionality in the cases associated with freedom of expression and its limitations, as adjudicated by the UK Supreme Court.

6.2 Doctrine of Proportionality: an exclusive tool of judicial review

The notions of proportionality and unreasonableness both claim to provide a suitable title toward the judicial evaluation of irrationality in administrative law. Some argue that the principle of proportionality can be treated as an aspect resulting from Wednesbury unreasonableness. The Wednesbury test was developed to review an action that is highly arbitrary and discriminatory.[800] The judiciary seemed reluctant to enter into the administrative matters and review its actions. Later, the test of Proportionality arose to review action that is not proportional to the desired goal to be achieved by that action.[801] The Wednesbury assessment is derived from the case between the Care of Associated Provincial Picture Houses Ltd v. Wednesbury Corp.[802] The coined phrase "Wednesbury unreasonableness" is

[800] Abhinav Chandrachud, 'Wednesbury Reformulated: Proportionality and the Supreme Court of India' (2013) 13 Oxford University Commonwealth Law Journal 191 p 101.
[801] Thomas C Grey, 'Judicial review and legal pragmatism' (2003) 38 Wake Forest L Rev 473 p 171.
[802] Facts: An English law provided that cinemas could only open on Sundays with permission from the local authority. Associated Provincial Picture Houses (Associated) applied for permission. Permission was granted, but only provided that no children under the age of 15 was admitted. Associated appealed arguing that the decision was unreasonable.
Issue: Could the Court overturn the decision because it was unreasonable?
Held: The Court held that it could not intervene because it can only do so where the decision maker has gone beyond their legal powers.
This means the court can only intervene in cases where:
The decision maker has not considered matters that lawfully must be considered;
The decision maker has considered matters that are not relevant; or
The decision was so unreasonable that no reasonable person could have made it.
The third limb – that the decision was "so absurd that no sensible person could ever dream that it lay within the powers of the authority" has become known as *Wednesbury Unreasonableness.*

implemented to refer to the third limb of being so irrational that it cannot be taken into consideration by any reasonable power. The Wednesbury notion is an implement for challenging administrative action.[803] To make sense of this concept, the Wednesbury standard is interpreted considering the basis for judicial appraisal of administrative endeavour. In correlation, there is already an existing ultra vires standard. The ultra vires principle indicates an action that is greater than the authority of the legal organisations, with the implementation of this standard having significance in continuation of parliamentary independence and the decree of law.

Decisions in England allowed for significant changes to the principles of Wednesbury unreasonableness. In this scenario, the GCHQ (Council of Civil Services Unions v. Minister for the Civil Services) is a landmark case which has given recognition to the doctrine of proportionality as a tool of judicial review. In this case, the court has widened the grounds for judicial review by introducing 'illegality', 'irrationality' and 'procedural impropriety' for administrative action to the judicial review process. I must say that the principles of proportionality in this case anticipated that a public authority should remain proportionate in relation to his goals and the means by which he aims to achieve these goals so that public interest is preserved. The court also asserted a defining ground for judicial review, therefore suggesting that administrative processes should hold a reasonable connection to the general reason for which the authority has been given. The concept of proportionality therefore dictates that for any decision made by the Court, the advantages and disadvantages of any administrative feat need to be assessed. That is except if the questioned action is in the interest of the public domain, for which it cannot be supported. In my view, the main theme of this concept is the inspection of the administrative action to elucidate whether there is proportionality relating to the authority given and the purpose for which the authority was granted. Therefore, any powers issued by the administrative authority while employing flexible authority are required to balance the decision in proportion to the body of the control provided.[804] Thus, the overall effect is that administrative actions can have a present role in

In this particular case, whether or not the Court thought the condition was fair or the best outcome was irrelevant – it is only relevant whether it was lawful, and it was. This was because the Parliament wants the decision maker to make the decision, not the Court. Therefore associate's case failed.
This case therefore shows that a Court can only intervene in very limited circumstances. This is what is known as 'judicial review'.

[803] Grainne De Burca, 'Proportionality and Wednesbury unreasonableness: the influence of European legal concepts on UK law' (1997) 3 European public law 561 p 186.

[804] P. Craig, 'The Nature of Reasonableness Review' (2013) 66 CURRENT LEGAL PROBLEMS 131 p 157.

people's current lives and their rights, liberties and legitimate pursuits. To further strengthen this argument, I refer to the case of R (Daly) v. Secretary of State for the House Department, in which Lord Steyn elucidated the previous conclusion and orated the principles of judicial appraisal as falling under:

> The explanation of the Master of the Rolls in the first sentence of the cited passage requires clarification. It is couched in language reminiscent of the traditional Wednesbury ground of review (Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corporation [1948] I KB 223), and in particular the adaptation of that test in terms of heightened scrutiny in cases involving fundamental rights ….. There is a material difference between the Wednesbury and Smith grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake.[805]

Drawing from this case, the administrative authority of choice, which has continued to be safeguarded from judicial appraisal except under opposing grounds of absurdity, irrationality or perversity, is subject to the assessment of proportionality as voiced by Prof. Jeffrey Jowell in the piece entitled "Beyond the Rule of Law", referring to Constitutional jurisdictive appraisal.

Prof Jowell divides proportionality into a four-step procedure, which attempts to answer the following questions:

1. Did the action follow an appropriate end goal?
2. Was the process undertaken appropriate to achieving this objective?
3. Were there other less constrained means of accomplishing the aim?
4. Is the derogation suitable generally when considering the welfare of a democratic society?

[805] UK Lord Steyn, *R (Daly) v. Secretary State for the Home Department* (2001).

In elaborating these four-step approaches, it is essential to state that prima facie defilement of any democratic rights is hard to achieve while still providing a scheme for effective scrutiny of any decisions summoned into query. When legislative and administrative measures are against private interests, individual rights and fundamental freedoms (among other areas), the ECJ applies the proportionality principle in order to balance these measures; however, this will not be further discussed here. As a result, it can be shown that there are numerous ways to interpret the proportionality principle. Due to its ability to adopt different balancing schemes (its relativistic nature), it can also be said that this is the reason why the proportionality principle is adopted by many international and national courts.

6.3 The doctrine of proportionality and reasonableness: an analytical approach

The doctrinal debate about proportionality, and about whether and how it fits within the English model of judicial review, is expressed – not only by academic commentators but also by the judiciary in the course of decision-making and elsewhere – in terms of the constitutional framework of the state and the role of the judiciary within this. This section denotes that if the law is unconstitutional due to its restrictions of human rights, it is disproportional. This impinges on all sub-legal actions governed by the statute restricting the constitutional right, which is unlawful, due to lack of adequate approval. If there is approval over constitutional decrees due to proportionality, this should extend to sub-statutory actions, which are also required to be proportional. Hence, whichever the case, proportionality as a concept governs both statutory legitimacy and the constitutional legitimacy of sub-statutory actions.

However, first I prefer to explain and define the principle of Reasonableness, which it is essential to divide into two parts.

1. When is an action reasonable?
2. Reasonableness as a balance between conflicting principles.

6.3.1 When is an Action Reasonable?

There is no collective agreement on the absolute definition of reasonableness.[806] By prior practice and knowledge, reasonableness was decided on a case-by-case basis.[807] The Wednesbury[808] test was created by the UK to produce guidance on the margins separating reasonableness within administrative law. Courts were hesitant to impose unless the unreasonableness was excessive: hence, so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.[809] On the question of when "simple" unreasonableness turns into "extreme" unreasonableness, no one has the answer.

6.3.2 Reasonableness as a Balance between Conflicting Principles

It is understandable that reasonableness is a normative concept and it can be achieved through an evaluative, rather than descriptive, process. It is not bound by deductive logic. Rather, it is determined by the identification of the relevant considerations and their balancing in accordance with their weight.[810] Simply, this means that what justifies resort to the requirement of reasonableness is the existence of a plurality of factors that must be evaluated in respect of their relevance to a common focus of concern.[811] Therefore, a decision is reasonable if it reached after giving the proper weight to the different factors that should have been considered, and if it achieves proper balance between the relevant factors.[812]

6.3.3 The Relationship between the Proportionality and Reasonableness.

The relationship between proportionality and reasonableness in the context of the constitutional rights is based on the definitions of these notions. Reasonableness is defined by the English courts in Wednesbury, based on the notion of "extreme" unreasonableness: according to this stance, a decision is unreasonable only when it contains "something so absurd that no sensible person could ever dream that it lay within the powers of the authority".[813] Such a definition of the notion of reasonableness is weak and feeble. It does not distinguish between the lack of a

[806] Tom R Hickman, 'The reasonableness principle: Reassessing its place in the public sphere' (2004) 63 The Cambridge Law Journal 166, Barak, 'the Judge in the a Democracy 'p 248.
[807] A, 'Proportionality: Constitutional Rights and Their Limitations' p 373.
[808] Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223.
[809] Council of Civil Service unions v. minister for the Civil Service [1985] AC 374, 410) Lord Diplock).
[810] CA 5604/94 Hemed v. State of Israel [2004] IsrSC 58(2) 498, 506 (Barak, P.).
[811] Silvia Zorzetto, 'Reasonableness' (2016) 6672016 The Italian Law Journal 595.
[812] Robert Alexy, 'The Reasonableness of the Law', Reasonableness and law (Reasonableness and law, Springer 2009).
[813] Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 229.

rational connection, necessity, and balancing. In the words of Chief Justice Dickson of the Canadian Supreme Court, when comparing the concepts of reasonableness according to Wednesbury and proportionality: "Unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis".[814] In some cases, the Wednesbury version of reasonableness does not even recognize balancing.[815] Such reasonableness is sometimes name *reasonableness* "in a weak sense".[816] Often it is undistinguishable from the rational connection component of proportionality, wherein a decision is reasonable if a rational connection exists between its objective and the means chosen to fulfil it. Accordingly, the way reasonableness should be considered differs from the way proportionality should be considered.[817] As Lord Stein has noted in his judgment, the three components of proportionality are criteria that are more precise and more sophisticated than the traditional grounds of review.[818] He emphasized that: "The intensity of review is somewhat greater under the proportionality approach … The intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being persuade".[819] With this mind, no one can question whether there is any sense in continuing to rely on Wednesbury whenever proportionality applies. This question has yet to be determined in English Law.[820] Hence, it can be concluded that reasonable application of constitutional rights requires proportionality analyses, proportionality analyses includes balancing,[821] and the central component of proportionality is proportionality *Stricto Sensu*.[822] At the heart of that component lies the notion of balancing between conflicting principles.[823]

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[814] Slaight Communications Inc. v. Davidson [1989] 1 SCR 1038, 1074.
[815] Jason Varuhas, 'Keeping things in proportion: the judiciary, executive action and human rights' (2003)
[816] Wojciech Sadurski, Rights before courts (Springer 2005).
[817] See R. v. MAFF. Ex parte First City Trading [1997] 1 CMLR 250.
[818] Ibid para 31.
[819] Ibid para 37.
[820] J. Jowell, "Administrative justice and Standards of Substantive Judicial Review," in A.Arnull, P.Eeckhout, and T. Tridimas (eds.), *Community and Change in EU Law: Essays in Honor of Sir Francis Jacobs* (Oxford University press, 2008), 172.
[821] Barak A, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 374.
[822] N. Emiliou, T*he Principle of Proportionality in European Law: A Comparative Study* (London: Kluwer Law International, 1996), 37.
[823] Barak A, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 343.

It is pertinent "to mention here that when we are talking about the judicial review, we mean justice and fair trial, as mentioned in Article 6[824] of HRA 1998. The principle of a fair trial infuses the common law in both civil and criminal contexts. This principle is regularly applied in determining stays of proceedings, matters of trial procedure, the exclusion of evidence and the formulation of directions to juries. These applications commonly involve the judicial balancing of competing interests: for example, in the criminal context, the interest of the accused and the public in a fair trial must sometimes be considered against the public interest in the prosecution of persons who commit offences."

6.4 The Notion of Article 6 of the HRA 1998

As we know, in the UK, the right to a fair trial under Article 6 of the European Convention on Human Rights is given force by the "Human Rights Act 1998. However, between 1971 and 1975, the right to a fair trial was suspended in Northern Ireland. Suspects were simply imprisoned without trial and interrogated by the British army for information. Three court cases related to the Northern Ireland conflict that took place in mainland Britain in 1975 and 1976 have been accused of being unfair, resulting in the false imprisonment of the Birmingham Six, the Guildford Four and the Maguire Seven. These convictions were later overturned, though an investigation into allegations that police officers perverted the course of justice failed to convict anyone of wrongdoing."

The concept of "civil rights and obligations" cannot be interpreted solely by reference to the respondent State's domestic law; it is an "autonomous" concept deriving from the Convention.

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[824] *Right to a fair trial,*

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

(a)to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b)to have adequate time and facilities for the preparation of his defence;

(c)to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d)to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e)to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 6 (1) applies irrespective of the parties' status, the nature of the legislation governing the "dispute" (civil, commercial, administrative law etc.), and the nature of the authority with jurisdiction in the matter (ordinary court, administrative authority etc.).[825] However, the principle that the autonomous concepts contained in the Convention must be interpreted in the light of present-day conditions does not give the Court power to interpret Article 6 (1) as though the adjective "civil" (with the restrictions which the adjective necessarily places on the category of "rights and obligations" to which that Article applies) were not present in the text.[826] The applicability of Article 6 (1) in civil matters firstly depends on the existence of a "dispute" (in French, "contestation"). Secondly, the dispute must relate to a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. Lastly, the result of the proceedings must be directly decisive for the "civil" right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 (1) into play.[827] The two aspects, civil and criminal, of Article 6 of the Convention are not necessarily mutually exclusive, so if Article 6 (1) is applicable under its civil head, the Court may assess whether the same Article is also applicable under its criminal head.[828] The Court considers that it has jurisdiction to examine of its own motion the question of the applicability of Article 6 even if the respondent Government have not raised this issue before it.[829]

DG v Secretary[830] is a landmark case in which the court in the UK has enhanced the circle of fair trial. DG appealed against a decision to refuse him Employment and Support Allowance (ESA), which was taken after a medical examination. Even though DG requested Jobcentre Plus to contact his GP (also his nominated representative), neither the GP nor DG's social worker were approached for evidence. At the first stage of the independent tribunal process (the First Tier Tribunal), DG waived his right to put his case in person at an oral hearing. This decision was based on advice from Jobcentre Plus. The appeal was dealt with on paper and

[825] Georgiadis v. Greece, 34; Bochan v. Ukraine (no. 2) [GC], 43; Naït-Liman v. Switzerland [GC], § 106
[826] (Ferrazzini v. Italy [GC], 30).
[827] Denisov v. Ukraine [GC] Guide on Article 6 of the Convention, Right to a fair trial (civil limb) European Court of Human Rights 7/97 Last update: 30.04.2019 § 44; Regner v. the Czech Republic [GC], § 99; Károly Nagy v. Hungary [GC], § 60; Naït-Liman v. Switzerland [GC], sec 106).
[828] Ramos Nunes de Carvalho e Sá v. Portugal [GC], sec 121.
[829] Selmani and Others v. the former Yugoslav Republic of Macedonia, 27.

[830] DG v Secretary of State for Work and Pensions (ESA) [2010].

dismissed. When DG appealed this decision, the Upper Tribunal found that DG did not have a fair hearing of his appeal as required by Article 6. This decision took into account the bad advice from Jobcentre Plus, the claimant's mental health problems and the failure of both the Department for Work and Pensions and the tribunal to communicate with his GP.

6.5 The principle of unreasonableness under criticism

Analysing the Wednesbury principle, it is concluded that there are two main objections relating to its content. First, unreasonableness may be redundant, as it does not add anything to existing techniques. For instance, there seems to be an overlap between unreasonableness on the one hand and arbitrariness on the other. Public law does not consider unreasonableness as a separate head of review, but treats it as a distinct head of review from dishonesty/bad faith, which focuses on the decision-maker's motives. The link between unreasonableness and dishonesty is not inevitable, and the non-overlapping areas are significant enough to warrant treating the two as distinct heads of review.[831] The same holds true in private law.[832] After all, "someone may act irrationally while being honest".[833] Braganza v BP Shipping Ltd[834] and Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2)[835] showed that a decision might be found to be irrational although it was arrived at honestly. Similarly, in Clark v Nomura, the court did not find that the employer had acted dishonestly when it failed to award a bonus to the defendant, but found that it had acted irrationally. These cases show that there is no necessary link between irrationality and dishonesty, and that their overlap is not so substantial as to render the distinction between them insignificant. The second criticism against Wednesbury review is that its content is vague, and thus it may be deployed opportunistically and hence cause uncertainty and disruption to viable dealings.[836] Although ambiguity has been raised as an objection to Wednesbury review in public law as well, the discourse there suggests that vagueness can be alleviated by distilling Wednesbury's "inherent logic and structure".[837]

[831] Examples abound of decisions being struck down on unreasonableness but not on bad faith grounds. Recent examples include: In the Matter of an Application by Martin Neeson for Judicial Review v In the Matter of a Decision of the Department of Finance and Personnel [2016] N.I.Q.B. 58; R. (Hoyte) v Southwark LBC [2016] E.W.H.C. 1665 (Admin)
[832] Hooley, "Controlling Contractual Discretion" [2013] C.L.J. 65 at 74–79.
[833] Mallone v BPB Industries plc. [2003] B.C.C. 113 at [39].
[834] [2015] 1 W.L.R. 1661.
[835] [1993] 1 Lloyd's Rep. 397.
[836] Morgan, "Resisting Judicial Review of Discretionary Contractual Powers" [2015] L.M.C.L.Q. 483 at 486.
[837] Daly, "Wednesbury's Reason and Structure" [2011] P.L. 237 at 254.

Administrative law scholars have analysed how the principle has been applied by the courts in the case law in order to discern the "indicia of unreasonableness".[838]

Principally, Wednesbury unreasonableness is the same law which was established in the Rookes Case.[839] In this case, the Commissioner of Sewers had levied charges for repairing a river bank. Ideally, these charges ought to have been divided equally among all the owners benefited, but this charge had been thrown on one adjacent owner. According to law, they had the power to levy this charge in their discretion, but this charge was disallowed as inequitable.[840] While the discretion conferred by the authority to the commissioners allowed them to exercise such discretion as they thought fit, the additional limitation of such discretion being in conformity with the "rule of reason" was imposed by Coke in this case. There are three major flows which can be clearly identified in the principle of unreasonableness. The first is acting contrary to or failing to give effect to the terms of the law; the second is acting contrary to or failing to give effect to the purpose of the law; and the third is making a factual determination without sufficient or proper evidence. In comparison to this, the next section addresses the way in which the doctrine of proportionality signifies Article 6 of HRA.

6.6 The evolution of the doctrine of proportionality as a ground of Judicial Review in the UK

It is vital to mention here that the doctrine of proportionality is struggling to establish its place in the UK's legal system.[841] Though this doctrine came into the UK legal system some time prior to the HRA, it was not functional as it was after the promulgation of HRA. However, the Human Rights Act 1998 has allowed the judiciary to review the Acts of Parliament, evaluating

[838] This term was coined by Daly, who distilled five such indicia in public law. The first is illogicality (the decision-maker chose an inapt means of achieving a particular objective), the second disproportionality (the means chosen by the decision-maker to achieve an objective imposes costs on an individual that substantially outweigh the benefits), the third inconsistency with the terms, purpose or policy of the statute, the fourth differential treatment (the same set of facts produce different outcomes), and the fifth unjustifiable changes in policy. Daly, "Wednesbury's Reason and Structure" [2011] P.L. 237. See also Woolf et al., De Smith's Judicial Review (2013) at [11-028–11-072].

[839] *Rookes* v. Hill, *1598.*

[840] Coke opined: "… notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited, and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections…"

[841] Cohn, 'Legal transplant chronicles: the evolution of unreasonableness and proportionality review of the administration in the United Kingdom'.

their compatibility with the European Convention on Human Rights. Section 4 of the HRA licenses judges to issue a "declaration of incompatibility" – an explicit statement of a statute's inconsistency with the Convention. Moreover, Article 6 of the HRA requires all public institutions, including the executive, to act in a manner compatible with the Convention's rights. The Judiciary has given the responsibilities to review the decisions of legislation and executive, the elected branches of government, to guarantee that they act within their constitutional limits. The first ever formulation of proportionality was applied in the UK system upon the case of Daly,[842] In this case, the court approved the approach to proportionality, and the limitations imposed on the rights were also accepted by applying the following statements:

> (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. [843]

Regarding R vs A,[844] public law is not, at its base, about rights, even though abuses of power may and often do invade private rights; it is about wrongs: that is to say misuses of public power.[845] In the UK, the doctrine of proportionality has been taken as an interpretive instrument and its application is subject to the nature of the case. However, most judges agree that the doctrine of proportionality can be construed in four different stages to measure its legitimacy; however, no established precedent has yet been defined. Prof. Jeffery Jowell has considered this doctrine in "*Beyond the Rule of Law: Towards Constitutional Judicial Review*"[846] – a useful tool of judicial review. After looking in to the principle of this doctrine, it can be defined in four stages, which are mentioned below:

(i) Sufficient importance of objective measure. (Legitimate objective).
(ii) Rational connectivity to measure the objective. (Rational connection).

[842] Daly vs. Secretary of the State for the Home Department 2001] UKHL 26; [2001] 2 AC 532.
[843] R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532.
[844] R vs. A 2001] UKHL 25; [2002] 1 AC 45.
[845] R v Somerset County Council, ex p Dixon [1998] Env LR 111, 121.
[846] Available at http://www.lawteacher.net/free-law-essays/constitutional-law/proportionality-as-a-ground-of-judicial-review-constitutional-law-essay.php accessed on 21september 2017.

(iii) Did the measure follow minimal impairment by not going further than required? (Minimal Impairment).

(iv) Was fair balance achieved between the interest of the community and the rights of the individual? (Overall balance). [847]

In my analyses, this system ensures that the right kind of scrutiny of the decision should be made by avoiding harming the fundamental rights. These questions established the proportionality test by the House of Lords, and the court acknowledged that the intensity of review is somewhat greater under the proportionality approach.[848] However, the fourth question, which talks about *balance*, was later applied for the first time in a case known as Samaroo v Secretary of State for the House of Department.[849] This case established the four principles of the doctrine and the House of Lords specified that all four questions must be satisfied for proportionality.[850] This doctrine demands a more active part from the court, rather than only looking into the rationality of the decision, they should assess the balance achieved by the chief decision-maker. In addition to this, notable emphasis should give to the relative weight of rights and contending interests. Concisely, proportionality is a significantly more demanding standard of review than irrationality. In addition, it allows methodology that is more organized. Hence, I would argue that proportionality is a highly structured and refined method, quite different from anything that was ever required under the more traditional grounds of judicial review.[851]

The doctrine of proportionality functions differently comparative to Wednesbury, as in proportionality, the burden of proof is on both the parties to establish their cases. However, in *Wednesbury*, it is only the claimant who must first establish his part of the case and then prove that the actions of the authorities are unreasonable and irrational.[852] Under *Wednesbury*, the applicant is duty bound to show the unreasonableness of a primary decision. On the other hand, proportionality requires the principal to clarify the necessity of any restriction of individual rights. The court must be persuaded that any such constraint is legitimate within the confines

[847] Samaroo v Secretary of State for the Home Department [2001] EWCA Civ 1139.
[848] R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532 para 27.
[849] Samaroo vs. Secretary of State for the Home Department [2001] EWCA Civ 1139.
[850] R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532 involved a challenge to a ministerial rule, whereas R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45 was a challenge to legislation. The two cases were decided within a week of each other in May 2001.
[851] Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'' in Nicholas Bamforth and Peter Leyland (eds), Public Law in a Multi-Layered Constitution (Hart 2003) 337.
[852] Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671, 680.

of the Convention. This opens what I can depict as a "justificatory gap"[853] between proportionality and *Wednesbury*, in which *Wednesbury* needs less to justify the decision-maker's actions on individual rights, whereas in proportionality, a solid justification is imposed. This denotes a major exit from conventional administrative law, which, as noted above, had little respect for the justification behind the primary decision.

Smith and Grady v UK[854] is a milestone case to understand the difference between these two methods and their application in the course of judicial review. The case was about a ban on confirmed gay individuals serving in the British military. The applicants claimed that such an inquiry concerned their private rights, protected under Article 8 of the European Convention of Human Rights. They were dismissed from the job based on their homosexuality. They filed a suit against this act, but the applicants faced defeat in both the Divisional and the Appeal court because both courts applied the principle of unreasonableness and the applicants failed to prove that the action of the authority was irrational.

The European Court of Human Rights also judged this approach of unreasonableness with doubts. In a clear statement, the court once said that the standard of review before the domestic courts was:

> Placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued….[855]

Coming back to Smith's case, this case reveals that the doctrine of irrationality actually does not have enough potential to protect the rights of the applicant to that extent, where proportionality is easily reached. Hence, the domestic courts, while applying the irrationality principle, failed to judge the justifications for the policy. They had rather depended upon the unsupported claim that permitting homosexuals to serve in the military risked morale and

[853] Taggart, 'Proportionality, Deference, Wednesbury' p 439.
[854] Smith and Grady v UK 50 (2000) 29 EHRR 493, see also Lustig-Prean and Beckett v UK (2000) 29 EHRR 548.
[855] Ibid Smith EHRR para 138.

operational adequacy. They were "restricted"[856] to asking whether the policy was irrational and simply declined to address the issue of whether a reasonable balance had been struck between the rights of the claimants and contending public interests. In this case, it can be alleged that the authority had no substantial and profound[857] justification to constitute the policy. The government provided no proof to show that the presence of homosexuals in the military undermined its adequacy. In the decision of Smith and Grady, it is clear to see that regarding Convention rights, irrationality was not a strong enough standard of review.

It is pertinent to mention here that the ECtHR particularly dismisses the idea that the Wednesbury precept suitably ensures Convention rights.[858] The doctrine of proportionality, with its emphasis on validation, gave assurance of its compatibility with the European Convention of Human Rights principles. The House of Lords in Daly objected to the ideas when individual rights are at stake and argued that there were no substantial reasons to suggest and authorise the extensive control on detainees being present while their cells searched.[859] Smith's case revealed that the policy and the method must be lawful, and there should be a concrete rationale for supporting it. In the final judgement of the European Court of Human Rights, Lord Bingham, in the case of Smith and Grady, stated that the court should observe whether an imprisonment was a crucial and suitable reply[860] to the public interest. The Daly case should be considered as an important step, which established a principle to rely less on Wednesbury, as most of the content of the case was based on Human Rights. Hence, the judgement in Daly was the prominent breakthrough, making a path for the development of an original concept of "culture of justification".[861] In this way, the principle of proportionality has been casually recognised as a standard of review in the cases taken under HRA. The need for legitimation that was missing under Wednesbury had been accepted a visible position in judicial review. None other than Lord Diplock was given the classical meaning of proportionality when his Lordship stated, "you must not use a steam hammer to crack a nut if a nutcracker would do".[862] To crack a nut with a heavy hammer and to use a gun to execute a fly are basic and common-sense examples of disproportionate actions. These actions are so

[856] Ibid para 132.
[857] Ibid Smith para 105.
[858] Richard Clayton, 'Regaining a Sense of Proportion: the Human Rights Act and the Proportionality Principle' [2001] EHRLR 504, 509.
[859] Ibid p 19.
[860] Daly vs. Secretary of the State for the Home Department 2001] UKHL 26; [2001] 2 AC 532 [18].
[861] Hunt (N 1187) 342
[862] *R* v. *Goldsmith* (1983) 1 WLR 151, p. 155

strikingly inconsistent, not on the grounds that we think of it as unsuitable to crack a nut or to kill a fly, but since clearly there are Less Restrictive Means (LRM) available: for example, a nutcracker or a flyswatter. Essentially, legal scholars repeatedly make LRM arguments while examining the proportionality of limitations of non-absolute human rights. I would argue that this notion is applicable to all branches of the government where the activities of these branches trespass upon Convention rights.

The concept of Less Restrictive Means (LRM) is illustrated in the examples of using a flyswatter to kill a fly or a nutcracker to crack a nut. Eva Brems[863] mentioned this concept, while contesting the cases of qualified rights; it is often argued in the principle of proportionality that less restrictive means could be adopted. Similar to this, Christoffersen, in her book,[864] has mentioned two methods to construct a proportionality test, which were based on horizontal and vertical theory. In applying a horizontal proportionality test, a court has to consider a number of relevant factors to judge whether the restriction is proportionate. While in a horizontal test, the court has to see all the existence of LRM and conclude that the action taken is justified. In her book, Christoffersen further explained that:

> In a horizontal test, the existence of LRM is not decisive in itself, but it might be taken into account as a relevant factor. A vertical proportionality test, on the other hand, is a step-by-step test that consists of a number of independent sub-tests. A failure to satisfy any of these sub-tests is both sufficient and necessary to establish the dis-proportionality of a right restricting measure.[865]

While further elaborating on this theory, the strict test mentioned above makes the proportionality dependent on the fulfilment of one legal requirement after the other, whereas a more flexible test takes account of the traditional requirements as factors in an overall assessment. The difference between strict-vertical and flexible-horizontal tests can be illustrated by reference to the different constructions of the Canadian Charter of Rights and

[863] Eva Brems Conflicts Between Fundamental Rights (Eva Brems Ed Human Rights Law Review (2015) 15(1): 139-168 at 140.
[864] Jonas Christoffersen, 'Fair Balance: Proportionality, Subsidiarity and Primarily in the European Convention on Human Rights ' (June 2009) volume 99 Martinus Nijhoff publishers p 97.
[865] Ibid p 101.

Freedoms and the South African Bill of Rights. Different scholars have tried to understand the structure of proportionality in different ways. They have also tried their level best to explore the different angles of proportionality. A German scholar, Alexy,[866] whose work was later translated by River into English, summed up this theory in his book as follows: "The central thesis of my book is that regardless of their more or less precise formulation, constitutional rights are principles and that principles are optimization requirements. Proportionality analysis is concerned with determining whether or not the limitation of human rights is permissible, having regard to the public interest which the government decision maker is seeking to pursue".[867]

I concur with Alexy's argument that an understanding of rights and the public interest, which is based on principles, requires a mechanism for resolving conflicts when those principles come into competition with each other.[868] This means that there is a central idea regarding the doctrine of proportionality that there must be a balance between the interest of the society and the right of the individual. It is pertinent to mention here that the German legal system works with Alexy's idea of legitimate objectives and suitability, and this concept is also found in some cases here in UK. For example, in Secretary of State for the Home Department v Akaeke,[869] a Nigerian woman who entered the UK through illegal means and married a British citizen, the Home Secretary issued her deportation orders and advised her to register herself through a proper channel. The Home Secretary also called her act "jumping the queue", which should be discouraged. The woman refused and emphasised that she should not to be deported, as this would be a violation of her fundamental rights, and challenged her orders. The court said that "the delay was so onerous that no prospective immigrant would be prepared to endure it in order to be exempted from the need to get entry clearance in their country of origin".[870] The court refused to deport the Nigerian woman, as it would have deprived her of her family right. The court also concluded that the Home Secretary's claim of preventing queue-jumping through deportation, in order achieve a legitimate aim, was not legitimate.

It is essential to mention here that the doctrine of proportionality test also addresses the theory of threshold criteria, according to which legitimate aim and rational connection are the

[866] Alexy, *A theory of constitutional rights* p 321.
[867] Ibid p 388.
[868] Ibid p 389.
[869] Secretary of State for the Home Department v Akaeke 2005] EWCA Civ 947.
[870] Ibid p 93.

essentials to be determined, which can be done in the second and the third stage of the proportionality test. Furthermore, an "illegitimate aim"[871] will not be enough to deduce a "public interest principle", and thus, in the first place, a lack of proportion in the task will be seen. At the time of applying this principle, the legitimate aim stage is the most important phase to find out the precise principles between the two rights. In this stage, the court that is adjudicating the case needs to examine the normative force of the public interest goal while pursuing the decision-maker's intention. It means that actually, the proportionality test encompasses the balance between the two principles against one another; this can be established in the case of B vs. Secretary of State for the Home Department.[872] In the said case, the court showed a serious concern when the Home Secretary deported an Italian national who had been involved and convicted for having multiple criminal records. Conclusively, Sedley L.J. stated that "if deportation had been permitted as the aim, then nothing short of deportation, denied the deportation of the Italian national. The aim had to be construed in terms of crime prevention and the protection of public safety to conduct the proportionality analysis".[873] The significance of measuring the challenge in an aim is clearly foretold by this. It means that a public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – misuses of public power.[874] The next section embarks on the analyses of cases which are critical and limited to explore the application of this doctrine. In doing so, my objective is to analyse how the court applied this doctrine on these cases, which limited the freedom of expression of an individual. Moreover, this effort will also clarify the different characteristics of the doctrine of proportionality, when applied on the cases.

6.7 Hailing the right of freedom of expression; the landmark case of R v Secretary of State for the Home Department[875]

David Miranda, "the partner of Glenn Greenwald, the journalist famous for breaking the Edward Snowden story, was questioned at Heathrow airport and had encrypted storage devices seized under the Terrorism Act 2000.[876] Miranda filed a complaint, arguing that this action was

[871] Claudio Michelon, 'LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY. Ed by George Pavlakos Oxford: Hart Publishing (www.hart.oxi.net), 2007. 378 pp. ISBN 9781841136769. £45' (2008) 12 Edinburgh Law Review 498.
[872] Unreported, Court of Appeal, 18 May 2000.
[873] R v Somerset County Council, ex p Dixon [1998] Env LR 111, 121.
[874] Ibid p 111.
[875] Court of Appeal, Civil Division, Lord Dyson MR, Richards and Floyd LJJ, 19 January 2016.
[876] Terrorism Act 2000 paragraph 2(1) of Schedule 7 ("TA2000").

unlawful. The England and Wales Court of Appeal applied the "Doctrine of Proportionality" and ruled that paragraph 2(1) of Schedule 7[877] to the Terrorism Act 2000 was not compatible with Article 10 of the European Convention on Human Rights (European Convention of Human Rights or Convention) because it did not provide adequate safeguards against its arbitrary exercise." Soon after Miranda's imprisonment, the British authorities encoded illegal material that was taken from him, including 58,000 "highly classified" UK Documents taken from Snowden, which they claimed to have "reconstructed", and of which 75 had been decrypted and viewed. This incident made the London police more vigilant. The police counter-terrorism division began a criminal investigation whose main purpose was to focus on the journalists who were responsible for handing over the documents.

In Miranda's[878] case, the Divisional Court's judgment took consideration of the large amount of observation, on which many scholars[879] shared their views. One of them was Mark Elliot, who also drew attention to one essential part of Laws LJ's judgment, relating to the quality of the proportionality test. Lord Justice (LJ) Laws mentioned the "recent restatement" of that test in Bank Mellat v Her Majesty's Treasury[880], in which he stated:

> The question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to that objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these

[877] Power to stop, question and detain.
2 (1)An examining officer may question a person to whom this paragraph applies for the purpose of determining whether he appears to be a person falling within section 40(1)(b).
(2)This paragraph applies to a person if—
(a)he is at a port or in the border area, and
(b)the examining officer believes that the person's presence at the port or in the area is connected with his entering or leaving Great Britain or Northern Ireland or his travelling by air within Great Britain or within Northern Ireland.
(3)This paragraph also applies to a person on a ship or aircraft, which has arrived at any place in Great Britain or Northern Ireland (whether from within or outside Great Britain or Northern Ireland).
(4)An examining officer may exercise his powers under this paragraph whether or not he has grounds for suspecting that a person falls within section 40(1) (b).
[878] Miranda v Secretary of State for the Home Department [2014] EWHC 255.
[879] Fiona De Londras and Fergal F Davis, 'Controlling the executive in times of terrorism: Competing perspectives on effective oversight mechanisms' (2010) 30 Oxford Journal of Legal Studies 19, Rosalind English, 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 S Afr J on Hum Rts 641.
[880] Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 39.

> matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.[881]

The exposure of the distinguishing assignments which the courts have a duty to perform when taking part in a substantial judicial review is a major attribute of the proportionality test. Laws LJ's observations signify much on the distinction between other tools of proportionality with fair balance questions: for example, in its rigid form, the question of necessity is reduced to an evaluation of the relative adequacy of measures having different levels of impact upon the right and the obligation of the authority being to choose the *Least Restrictive Measurements* which are competent enough to make a balance between the restrictions on the rights and the aims to be achieved. This is eventually a specialized examination that requires calculations to be made about the probable impact of various methods on the important issues.[882]

It is pertinent to mention here that in this scenario, Lord Laws LJ is pointing out the fair balance question differently. This is because the court has been asked to compare the issue arising between the "National Security" and "Journalistic Freedom", which, in one sense, cannot be judged by the same standard. Until each of the competing matters is invested with a judge by the court undertaking the review, assessment is rendered unviable because of their basic difference in measurement standards. This means that the review based on fair balance gives direction to the reviewing court to make a value judgement, which is more significant than the necessity review approach.

Obviously, this does not mean that after this there are no values left for the fair-balance review. In fact, that a measure given is the least-restrictive method of protecting some contending strategy objective, and is along these lines essential, cannot be determinative of its proportionality, given the prospect that the interest of the society might be of less value in comparison with the human-rights misfortune.

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[881] Bank Mellat v HM Treasury (No 2)[2013] UKSC 39 para 20.

[882] Mark Elliott, The Miranda case, the fair-balance test, and deference, February 20, 2014, Available at https://publiclawforeveryone.com/2014/02/20/the-miranda-case-the-fair-balance-test-and-deference/?iframe=true&preview=true accessed on 22 July 2017.

6.8 The Application of the Doctrine of Proportionality and Laws LJ's Assertion of Incompatibility in *Miranda's* Case

In the concluding section of the judgment, Laws LJ took into consideration the issue of whether the stop control (if used in relation to the journalistic information or material) failed to be "recommended by law" as mentioned in Article 10 (2). What I have conceived from this, contended five standards which could be taken from the Strasbourg statute on this point.[883] To begin with, the assurance of journalistic sources must be checked with a lawful procedure proportionate to the protection and the significance of the Article 10 in question. Secondly, there must be a guarantee of a proportionate review by a judge or any other independent lawful authority. Furthermore, there must be impartial and proportionate judgement of the material handed over by a journalist. The third standard is the legitimate position of the body, which should be impartial and independent in practice, to judge and measure the potential danger and relevant interest prior to disclosure. This means that whatever the decision is, it should be according to a rule of law. The fourth standard relates to the exercise of an independent review, which should be capable enough to make a decision on reviewing the material handed over by the journalist and should not infringe upon the freedom of expression mentioned in Article 10 of the European Convention of Human Rights. Lastly, in high profile cases such as this, where sometimes it is very hard for an authority to give detailed grounds, it is essential to establish whether any issue of privacy arises, and if so, whether the public interest invoked by the investigating authorities outweighs the general public interest in source protection".[884]

As this case did not concern the revelation of a journalist's source, the court was genuinely unable to discover a way to make a distinction between the revealing of journalistic material simpliciter and disclosure of journalistic material which may expose his confidential source".[885] As it is unfeasible to expect that an average journalist would have the capacity to get interim relief in an emergency upon confinement under Schedule 7, and after the fact the judicial review could not re-establish the confidentiality of sources or material, there was insufficient legal protection to keep away from the risk that it would be practiced arbitrarily.

[883] Sanoma Uitgevers B.V. v The Netherlands, 14 September 2010, Application No. 38224/03, European Court of Human Rights (The Netherlands).
[884] Sanoma Uitgevers B.V. v The Netherlands, 14 September 2010, Application No. 38224/03, European Court of Human Rights (The Netherlands) no 2 para 100.
[885] Ibid Sanoma (N 1321) para 107.

Hence, keeping in view the abovementioned arguments, it can be well said that the power to stop under schedule 7 was irreconcilable with Article 10 and the reason in the judgement; the Court has observed that no "absolute" method has been formulated for the judicial scrutiny for cases like this. Some form of judicial or other independent and impartial scrutiny conducted in such a way as to protect the confidentiality in the material was considered the "natural and obvious safeguard against the unlawful exercise of…Schedule 7".[886] Hence, it can further be concluded that the decision as to how such safeguards would be implemented would be left to Parliament.

6.8.1 Doctrine of Proportionality and Miranda's case analyses

After analysing the Miranda case of Appeal,[887] the exceeding verdict of the UK's Court of Appeal can be summarized on five major bases, in which the Court of Appeal has ousted the decision of the High Court.

(i) The court erred in determining the reason of the investigating officers who directed the stop by using the information and judgements provided to them by other parties, mainly security services.
(ii) The court erred in assessing the main task for which Schedule 7 power was actually utilized.
(iii) The court embraced a defective approach of the review of proportionality by being unable to determine whether there was a genuine threat to public protection that justified the use of Schedule 7 power to take away journalistic material.
(iv) The court erred in its assessment of proportionality in concluding that the use of TA2000 would not have been possible or practical; and
(v) The Schedule 7 power was not compatible with Article 10 of the Convention because it is not "prescribed by law" as required by Article 10 (2).

The court reversed the High Court's previous decision. Thus, it clarified that journalists have the right of protection under the European Convention on Human Rights. Hence, restraining and searching them for the sake of counterterrorism laws should be restricted. After the court gave verdicts on this case, the Home Office of the UK made a press release stating that the

[886] Ibid para 114.
[887] R (on the application of Miranda) v Secretary of State for the Home Department and additionally with (Liberty and others intervening) [2016] EWCA Civ 6.

Home Office has changed the mode of practice for inspecting officers to train them not to inspect journalistic material at all. This goes well beyond the court's suggestions for this situation, so maybe legislative change will not be required after all.[888] For this case, the court also noticed that the significance of these standards is essential. Hence, the disclosure of the material has damaged the confidentiality of the journalist (regardless of whether it includes the distinguishing proof of a writer's source) and is against the protection of Article 10 of the European Convention on Human Rights.[889]

In my assertion, the idea to represent a reporter as an accidental terrorist has been rightly dismissed, as the seizure of journalistic material is secured by lawful protections[890] and it is proved that the UK's terrorism law breaches the *freedom of press* and surely journalism is not terrorism.[891] The Court of Appeal used the doctrine of proportionality, and by applying the forth pillar of the doctrine "fair balance", came to the conclusion that Schedule 7 of the Terrorism Act 2000 was not compatible with the European Convention on Human Rights Article 10 (2) to provide adequate protection from police officers' power to stop and search, and hence violated the freedom of the expression of the appellant. According to the principle of proportionality, an understandable connection between the aim and the method that is used to achieve the aim needs to be present. The principle of proportionality is applied by the UK court when reviewing action or legislation for compatibility with the European Convention on Human Rights[892] or European Union[893] law. The courts have the power to cancel penalties ordered by administrative bodies and lower courts that are disproportionate when compared to

[888]Available at http://www.bbc.co.uk/news/uk-35343852 accessed on 26 June 2017.
[889] Ibid Sanoma (N 1321) para 113.
[890] Ibid.
[891]Available at https://twitter.com/davidmirandario/status/689407688871047168 accessed on 30 June 2017.
[892] Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (TS 71 (1953); Cmd 8969) ('the European Convention on Human Rights'): R (on the application of Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532, [2001] 3 All ER 433, at [25]-[27], per Lord Steyn. For the test of proportionality applied in relation to Convention rights, see Ibid Handyside, (N332), European Convention of Human Rights 5493/72, at [49]. See also R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills (Just for Kids Law intervening) [2015] UKSC 57, [2016] 1 All ER 191, [2015] 1 WLR 3820; R (on the application of SG (previously JS)) v Secretary of State for Work and Pensions [2015] UKSC 16, [2015] 4 All ER 939, [2015] 1 WLR 1449; R (on the application of Lumsdon) v Legal Services Board [2015] UKSC 41, [2015] 1 All ER 391, [2015] 3 WLR 121; R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department [2014] UKSC 60, [2015] AC 945, [2015] 2 All ER 453; R (on the application of Kaiyam) v Secretary of State for Justice [2014] UKSC 66, [2015] AC 1344, [2015] 2 All ER 822; Pham v Secretary of State for the Home Department [2015] UKSC 19, [2015] 3 All ER 1015, [2015] WLR 1591.
[893] See R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd [1999] 2 AC 418, [1999] 1 All ER 129, HL; R (on the application of Sinclair Collis Ltd) v Secretary of State for Health [2011] EWCA Civ 437, [2012] QB 394, [2012] 2 WLR 304; and Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69, [2015] All ER (D) 223 (Nov), [2015] 3 WLR 1655.

the related misconduct.[894] In other cases, the courts do not generally quash for lack of proportionality, although they may consider it an indication or aspect of Wednesbury unreasonableness. Many say that the principle of proportionality is still being developed in English law.[895]

Lord Justice Richards and Lord Justice Floyd delivered the judgment for the England and Wales Court of Appeal. The Court began by stating the fact that the material seized was allegedly journalistic material and was central to the third, fourth and fifth grounds of appeal. With regard to the interpretation of the definition of terrorism, the Court rejected the literal interpretation that had been adopted by the lower courts, holding that Parliament must have intended for there to be a mental element to the definition of terrorism, because:"

> If Parliament had intended to provide that a person commits an act of terrorism where he unwittingly or accidentally does something which in fact endangers another person's life, I would have expected that, in view of the serious consequences of classifying a person as a terrorist, it would have spelt this out clearly.[896]

In addition, the court agreed that this would not prohibit the publication of material from comprising terrorism if it did endanger a person's life or create risk for the health and safety of the public as well as of the publisher of the material, whether or not it was the intended or reckless effect of such publication.[897] The court held that the main intention of the Schedule 7 stop was to give effect to the Port Circulation Sheet ("PCS") which was completed by Security

[894] R v Barnsley Metropolitan Borough Council, ex p Hook [1976] 3 All ER 452, [1976] 1 WLR 1052, CA; and see R v Secretary of State for the Home Department, ex p Hindley [2000] QB 152 at 177, [1999] 2 WLR 1253, CA, per Lord Woolf MR, affirmed in the House of Lords: [2001] 1 AC 410, [2000] 2 All ER 385.
[895] For a discussion of irrationality versus proportionality see: R (on the application of Association of British Civilian Internees: Far East Region) v Secretary of State for Foreign and Commonwealth Affairs [2003] EWCA Civ 473, [2003] QB 1397, [2003] 3 WLR 80, at [32]-[37], per Dyson LJ. See also R (Daly) v Secretary of State [2001] 2 AC 532; R (on the application of Richardson) v North Yorkshire County Council [2003] EWHC 764 (Admin), [2004] 1 P&CR 361, [2003] 18 EGCS 113; R (on the application of Ala) v Secretary of State [2003] EWHC 521 (Admin), [2003] All ER (D) 283 (Mar); Huang v Secretary of State for the Home Department [2005] EWCA Civ 105, [2006] QB 1, [2005] 3 All ER 435; R (on the application of Lumsdon) v Legal Services Board [2015] UKSC 41, [2015] 1 All ER 391, [2015] 3 WLR 121; R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department [2014] UKSC 60, [2015] AC 945, [2015] 2 All ER 453.
[896] R (on the application of Miranda) v Secretary of State for the Home Department and another (Liberty and others intervening)[2016] EWCA Civ 6 para 54,55.
[897] Ibid 55

Services following a conversation between the Security Services and the Ports Officers, and it was not an incorrect intention.[898] The Court stated that it was not obligatory for the security officers to assume that the material would be unconstrained for a political reason; however, it was sufficient for them to have considered that it might be released. Consequently, it was judged by the courts that the authority specified by Schedule 7 was implemented for a legal purpose.[899]

The Court concurred with the assessment of the lower court regarding the fact that Miranda was not initially seen by authorities to be a journalist and stated that this was indeed relevant, as it would be unreasonable to criticize an authority for being unable to give proper justification to the freedom to publish journalistic material if the authority did not, or could not, reasonably know that it was journalistic material. Hence, it was necessary to be known by the authorities that Mr Miranda had editorial material.[900] It was found that without a doubt, Mr Miranda was not himself a journalist; however, he worked with Mr Greenwald, who was a journalist, and the authorities knew about this. Consequently, the balancing exercise should be made on the foundation that the material found with Mr Miranda could be journalistic in nature.[901] The court refused to agree that the application of schedule 7 stop power contrary to Miranda was unreasonable or unfair. The court carried the view that it was intervening in Miranda's rights of liberty, which are mentioned in article 10, but that the national security interest was more important than Miranda's article 10 rights. Finally, it was stated that "considerable deference" should be given to decisions to invoke Schedule 7 powers.[902]

Finally, with regard to whether the Schedule 7 power was compatible with Article 10 of the Convention, the Court held that The central concern is that disclosure of journalistic material (whether or not it involves the identification of a journalist's source) undermines the confidentiality that is inherent in such material and which is necessary to avoid the chilling effect of disclosure and to protect Article 10 rights.[903] The Court accepted that Schedule 7 powers must be exercised rationally, proportionately, and in good faith to provide a degree of protection. However, the Court considered the fact that the only recourse when the powers

[898] Ibid 32, 37
[899] Ibid Miranda (N 1301) para 58.
[900] Ibid Miranda (N 1301) para 64.
[901] Ibid Miranda (N 1301) para 67.
[902] Ibid Miranda (N 1301) para 84.
[903] Ibid Miranda (N 1301) para 113.

were not exercised in such a manner was the possibility that judicial review proceedings would fall short of being adequate safeguards against arbitrary decision-making.[904] Thus, it was held that: the stop power conferred by para 2(1) of Schedule 7 is incompatible with Article 10 of the Convention in relation to journalistic material in that it is not subject to adequate safeguards against its arbitrary exercise.[905]

The Court further stated that:

> … in disagreement with the Divisional Court, I would declare that the stop power conferred by para 2(1) of Schedule 7 is incompatible with article 10 of the Convention in relation to journalistic material in that it is not subject to adequate safeguards against its arbitrary exercise and I would, therefore, allow the appeal in relation to that issue. It will be for Parliament to provide such protection. The most obvious safeguard would be some form of judicial or other independent and impartial scrutiny conducted in such a way as to protect the confidentiality in the material. [906]

Hence, "it would be up to Parliament to decide how to provide such protection, but the most obvious safeguard was a form of judicial or other independent and impartial scrutiny that protects the confidentiality in the material.

Another landmark case – that of Rajavi – in which the court applied the doctrine of proportionality in the judicial review and checked the balance between the freedom of expression and state security is analysed in the next section. "

6.9 The Rajavi case and the application of the doctrine of proportionality

In this case, the appellants submitted that the restriction on Mrs Rajavi from entering the UK amounted to a disproportionate interference of their rights under Article 10. Hence, they appealed to the Court (Court of Appeal), in which the main issue was whether the infringement

[904] Ibid Miranda (N 1301) para 114.
[905] Ibid Miranda (N 1301) para 119.
[906] Ibid.

of the appellant's Article 10 rights was proportionate. The appellants sought to challenge the Home Secretary's assessment that the visit would provoke the possibility of Iranian retaliation. It was argued that proportionality required the court to be satisfied that the interference was strictly necessary.

It was also argued that this restriction amounted to disrespect to Parliament.[907] Hence, in this case, the government's basis for exclusion was that allowing Rajavi into the UK to meet with parliamentarians would thus damage national security by causing an impact on the UK's relationship with Iran. Underlying this reason, a value judgement regarding the significance of national security relevant to the freedom of expression connections of excluding Rajavi is brought up. Similar to the case of *Carlisle,* the main objective of authorities after eliminating Rajavi was that allowing her to enter the UK and meet parliamentarians would somehow harm national security as well as the political relationship which the UK holds with Iran. In situations such as these, it needs to be determined whether the public policy gain justifies the restriction of an individual's human rights and involves the application of a normative calculus, which thus elevates questions regarding constitutional functions of the reviewing court as well as the political decision-maker.

This means that the lawful considerations remains a suitable ground on which courts can show respect to executive powers of the state, such as foreign policy and national security. Hence, it is said to be in this situation that the Government's assessment relating to the *relative* importance of the right, as opposed to the public-policy objective, deserves to be of proportionate respect. Due to the fact that the fair balance test is, by definition, one which concerns itself with the relative significance of the two variables mentioned, it is fair to deduce that the *relative* evaluation is pertinent when applying these considerations to the fair balance stage of the proportionality analysis.

As described in *Miranda*[908] by Laws LJ, the last limb of proportionality in a case where the debated measure passes all points from (i) to (iii) is to decide whether the means (which has a justified intention and does not exceed that which is necessary) causes offense because it is

[907] R (on the application of Lord Carlile of Berriew QC and others) (Appellants) v Secretary of State for the Home Department (Respondent) [2014] UKSC 60 (Lord Carlile, paras 49-50).
[908] David Lowe, 'Surveillance and international terrorism intelligence exchange: Balancing the interests of national security and individual liberty' (2016) 28 Terrorism and political violence 653.

unable to find the balance between the interests of the society and the freedom of expression of an individual; and that the court should be the judge of where the balance should be found. Therefore, it can be deduced that it is not easy to differentiate this question by an elected member of the government. If it is well within the judicial jurisdiction, it must be on the same basis that there is a plain case.

6.9.1 How the Principle of Proportionality is used in Rajavi's Case.

The following three points were important for Rajavi's case and the Supreme Court's decision:

(i) Granting permission to Rajavi would damage connections with Iran.
(ii) Deterioration of the UK's foreign strategy.
(iii) Domestic security aims.

"

An integral point of the case and the Supreme Court Justice's judgement was the assertion of the Home Secretary that allowing Rajavi to enter into the UK would as a result harm relations with Iran and thus further damage the spirit of the UK's foreign policy and national security goals. From such a standpoint, it is essential to be clear about how Iran's reasonable response to a decision to allow Rajavi to enter into the UK was relevant to the proportionality of the decision not to allow her to do so. Three main outcomes are thus presented.

Firstly, the probability and implications of an adverse Iranian response was essential to the question of legal contending interest: for example, national security was capable of justifying an obstruction with the freedom of expression, as described in Article 10 (2). If no threat of the UK's involvement with Iran being severed or harmed was calculated, then there would be no possibility of damage to the UK's foreign policy and national security interests would become prevalent, and the resistance of the Article 10 right would be unsupported, even in *prima facie* terms.

Secondly, the sensitive nature of any Iranian response was essential to the issue of necessity. It is essential to prevent Rajavi's entrance into the UK in order to avoid an Iranian response, which would, in turn, impair the UK's diplomatic relationship with Iran and would be an impediment to the UK's national security interests. This relates to the relative assessment of possible and likely Iranian responses to numerous methods of the treatment of Rajavi, and would include asking whether the essential national security interests could have been

guaranteed by less restricting means than the draconian method of denying Rajavi entrance into the UK. For example, political process could have balanced the consequences of allowing Rajavi to enter into the UK, and thus the banning would not have been essential in the grand scheme of things. Thus, a wide degree of knowledge of Iranian responsiveness is integral in order to make a judgement of this nature and issues regarding the relative institutional skill of the courts and government are thus brought up.

Thirdly, Iran's possible response in this regard is noteworthy in the question of fair balance. If Rajavi was allowed to enter into the UK and address parliamentarians, how damaging would this be to the national security of the UK? Furthermore, would these negative outcomes be acceptably overpowering in order to justify the limitation of her freedom of expression? We turn to a predictive evaluation of the probable nature and threat of any Iranian response; however, an esteem judgement concerning the relative importance assigned to the contending matters in play would also be considered. Thus the question arises: would it be justified to limit a measure of freedom of expression by depriving in-person meetings between Rajavi and the parliamentarians, in order to ensure national security? It is Lord Sumption's assertion that issues such as these comprise the balance between two disproportionate qualities: the rights mentioned in the Convention as well as the interests of the society dependent upon it to legitimize the interference with it. This raises critical issues, not regarding the respective abilities of judges and official decision makers, but about their respective legal functions.

6.9.2 The Judgment in the case

In this judgment,[909] the Supreme Court raised fascinating and critical issues in relation to the responsibility of the courts while applying the doctrine of proportionality in cases related to obstructions with qualified human rights. The case was basically based on the question of whether the Home Secretary's action had violated the freedom of expression defined in Article 10 of the European Convention on Human Rights. The accusations made by the Home Secretary were initiated due to her decision not to permit Mrs Maryam Rajavi, who was a "Rebel Iranian Politician" and had close associations with some people who were restricted in the UK following the Terrorism Act 2000, to enter the country.

[909] R (Carlile) v Secretary of State for the Home Department [2014] UKSC 60.

Further justification on her decision was that Rajavi's presence in the UK would not be beneficial or in the interest of the public at large, and further, in the light of the foreign policy of the country, keeping in view the terrorism threat, her presence might bring an irreparable loss to the country. More exclusively, she contended that permitting Rajavi to enter the UK would be seen as a "planned move against Iran" and against its government. This, it was stated, threatened to destabilise relations between the UK and Iran, which would be detrimental to the relationship between the two countries and would be further against the UK national-security interest. In the final judgement of the Supreme Court, it was held by a 4-1 majority that the Home Secretary's decision was legitimate.

6.10 Challenges for the Doctrine of Proportionality

Some authors[910] argued that the proportionality analysis is – or is claimed to be – morally neutral. In this regard, Stavros Tsakyrakis writes: "The principle of proportionality pretends to be objective, neutral and totally extraneous to any moral reasoning".[911] It is imperative to differentiate between two claims which could be made with regard to the supposed moral neutrality of proportionality. Firstly, one could argue that the principle of proportionality itself is already morally neutral. Secondly, one could say that the proportionality analysis – or the application of the principle to a given case – proceeds in a more neutral way. Therefore, the evaluation presented above, only insofar as there would be a serious flaw in the doctrine if it were correct that the principle of proportionality or its application was morally neutral. However, the question of why an attractive conception of proportionality should endorse this neutrality arises. The proportionality principle itself works at a high level of abstraction; however, this should not be confused with moral neutrality. An example of a moral statement would be, for example, that only legitimate (as opposed to illegitimate) goals should be used to justify an interference with the right.

Comparably, the claims that an interference should be suitable, necessary and proportionate are evidently moral statements regarding the conditions under which interference with a right is justified. To give an example, someone could claim that even when an interference with a right goes further than that which is necessary, it would be justified; and further, an argument

[910] Möller, 'Proportionality: Challenging the critics' p 87.
[911] Stavros Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7 International Journal of Constitutional Law 468.

could then arise where we would then attempt to convince him that he was mistaken in his view and that it was morally essential to restrict the acceptable limitation of rights to what is necessary. Therefore, we could defend the principle of proportionality on moral grounds on the basis that proportionality is a moral concept. The application of the proportionality principle must also be morally reasoned. Therefore, it is clear that human rights are creatures of morality, and that thus, reasoning with them is moral reasoning.

Let us imagine that a judge in the ECtHR is duty bound to decide on the Odievre case,[912] which involves an adopted woman who wants French authorities to release the identities of her biological parents, to check whether the denial of her claim, which would interfere with Ms Odievre's right to private life under Article 8 of the ECHR, is proportionate or not. In order to assess the proportionality of this case, the judge has to analyse the reasons behind the French policy which protects the private life of her biological parents and the adoptive family, and so on,[913] and decide whether these reasons are so weighty that they outweigh Odievre's right. Could he find this balance in a "morally neutral way"? One might say that one's job as a judge is to apply the Convention and not to develop free-standing moral arguments. In my opinion, there is a basis of truth in this argument, as judges are restricted in some form or another by the constitution in which they are interpreting.

This criticism does not have much authority regarding systems of judicial review which use proportionality, which means that one can only ask oneself whether the reasoning behind the French policies is weighty enough to justify denying the claimant's right. That assessment should thus be a moral one, and any interpretation of the proportionality principle which denies this is mistaken. Thus, the only charge that one can initiate is that a specific author, after developing his view of proportionality, has made an error. It is an unattractive interpretation of the principle which allows the assumption of moral neutrality and not 'the' principle of neutrality. Therefore, it is fair to say that the proportionality principle has survived recent assaults on it, despite debates imposed upon it by critics of the principle. Firstly, these critics identified issues with certain conceptions of proportionality; however, these criticisms should be directed at their main target – those conceptions of proportionality which make implausible claims – and not opposed to the idea of proportionality itself. Secondly, their criticisms

[912] Odievre v. France, (2004) 38 EHRR 43.
[913] Ibid paras. 44, 45.

regarding the impressionistic nature of balancing indicate an aspect in which the existing theories of proportionality are fragmentary.

6.11 Advantages of Proportionality as a Distinct Head of Review

After having gone through the threadbare discussion of proportionality and its critical analyses, the usefulness of proportionality has become quite obvious. I have demonstrated the following:

Firstly, proportionality would constitute a considerable positive point in terms of accountability. This would consequently make higher authorities and the judge more responsible due to a clearer and more reliable (more demanding) reviewability evaluation.

Secondly, an actual alternative to the Wednesbury doctrine is established in numerous methods. Primarily it is found that it would be more fitting to apply a uniform test regardless of whether challenges have been imposed under EU law, the HRA 1998 or all other purely national claims. On one end, the wide scope of the HRA entails that both national claims and European challenges could be invoked in an application for judicial review. It does not seem compulsory or advantageous to apply several tests to unrelated aspects of the very same case in practicality. Furthermore, the applicability of the principle, which relies heavily on the context, requires that different degrees of potency be used in order to suit the different types of judicial review which are at stake. This was demonstrated by the practice of the CJEU. [914] Albeit this feature is also evident in the doctrine of unreasonableness, jurisprudence has proven that the proportionality test is far more flexible in this regard.

Thirdly, proportionality also makes the approach clearer, thus making the test less chaotic and resulting in a better-organized method of review.[915] The vague formulation of the Wednesbury doctrine is unhelpful for the courts in practical terms because there are a few hesitations regarding the extent or degree to which it should be applied, particularly in cases where both the European Convention of Human Rights and European Union law cases are combined. In this sense, it is seen as "overly discretionary", as it does not ensure a "transparent reasoned

[914] S. Bailey et al., Bailey, Jones and Mowbray: Cases, Materials and Commentary on Administrative Law, p.629.
[915] Stephen Henry Bailey, Cases, materials and commentary on administrative law (Sweet & Maxwell 2005) p 630.

basis" for judicial review: the reason behind this is that it is not used on a regular basis, and due to the flexible principle, it contributes to further ambiguity in the law.[916]"

Fourthly, "proportionality is also necessary in terms of locus standi. While the traditional formulation of the Wednesbury principle proves to be improper to protect the interests of an applicant, its amended formulation also appears to be too unspecified to protect the interests of the decision-maker.[917]"

Lastly, grounds for review are not fixed for all time and may be expanded as required.[918] The formulation of the doctrine of unreasonableness took place at a time where judicial review seemed rather 'constrained'; now, however, a more liberal view of the principle seems more adapted to the evolution of the society, and hence, the law.[919] In this discussion, the advantages of proportionality overweigh any other approach.

It seems that as an alternative to the Wednesbury approach, the doctrine of proportionality, developed in English law, is a firmly established principle of Community law and also of ECHR. Now the live question is, therefore, whether the courts will proceed to apply proportionality as an independent head of review in cases which do not have a Community law element. Paul Craig, in his article *Impact of Community Law on Domestic Public Law,* cited a number of reasons as to why this development is likely to occur.[920] The proportionality principle, however, has the potential to turn that 'exception' into 'the rule' when ECHR points arise, but still there is an urgent need to recognize this doctrine as a general norm of judicial review in the UK's legal system.

6.12 Conclusions

This chapter demonstrated that the doctrine of proportionality has struggled to come into prominence, as the domestic courts always refused to use proportionality as a free-standing

[916] Bonina Challenor, 'The balancing act: A case for structured proportionality under the second limb of the lange test' (2015) 40 University of Western Australia Law Review 267.
[917] S. Baileyetal., Bailey, Jones and Mowbray: Cases, Materials and Commentary on Administrative Law, p.629.
[918] R v Inland Revenue Commissioners ex parte national Federation of Self---employed and Small 10 Servais–Wednesbury and the UK Legal System Maastricht Student Law Review www.mslawreview.eu.
[919] M. Klattetal, 'The Constitutional Structure of Proportionality' (2012) Oxford University Press 170, Taggart, 'Proportionality, Deference, Wednesbury' p 428.
[920] Paul Craig, 'The impact of community law on domestic public law' (1997) Administrative law facing the future: old constraints and new horizons, ed Peter Leyland and Terry Woods 271.

ground of Judicial Review,[921] but it received its most significant recognition in English administrative law, when Lord Diplock in GCHQ upheld the potential importance of proportionality when used in one of the human rights violation case. He argued that for the judges to use proportionality as a ground for judicial review would be a step towards the incorporation of the convention rights by the back door. It seems that Wednesbury unreasonableness turned out to be almost useless in terms of fundamental rights, and irrationality would not seem strong enough to deal with this higher perception of law, so the much awaited principle of proportionality was eventually used by the court after strict scrutiny only in cases where there is a human rights violation in reference to ECHR law.[922]

This chapter has also examined the application of the doctrine of proportionality by analysing the most recent cases of the Supreme Court of the UK. It has effectively checked the balance between the interest of the society and the rights of the individual, with all due credit to the Lords, who have confidently applied it in each particular case. It is compatible with the common law system; however, there are some areas which can be interpreted well to make this doctrine a firm principle in the judicial review process in the UK judicial system. This doctrine has proved that it has the potential to safeguard the rights of an individual, and simultaneously, if the interest of the society is critical, it should be prioritised over the rights of an individual. This chapter has also focused on one of the primary purposes of this research and that is to find the answer to the question of whether the doctrine of proportionality is harmonious with the common law system and whether the UK's legal system should seriously consider it as a common norm in protecting freedom of expression leaving the principle of unreasonableness behind. There are number of cases where the notion of unreasonableness was used as a ground of judicial review;[923] and proved to be the difficult one.

For example *Smith and Grady v UK* (1999) 29 EHRR 493 was a notable decision of the European Court of Human Rights that unanimously found that the investigation into and subsequent discharge of personnel from the Royal Navy on the basis they were homosexual was a breach of their right to a private life under Article 8 of the European Convention on Human Rights. The decision, which caused widespread controversy at the time led the UK to adopt a revised sexual-orientation-free Armed Forces Code of Social Conduct in January 2000. In UK law the decision is notable because the applicants' case had previously been

[921] *ex parte Brind* AC 1.
[922] Steyn, *R (Daly) v. Secretary State for the Home Department*.
[923] Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) p 23.

dismissed in both the High Court and Court of Appeal, who had found that the authorities' actions had not violated the principles of legality including Wednesbury unreasonableness, thus highlighting the difference in approach of the European Court of Human Rights and the domestic courts. The test of unreasonableness has always been difficult to pin down because it is such a subjective concept and opinions can obviously vary widely on whether a particular decision is reasonable or not. Another aspect, as discussed in *British Airways Board v Laker Airways*,[924] was that it would be very difficult for the courts to intervene on grounds of unreasonableness if the matter concerned relations to higher political and constitutional affairs. Also, the courts have adopted the view that the test of unreasonableness does not provide sufficient protection for convention rights, as in *ex p Smith and Other*.

Hence, the findings of this chapter are important that the doctrine of proportionality can be regarded as a superior concept to Wednesbury or irrationality, thanks to the principle's emphasis on balance and justification, which is taken to offer a "more structured methodology".[925] However, despite its significance, there is a gap in the explanation of this doctrine, namely the lack of a unified definition. As stated earlier, this doctrine is an interpretive instrument, and there is no binding precedent for this doctrine to follow. It is thus timely and important to define this doctrine and apply it uniformly. Based on the research in this thesis, the next chapter will provide some recommendations on how this doctrine can be efficiently utilised in the UK Judicial System.

[924] *Laker Airways, Inc. v. British Airways, PLC* F 3d (Court of Appeals, 11th Circuit) p 67.
[925] Jackson, 'Constitutional law in an age of proportionality' p 124.

CHAPTER SEVEN: Conclusions and Recommendations

7.1 Introduction

As presented in the introduction to this thesis, the study sought to find answers to the following research questions:

> First, to examine whether the doctrine of proportionality a tool of judicial review is a more beneficial instrument than Wednesbury to ensure that the fundamental rights of individuals (Freedom of Expression) are protected.
>
> Second, to examine whether the doctrine of proportionality is harmonious with the UK's legal system and whether the UK's judicial system should earnestly consider it as a basic norm at a time of judicial review.

The thesis used the concept of militant democracy as the conceptual basis for its analysis. In this thesis, I urged that the doctrine of Militant Democracy is vital in today's contemporary democratic society, where it is very difficult to sustain a pure democracy. A democracy has to be equipped and ready to fight its enemies; otherwise, similar to what happened to the Weimar government, the intolerant destroy the democracy and the tolerant as well. After the 9/11 terrorist attack in the USA, the terrorism threat has crossed the threshold of tolerance, and the UNO alerted member states to take some dramatic measures to handle this threat.[926] Hence, the states have developed anti-terrorism laws, which are vital to stop the threat of terrorism and to protect society.

The thesis argued that the doctrine of militant democracy principally works as a preventive measure;[927] it takes action *before* an incident happens. It also permits the democratic society to derogate from the qualified rights at the time of emergency,[928] and provides security to the society. Hence, the militant democracy safeguards the core of the constitution and simultaneously protects the society from being destroyed. Therefore, it is evident to deduce that militant democracy is a proportional solution for the prevention of terrorism, as it takes the

[926] O'Connell R, 'Militant Democracy and Human Rights Principles.' (2009) 1 Const L Rev 84.
[927] Sajo A, 'From Militant Democracy to the Preventive State.' (2009) 1 Const L Rev 63.
[928] Yatsunska O, 'Militant Democracy: Undemocratic Political Parties and beyond.' (2016) 44(1) Int'l J Legal Info 70.

necessary amount of action needed in order to protect the interest of the society.[929] This doctrine does not allow enemies of the society to misuse the human rights. In this scenario, if we take the example of the freedom of expression of an individual, this doctrine does not allow anybody to make a hate speech in a democracy and bring terror and fear into society. As we know, the doctrine of militant democracy on one side protects the society from threat, but on the other side gives substantial power to the state authorities to derogate from the very basic and important human rights.[930] Now, sometimes states with poor human rights records also justify their actions under the cover of militant democracy. Here, the doctrine of proportionality as a tool of judicial review is adequate to determine the balance between the actions of the state, which has minimized the fundamental rights of the individuals. It has a unique feature, namely the burden of proof, which must borne by both the parties. Once the case is admitted by the court of law, each party has to prove its part of the case.

7.2 Findings of the thesis

The thesis turned to the doctrine of proportionality works in exactly the same way as the principle of equality, which is the essential feature of the principles of justice and democracy. The Common Law system, which is based on both the principles,[931] resembles the doctrine of proportionality. The doctrine of proportionality has two basic principles – balance and necessity – and these principles do not legalize any action when they are not equal and essential. Hence, they help to uphold the rule of law in a society. It is also pertinent to mention here that these two principles are the essence of the common law system in the UK. Determining whether the incidental harm expected to be caused by an action of the state would be excessive in relation to the concrete and direct benefit (to the society) anticipated is probably the most challenging aspect of the application of the rule of proportionality in practice. It requires valuing and comparing two incommensurable factors: protection from the threat and incidental harm. The doctrine of proportionality frequently requires this type of assessment. For instance, in human rights law, proportionality can require balancing restrictions of certain rights with

[929] Bourne AK, 'The Proscription of Political Parties and Militant Democracy.' (2012) 7(1) J Comp L 196.
[930] Puskarova E, 'Theoretical Framework of the Concept of the Militant Democracy.' (2016) 99(4) Pravny Obzor 331 vernance. (BLIHR, 2004, p. 11).
[931] John Chu, 'One controversy, two jurisdictions: A comparative evaluation of the ultra vires and Common Law theories of judicial review' (2009) 14 Judicial Review 347.

considerations of national security.[932] Moreover, it is an assessment that government actions are constantly under check: though it may be difficult to attempt to set parameters for making such determination, it is not, in practice, an impossible determination to make.

7.2.1 Findings of the first research question

This thesis revealed that proportionality ordains that administrative measures must not be more drastic than is necessary to attain the desired result. The ECtHR has applied the doctrine liberally, and so it has infiltrated UK law to a significant extent. Addressing the first research question, the thesis has argued that a concept like 'proportionality' has long been operating covertly in the UK's legal system under the label of irrationality or Wednesbury unreasonableness is doubtful. I reached the conclusion that although principles of proportionality and unreasonableness or irrationality cover a great deal of common ground, a clear difference has emerged in judicial decisions and theoretical analysis. I found that from its emergence, proportionality has been a unique tool of judicial review with a distinctive identity. Previously, where a body was awarded subjectively-worded powers, the courts adopted a 'hands-off' approach, as they were reluctant to intervene in such administrative actions.[933] This was the rationale for the substantive meaning of unreasonableness. Associational Provincial Picture Houses v Wednesbury Corporation[934] was the case that marked the occasion. The basic principles of unreasonableness were reaffirmed and elaborated; however, it was difficult for the court to pin down the ultra vires actions of the state, because it is such a subjective concept and opinions can obviously vary widely on whether a particular decision is reasonable or not. I also found[935] that it would be very difficult for the courts to intervene on grounds of unreasonableness if the matter concerned relations to higher political and constitutional affairs. Hence, I would argue that the test of unreasonableness does not provide sufficient protection for convention rights, as is also indicated in Smith's case.[936] It also seems that Wednesbury unreasonableness has turned out to be almost useless in terms of protecting fundamental rights. Irrationality would not seem strong enough to deal with this higher perception of law; the

[932] For example, Article 8(2) of the European Convention on Human Rights prohibits interference with the right to respect for private and family life, home and correspondence, except such as is in accordance with the law and is necessary in a democratic society inter alia in the interests of national security.
[933] G W Keeton, 'Liversidge v. Anderson' (1942) 5 Mod L Rev 162.
[934] Wednesbury Case, 1948 K.B.1 223 (1948).
[935] House Lords Judgment in British Airways Board v. Laker Airways Ltd. (U.S. Jurisdiction in Antitrust Action; British Protection of Trading Interests Order)' (1984) 23 ILM 727
[936] *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

much-awaited principle of proportionality was eventually adopted by the courts to assist with irrationality.[937]

The study also revealed that the doctrine of proportionality provides that action will be unlawful if it is disproportionate in its effect, or relative to what is required. In other words, there should be reasonable proportion between the administrative objective and the means used to achieve it. In reference to this, the central issue in the case of the *Belmarsh detainees* was the proportionality of the government's response to the threat posed by global terrorism after the attacks in New York, Washington and Pennsylvania on 11th September 2001. The case of the Belmarsh detainees has been recognised as having high constitutional significance, in which the court has not given any room to the doctrine of proportionality, leading to the miscarriage of justice. According to the findings of this thesis, the main reason why the UK's legal system is reluctant to accept the proportionality principle is a concern that the principle would widen the scope for judicial intervention in merit questions. Proportionality can definitely be regarded as a superior concept to Wednesbury or irrationality, as it places emphasis on balance and justification, offering a more structured methodology.

7.2.2 Findings of the Second research question

The second research question of the doctrine of proportionality and its compatibility in the UK's legal system is also very critical and acute. Whether the proportionality test should be a general ground for judicial review in UK public law has not yet been answered by any binding Supreme Court decision.[938] This question is also a source of ongoing and fierce academic dispute wherein the views against having proportionality as a general ground for review in English law seem to be the dominant ones. These decades of academic dispute and judicial reluctance and hesitance can be perceived as lost decades in UK public" law. While looking into the answer to this question, one of the findings of this thesis revealed that almost all arguments against having proportionality as a general ground for review rely on misconceptions. In relation to this, after detailed discussion in Chapter Six, I must say that these misconceptions have now become hurdles in adopting the doctrine of proportionality as a common tool of judicial review in the UK. The first misconception relates to overlooking the nature of the reasonableness principle as a balancing and weighing test, thus overseeing the

[937] *ex parte Daly*, 2001 U.K.H.L. 26, 2001 All E.R.3 433 (2001).
[938] Nehushtan, Y. (2017). The Non-Identical Twins in UK Public Law: Reasonableness and Proportionality Israel Law Review, Vol. 50, Issue 1 (2017), pp. 69-86.

identical nature of the reasonableness test and proportionality *stricto sensu.* The second misconception relates to overlooking the fact that proportionality adds very little to already existing grounds of judicial review in UK public law, and that this addition is not necessarily focused on the administrative weighing and balancing process. The third misconception, which results from the first two, is the view that reasonableness prescribes, in and of itself, lower judicial scrutiny, whereas proportionality inherently entails stricter scrutiny. After examining in detail the salient features of the doctrine of proportionality, I would argue that these arguments are feeble. The proportionality test directs attention to these factors, forces judges to consider them and introduces an element of structure into judicial reasoning. This is where proportionality adds something new to UK public law, and forms a reason against having proportionality as a general ground of review. A better understanding of the concepts of proportionality, as suggested here, will not only promote a better understanding of UK public law but will also improve the quality of both administrative decision-making and judicial reasoning, and will lay out a common conceptual ground for normative arguments about the scope and intensity of judicial review.

I have also conceived from this thesis that the possibility that the doctrine of proportionality can be used in the UK's judicial system has increased since the Human Rights Act 1998 came into force in the UK. This Act requires UK superior courts to apply the proportionality test with regard to protected rights. The UK Supreme Court showed the first significant signs of willingness to use proportionality as a ground for review in public law, which it demonstrated well in two recent cases: Ms Rajavi from 2015, and Miranda from 2016. In specifying the reasons for its willingness, the court stated that: The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages".[939] Truly, in the last couple of years, UK courts have been contemplating the possibility that English law might adopt proportionality as an additional ground of judicial review,[940] only to cases that limit Convention rights. However, they have not accepted its scope of use in a general sense, as in Germany and other European states. There seems no reason why such factors should not be relevant in judicial review even outside the

[939] Christopher Knight & Tom Cross (2017) Public Law in the Supreme Court 2015–2016, Judicial Review, 22:2, 215-244, available at DOI: 10.1080/10854681.2017.1329177 accessed date 15 march 2019.
[940] For a relatively early judicial discussion of this option see the GCHQ case (n 19) 410 (Lord Diplock).

scope of Convention and EU law.[941] It is worth emphasising this point: factors such as suitability, appropriateness, necessity and the balance or imbalance of benefits and disadvantages were never absent from UK public law. At the same time, these factors are not always applied by UK courts, even in cases concerning rights.[942]

In the UK, the government policy is not to promote the doctrine of proportionality in the judicial system,[943] and always encouraged the judiciary to rely on Wednesbury unreasonableness to check the actions of the government. One can quote a number of cases when this kind of selection has led to the violation of human rights.[944] One of the key purposes of the doctrine of proportionality is to ask the government the reasons that led them to limit the freedom of expression. This means that the government should answer the question of whether the action was necessary for the benefit of the society or whether this limitation has fulfilled a purpose. Hence, this doctrine investigates whether balance was achieved at the time of limiting the rights. What this also means is that whilst anti-terrorism laws contain a number of sections that legitimise the derogation and limit the right to freedom of expression, the doctrine of proportionality examines the use of these provisions in the right place and at the right time.

One of the objectives of this thesis is to check the concordance between the doctrine of proportionality and the principles of the common law system. After analysis of this question, I conclude that both doctrines are rooted in the same principles, which are established upon human rights. Any limitation on these human rights requires a legitimate legal justification for the reason that proportionality is required to possess both a rational justification and a structured discretion. This thesis also showed how proportionality could be considered as a vessel for human rights theories, as it is an analytical and legal tool which aims to protect human rights and public interest simultaneously. It also showed that the doctrine of proportionality could be compatible to most human rights theories: for example, Alexy's theory of principle shaped rights.[945]

[941] Pham (n 12) para 95 (Lord Mance); Kennedy v Charity Commission [2014] UKSC 20, [2014] 2 WLR 808, para 54.
[942] C Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1.
[943] Fordham M, 'Wednesbury.' (2007) 12(4) Jud Rev 266.
[944] Stohl M and Carleton D and Lopez G and Samuels S, 'State Violation of Human Rights: Issues and Problems of Measurement.' (1986) 8(4) Hum Rts Q 592.
[945] Alonso J, 'The Logical Structure of Principles in Alexy's Theory: A Critical Analysis.' (2016) 28 Revus: J Const Theory & Phil Law 53.

Heading towards more findings, proportionality, which is the principle of necessity and balance, also works with alternative means, which limit the right to a lesser extent and which can fulfil the goal at the same level of efficiency when the level of abstraction is higher or vice versa. The necessity principle in the doctrine signifies how the level of abstraction should be determined according to the actual purpose, which underlines the law, and should the law have several purposes, the examination should be conducted with respect to the law's predominant purpose. The principle of balance, however, is often under scrutiny, as many imply that it aims to balance items that cannot be measured, and others imply that it is nonsensical. Some are even of the opinion that proportionality *stricto sensu* (balance) protects rights even less than its alternatives. Nevertheless, in certain circumstances, proportionality *stricto sensu* may safeguard general rights better than strict scrutiny. However, the findings of this thesis illustrated that when Proportionality *stricto sensu* is met and balanced, then judicial discretion is broad and legislative discretion is narrow. Principally, the concept of proportionality warrants the Court to decide whether the steps taken were the steps needed. It shows the contrast between irrationality and proportionality: irrationality allows the courts to review the merits of a decision and proportionality is the expectation that administrative action should not go beyond that which is necessary in order to receive a specific outcome. Furthermore, courts should create a binding and upright method to assess proportionality.

Limitations on rights should follow a proper procedure so that the conditions upon which the state strikes a balance between the right of an individual and the interest of a society should be genuine, honest and without any mala-fide. Further analyses in this study showed that there are some provisions that allow derogations and limitations, but only in specific circumstances and under specific conditions. This means that derogation and limitations are permissible, but should not damage the fundamentals of the rights, and the actions of the states must respect the basic principles, objectives and purpose of the convention. In chapter, number six it is very significant: I have examined the two latest cases that have limited the freedom of expression. I found that the application of the doctrine of proportionality is very useful and substantial enough to inspect whether the limitation provisions present with the rights have been used correctly by the UK Government. In both cases, the court adjudicated the limitation on the freedom of expression wisely and decided the case on merit. In one case, they found the violation of the fundamental right, and in the other case, they did not. For instance, I agree with Lord Slynn that even without reference to the HRA 1998, the time has now come to recognise

proportionality as a part of English Administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law.[946]

In concluding, this thesis added to the existing scholarship by revealing that first the doctrine of militant democracy must be well defined by the international community and practiced uniformly to enhance the rule of law. Secondly, this is the time when the UK should accept the significance of the doctrine of proportionality in its legal system; thirdly there is also a desperate need for legislation to protect the fundamental right of freedom of expression in the UK, in order to allow the democratic norms in society to flourish.

7.3 Recommendations

Based on the research conclusions, the following four recommendations are suggested:

7.3.1 Militant democracy should be defined on the parameters of the principles of Human Rights

The notion of "militant democracy" is an interpretive instrument and can be understood as the legal restriction of certain democratic freedoms to protect democratic regimes from the threat of being subverted by legal means, which makes this term a jarring one. Many states have included this notion into their constitutions.[947] The European Court of Human Rights has long had to deal with issues of militant democracy, whether in relation to the persistence of racist and fascist parties, Germany's loyalty laws, or political violence in the UK and Ireland.[948] A number of different reasons are generally given for the use of militant democracy type measures;[949] typically, these include combating political violence; controlling racist and far-right parties; defending fundamental constitutional or human rights principles; securing the transition to democratic rule; or protecting the territorial integrity of the state.

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[946] Xin Zhang, 'Towards the Rule of Law: Judicial Control of Administrative Discretion in a Comparative Context' (2018) Available at SSRN 3286207 p 87.

[947] The German Basic Law is the most elaborate on this point, there are also relevant provisions in the Italian Constitution of 1947, which prohibits the reorganisation of the fascist party and provides for limiting the political rights of fascist leaders. See also G.J. Jacobsohn, "An unconstitutional constitution? A comparative perspective" (2006) 4 (3) International Journal of Constitutional Law 460; Rory O'Connell, "Guardians of the Constitution: Unconstitutional Constitutional Norms" (1999) 4 Journal of Civil Liberties 48-75, Article 12 of the Transitional Provisions, available in Italian at <http:// www.quirinale.it/costituzione/costituzione.htm> last accessed on 22 March 2009.

[948] P. Harvey, "Militant democracy and the European Convention on Human Rights" (2004) 29 (3) European Law Review 407-420.

[949] Issaacharoff discusses the threats posed by insurrectionary, separatist and anti-democratic parties: S. Issacharoff, "Fragile Democracies" (2007) 120 Harvard Law Review 1405, 1433-1447.

However, the most dramatic and controversial of all the ECtHR decisions on the theme of militant democracy was the decision in the Turkish Welfare Party case.[950] This is a serious matter of political concern. It implies that provisions of militant democracy may have the opposite effect than the one intended. Instead of protecting democracy against its supposed enemies, they may provide a means for those empowered to make the relevant decisions to arbitrarily exclude an indeterminately expansive range of political competitors from the democratic game, thereby restricting the democratic nature of the regime and effectively "doing the work of the enemies of democracy for them".[951]

The basic reason, as I have sought to bring out, is that there is no principled way of establishing what constitutes an "enemy of democracy", since that is ultimately a decision over the boundaries of the political entity itself. Such a decision, by definition, cannot be made by democratic means and must accordingly amount to a sovereign exercise of "authoritarian" power. In making this argument, however, I do not wish to dismiss the concerns that motivate theorists of militant democracy in the first place. However, analysing all the obstacles, I have found two possible ways to achieve the best use of militant democracy. One possible way is to draw a clear distinction between the legal regulation of the kinds of actions that are allowed within a democratic framework and the set of legitimate political actors based on their goals or ideologies. Another possible way of dealing with the same problem is to pursue the opposite political strategy from the one implicit in the idea of militant democracy: that is, to strive as much as possible to include the presumptive enemies of democracy within the legal framework of democratic norms, rather than excluding them.

Any restrictions on freedom of expression must be necessary in a democratic society. In this context, the theory of militant democracy denotes that a democratic state is entitled to take preventive steps against a political movement that uses undemocratic means (violence) or pursues antidemocratic goals. The legitimacy of such measures is questionable if the state is not itself committed to democratic means and goals. For this reason, it is imperative that courts apply the human rights principles rigorously.

[950] Refah Paritisi (Welfare Party) v. Turkey (2003) 37 EHRR 1.
[951] Kirshner, A. S. (2014). *A theory of militant democracy: The ethics of combatting political extremism*. Yale University Press.

7.3.2 The doctrine of proportionality in the legal system of the UK

It is greatly recommended that the doctrine of proportionality should be well defined and adopted as a general norm by the UK's legal system, as in other European countries. This is because a uniform standard is needed for this principle. Currently, this doctrine is an interpretive instrument: hence, in the UK, the courts construe and apply this doctrine according to the case, making it vulnerable to criticism for not having a uniform standard.

The obscurity in its definition allows for "abuse of process by local courts in the name of discretion leading to the lack of clarity".[952] In order to make vague definitions, the court uses ambiguous words such as "necessary" and "certain". This allows the meanings to vary depending on the case in every scenario, creating uncertainty in state freedom, and hence a lack of uniformity in judgments. Principled standards of identification are needed to prevent states from believing that they are superior to the law. The lack of a systematic and detailed justification for the use of the doctrine by states should be discouraged, as it threatens the rule of law and human rights.[953]

7.3.3 United Kingdom's Domestic Courts should apply proportionality as a general ground of review, in the context of Article 4 and 6 of the Human Rights Act 1998

The Human Rights Act 1998, Article 4 (Declaration of incompatibility) and Article 6 (Right to a fair trial) are very significant in this regard, mainly because it requires administrative bodies to apply a more structural decision-making process. It also requires the courts to apply a structural judicial reasoning, thus promoting both administrative and judicial integrity, transparency and accountability. In this context, one could argue against this view by asserting that proportionality does not necessarily promote integrity, transparency and accountability, as proportionality can be applied – and sometimes is applied – in a non-structural way, or in a way that makes it difficult to distinguish it from the reasonableness test.[954] It is true that proportionality is sometimes applied in that way, but this is the case only when the

[952] For a general discussion of both the theoretical and the legal dimension of European legal integration, see P.Craig, and G. de Búrca, EU Law: Test, Cases and Materials. (5th ed., Oxford: Oxford University Press, 2011) 2-5 and A.Wiener and T.Diez, European Integration Theory, (OUP, 2009).
[953] Case C 202/11 Anton Las v. PSA Antwerp NV Advocate General's opinion paras 75-8.
[954] For offering a different classification which focuses on the importance of either rights or interests see: M Elliott, 'From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification' in Wilberg & Elliott (eds), The Scope and Intensity of Substantive Judicial Review: Traversing Taggart's Rainbow (Hart Publishing 2015) 76.

proportionality test is misunderstood or is applied wrongly. The test itself is inherently more structured and properly understood than any possible meaning of reasonableness.

The doctrine of proportionality uses the balance approach, and is hence very useful to apply where two rights collide,[955] even if they are not necessarily fundamental rights. The doctrine of proportionality also asks if the desired outcome can be achieved through least restrictive measures.[956] It acts as a safeguard against the unlimited use of legislative and administrative powers and is considered to be a "rule of common sense", according to which an administrative authority may only act in proportion to the extent required to achieve its objectives.

Recently, the UK Supreme Court has started using this doctrine, but only in cases which address EU or ECHR laws. Giving the importance of each right (not necessarily fundamental) in the overall scheme of constitutional value helps UK judges to decide whether a right should get more or less protection. (Deciding whether the right to life should limit the right to speech, and how much, must depend on the relative value of these rights in the overall scheme of social values). This allows UK courts to make beneficial decisions in favour of the proportionality review whilst preventing the dangers of paternalism and arbitrariness.

7.3.4 Protection of "Freedom of Expression" in the UK according to the principle of the UN's General Comment No 34

UK's law has traditionally taken little or no notice of freedom of expression.[957] A right to free speech or expression "was not generally recognized by the common law" system,[958] unlike, for example, the rights to property and reputation, which are strongly protected, respectively, by the laws of trespass and libel. With an unwritten constitution, the right to freedom of expression comes from the practice of the common law, alongside the UK's accession to international human rights instruments. As discussed earlier, I doubt whether the HRA Article-10 has had a very radical impact on the legal protection of freedom of expression. Indeed, in terms of the cases decided by the UK's court, I do not think it has been as substantial as it might have been

[955] J.Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Forida)', (2002) 21(2) Law and Philosophy, 137-164, 148-149.
[956] Tor-Inge Harbo, 'The function of the proportionality principle in EU law' (2010) 16 European Law Journal 158.
[957] Barendt, Eric (2009) "Freedom of Expression in the United Kingdom under the Human Rights Act 1998," Indiana law Journal: Vol. 84: Iss.3, Article 4.
[958] Ibid.

and I have found that there remain areas of uncertainty regarding the scope and application of the freedom of expression. Here, in the UK, the freedom of expression guarantee has also had a real impact on political and parliamentary debate: the new encouragement and glorification of terrorism offenses, and even more clearly the extension of the racial hatred offense to cover religious groups, are strongly resisted by reference to general free speech principles.

The UN's General Comment No. 34 also emphasises protection of the freedom of expression, and sets out the comprehensive basic norms and guiding principles, which should be respected by all the member states. Freedom of expression is essential to the virtuous working of the entire human rights system. It is inevitable that freedom of expression, which is an extremely important fundamental right, is exposed to very serious threat. I also conclude from my investigation that the response to this array of assaults and abuses requires multi-faceted action from many actors. Crucial to the effectiveness of all such responses will be the existence of a strong normative framework in the form of international human rights law in support of freedom of expression.

Further to my investigation, it is pertinent to mention here that in Europe, many states have given constitutional protection to this fundamental right.[959] I found that the UK is far behind the other European states in protecting this right; it is highly recommended that there should be legislation on the freedom of expression, to give this right true protection in the UK. It is perhaps a surprising consequence of a measure that was intended to strengthen the legal protection of fundamental rights by enabling them to be asserted in the UK's courts rather than resorting to Strasbourg. However, we know that here in the UK, parliament will take time to introduce the new legislation for the protection of freedom of expression. In my opinion the courts in the UK government should be encouraged to use the doctrine of proportionality where

[959] Freedom of expression is granted by Article 5 of the Basic Law for the Federal Republic of Germany, freedom of speech and expression is protected by Article 40.6.1 of the Irish constitution and the Article 14th of the Greek Constitution guarantees the freedom of speech, and expression of the people living in the state. United Kingdom should also corporate the legislation on freedom of expression in its legal system.
Available at https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510 accessed date 14th Jan 2019.
Article 5 Freedom of Expression: (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.
(3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution, Gerard Whyte, 'Religion and the Irish Constitution' (1997) 30 J Marshall L Rev 725, Antonis Chanos, 'New Constitutionalism and the Principle of Proportionality: The Case of the Greek Constitution' (2016) 16 Diritto & Questioni Pubbliche 191.

the rights contend; otherwise, if the case goes to the European Court of Human Rights, it may find again the violation of Human rights by the UK.

7.4 Conclusions

In this thesis, I have focused on the doctrine of proportionality as a tool of judicial review and found that in-spite of having criticism this doctrine can be a vital tool of the English legal system. This doctrine is very much compatible with the common law system – the Wednesbury unreasonableness principle – which has dominated the UK judicial system for a very long time, but it has not evolved very well and has left many cases in jeopardy. Contrary to the doctrine of proportionality, this principle shows only one side of the picture. However, the doctrine of proportionality places the burden of proof on both parties to prove that their case is *prima facie*.

The UK's judicial system showed reluctance for a very long time to use the application of proportionality and still not accepted as a general norm of judicia review. Hence, the European Court of Human Rights, in numerous cases, informed the UK government that their actions have violated the European Convention of Human Rights and that the individuals concerned must be compensated. Furthermore, since this doctrine is not defined in any statute hence, the courts have to interpret this doctrine every time when they intend to use this doctrine.

Proportionality can increasingly be used to support a general claims in UK law. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. Such a clearer articulation of standards promotes what has been called a 'culture of justification' in place of a 'culture of authority'. Now it is timely and important that the UK's legal system should start to consider adopting this doctrine as a general tool of judicial review and in its administrative law.

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