

PROPORTIONALITY AND DEONTOLOGICAL REASONS: UNATTAINABLE IDEALS IN THE CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

When Canada adopted the Canadian Charter of Rights and Freedoms (hereinafter Charter) in 1982¹, the country joined a growing number of jurisdictions in what has been labelled the “post-war paradigm”². Proportionality analysis has spread across the new world of constitutionalism and its place in constitutional adjudication has yet to be assessed and refined. In this regard, the test set up in *R. v. Oakes*³, the established way to assess proportionality in the Canadian context, is not devoid of any blind spots. One of these blind spots is the place given for non-instrumental reasons in the assessment of proportionality of legislation.

Commentators have already highlighted that proportionality is not compatible with a deontological conception of rights.⁴ In this paper, I will deepen this exploration of the compatibility of deontological arguments and proportionality by showing that the structure of proportionality is not designed for deontological reasons for limiting the rights. I do not discuss if this is fatal to proportionality but I think it is important that scholars and judges alike be aware that proportionality analysis simply disregards an important set of genuine moral considerations. To do so, I will first examine the inherent instrumental and consequentialist nature of proportionality analysis **(I)**. Second, I will show that some pieces of legislation are enacted for non-instrumental reasons **(II)**. I will then give the example of retributive justice as a form of deontological and non-

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² Canadian Charter of Rights and Freedoms; Part I of the Constitution Act 1982; Schedule B, Canada Act 1982 (UK) c 11.

³ Lorraine Weinrib, ‘The Post-War Paradigm and American Exceptionalism’ in Sujit Choudry (ed), *The Migration of Constitutional Ideas* (2007) 84.

⁴ *R v Oakes* [1986] 1 SCR 103.

⁵ Matthias Kumm, ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’ in George Pavlakos (ed), *Law, Rights And Discourse: The Legal Philosophy Of Robert Alexy* (2007) 133; Aharon Barak, *Proportionality: Constitutional Rights And Their Limitations* (2012) 471.

instrumental reason (III) and illustrate this with the Canadian case of *Sauvé II* to show that proportionality analysis is unfit for these kind of reasons (IV). Finally, I will show that the way the “proper purpose” requirement is framed makes deontological and non-instrumental reasons necessarily look suspect or improper (V).

THE INSTRUMENTAL NATURE OF PROPORTIONALITY

Proportionality analysis is based on a means-end and cost-benefit analysis.⁵ The two step analysis that distinguishes between the scope of a right and the justification for its limitation is a way to determine if the limitation is for a proper purpose that is rationally connected and necessary to achieve the end the legislator is seeking to achieve, and if the marginal general social benefit of achieving this end is proportionate to the limitation of the right. What must be underlined here is that the analysis is focused on the means used by the legislature, i.e., the provision that limits a constitutional right – to achieve its policy objective.

Should we limit free speech and prohibit the distribution of child pornography in order to protect potential victims?⁶ Should we limit the freedom of religion of certain public officials, like judges, to preserve the appearance of neutrality of the judiciary? Answering these questions involves an evaluation of the means used to achieve the end. The end is different from the means used. In this sense, the legislation is instrumental. Generally, when a legislator adopts a piece of legislation, he does so because he thinks that it can produce good social consequences. However, not every piece of legislation is necessarily instrumental. Instrumental provisions are easily identifiable in that it is clear that the purpose generally cannot be completely fulfilled. For example, fighting against the sexual exploitation of children is certainly a legitimate social policy objective. Nevertheless, this does not warrant constant electronic surveillance of the populace. There is a trade-off between the protection of the right to privacy of citizens and the need to protect children from sexual exploitation. Proportionality is good for balancing these competing claims. But in this case, it is clear that the result is that there will always be some sexual exploitation of children. The question is really: what level is tolerable for society? In this case, the purpose can be partially fulfilled, thus it is a scalar purpose, not an all-or-nothing purpose.

Unfortunately, the very structure of the proportionality analysis makes it difficult to analyze all-or-nothing and non-instrumental purposes. Let us examine the two steps analysis of proportionality as presented by Barak⁷:

⁵ Kumm (n 4).

⁶ *R v Sharpe* [2001] 1 SCR 45.

⁷ Barak (n 4).

1. A right is limited
2. The limitation is justified, i.e.:
 - A. There is a proper purpose
 - B. There is a rational connection between the purpose and the piece of legislation
 - C. The piece of legislation is necessary to achieve the purpose
 - D. At the margin, what the whole society gains from achieving the purpose outweigh the limitation of the right (proportionality *stricto sensu*).

What is interesting to note is that stages B and C of the justification involve a means-end analysis while stage D involves a cost-benefit analysis. The steps involving rational connection and necessity examine the link between the provision, i.e., the means and the goal (the “proper purpose” identified at stage A to see if there is a rational connection and no less restrictive means capable of fulfilling the purpose to the same extent. The proportionality analysis, *stricto sensu*, is a case of cost-benefit analysis. “It is an analytical process that places the proper purpose of the limiting law on one side of the scales and the limited constitutional right on the other, while balancing the benefit gained by the proper purpose with the harm it causes to the right.”⁸ All these stages presuppose that the purpose is external to the legislation, i.e., the piece of legislation is an instrument, or a means, to achieve a goal outside of it. Thus, proportionality analysis presupposes that all legislations are instrumental and therefore, the legislation’s constitutionality is to be analysed in light of its consequences and not its inner coherence or justification. It limits, in a sense, the kind of reasons the legislator can provide to justify its piece of legislation.

THE POSSIBILITY OF NON-INSTRUMENTAL PURPOSES

The problem is that even though most of the legislation enacted by parliamentary institutions nowadays fulfills some kind of regulatory role of social life, some still fall outside this instrumental model. Sometimes, even if a piece of legislation produces some consequences, it is unclear that these consequences were the purpose guiding the legislator; they might simply be a side effect, the legislator having arguments of principle for adopting the statute.⁹ Imagine that a legislator enacts, in a Civil Code, the following provision: “Nobody shall benefit from their wrongdoings”¹⁰. There may be some

⁸ *ibid* 343.

⁹ Ernest J Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale LJ 949 (1988). On the inherent coherence of private law, see Ernest J Weinrib, *The Idea of Private Law* (2012).

¹⁰ Ronald Dworkin, *Taking Rights Seriously* Ch 1 (1977).

consequential arguments in favor of this principle, but are they a part of legislator's reasoning as well? It is more likely that the legislator will enact such a provision because it is simply a basic principle of justice, i.e., for deontological reasons. This entails that the reasons for enacting a law can be completely different from the actual effects of this law.¹¹ The justification for the enactment of such a provision is not its consequences but its moral content. The provision can be said to be just in and of itself, not because of any instrumental role it plays in social life. I want to explore here a kind of non-instrumental argument that can be offered to justify a limitation of a right that fit only strenuously within the means-end/cost-benefit proportionality test: deontological arguments for punishment.

DEONTOLOGICAL ARGUMENTS: THE EXAMPLE OF RETRIBUTIVE PUNISHMENT

It is always problematic to identify the right level of abstraction at the proper purpose stage. This is even more problematic and crucial for non-instrumental purposes because they can always be reframed in a more abstract fashion. The problem is that at a certain level of abstraction, it fails to capture the real subjective intent of the legislator.¹² Let me illustrate this with the example of retributive punishment.

Imagine that a legislature wants to punish a certain type of crime by, say, the death penalty. Imagine that a person challenges the constitutionality of the death penalty based on its right to life. According to him, the death penalty is unconstitutional because it is not proportional. Before going forward, one thing must be clarified at the outset. Proportionality in the constitutional context is not like proportionality in the criminal context where it is normally used to mean that there must be a balance between the blameworthiness of the act and the punishment. In the constitutional context, the balance is between the social benefits furthered by the legislation (the "proper purpose") and the punishment. In the criminal context, the punishment is seen as a consequence of the wrongful act while in proportionality analysis the punishment is seen as a cause of some social benefit pursued by the legislator.

The purpose can be said (A) to punish a crime with the death penalty because it is recognised as a highly blameworthy conduct. On the other hand, we can move one-step back and say (B) that the purpose is to punish this crime with the death penalty to manifest society's disapproval of such conduct. In (B), the punishment itself is framed as a means to achieve society's interest. Alternatively, we can move another step back

¹¹ See Ronald Dworkin, *A Matter Of Principle* (1985).

¹² *ibid* (n 4) 285-302.

and say that the real purpose is (C) to increase the level of confidence in the justice system. Alternatively, we can also divert our attention and say that (D) the elected representatives simply want to please the electorate and be re-elected.¹³ These completely different purposes will trigger completely different analyses. The appropriate level of abstraction is crucial for the rest of the proportionality analysis. As I will argue here, however, I think it is possible to defend the proposition (A), i.e., that the purpose of a piece of legislation can be the very same thing it does. In other words, a piece of legislation can be genuinely non-instrumental. All other formulations (B, C and D) are scalar and instrumental purposes but (A) is an all-or-nothing non-instrumental purpose; either you punish this person with the death penalty or not. In fact, it is probable that even the subjective legislative intent was to enact a legislation imposing the death penalty because the representatives considered it to be just in these circumstances. The consensus in Parliament was about the appropriateness of this particular punishment. Therefore, the subjective legislative intent cannot be said to be “to punish this crime” or “to manifest social disapproval of this conduct”. The subjective legislative intent was rather “to impose death penalty for this crime”.

Now, once we admit that a purpose can be framed like (A), the rational connection and the necessity test become useless. Is punishing this person with the death penalty rationally connected to punishing this person with the death penalty? Of course. Is punishing this person with the death penalty necessary to punish this person with the death penalty? Of course. Do the social gains, at the margin, from punishing this person with the death penalty outweigh this person’s right to life? However, what social gains are we discussing here? Did we not just say that the legislator saw the punishment as the consequence of the blameworthiness of the act, not as the cause of some alleged social benefit? If the purpose is to impose the death penalty, the social benefit is to impose the death penalty, not any side effect that imposing the death penalty may have. The proportionality *stricto sensu* is about the social benefits of achieving the proper purpose itself, not its side-effects¹⁴. As we can see, retributive arguments for punishment fit uneasily in the proportionality framework. This unease with deontological reasons is best exemplified by the *Sauvé* cases, which I will now discuss.

THE CANADIAN EXPERIENCE IN SAUVÉ

The problem of non-instrumentalism discussed above has manifested itself in the Canadian context most famously in the *Sauvé* cases. M. Sauvé was an inmate serving a life sentence in prison. He challenged a provision of the Canada Elections Act prohibiting

¹³ John L. Austin, *How to Do Things with Words* (1962).

¹⁴ *ibid* (n 4) 342.

inmates from voting in federal election on the ground that this violated his constitutional right to vote as protected by Section 3 of the Canadian Charter of Rights and Freedoms.¹⁵ In 1993, the Supreme Court of Canada ruled that the impugned provision of the Canada Elections Act was unconstitutional¹⁶.

In response to this first decision, Parliament enacted a new piece of legislation reforming the Canada Elections Act and limiting the right to vote for inmates who were serving a sentence of more than two years of imprisonment.¹⁷ Following a new constitutional challenge again launched by M. Sauvé, the Court had to re-examine the question in 2002.¹⁸ In a surprisingly divided decision of 5-4, the majority noted that the purpose was “problematically vague” and “thin”. Moreover, the majority held that the new limitation was not rationally connected to its end and struck down the impugned provisions. The minority, on the contrary, thought that the limitation rested on a question of philosophy and principle and that it was not for the Court to resolve it. The difference in the opinion of the majority and the minority is striking and illustrates the unease with which justices try to impose the proportionality analysis on non-instrumental piece of legislation. Writing for the majority, Chief Justice McLachlin said that “symbolic” purposes were “problematic”.¹⁹ However, writing for the minority, Justice Gonthier, explains:

My disagreement with the reasons of the Chief Justice, however, is also at a more fundamental level. This case rests on philosophical, political and social considerations which are not capable of “scientific proof”. It involves justifications for and against the limitation of the right to vote which are based upon axiomatic arguments of principle or value statements. I am of the view that when faced with such justifications, this Court ought to turn to the text of s. 1 of the Charter and to the basic principles which undergird both s. 1 and the relationship that provision has with the rights and freedoms protected within the Charter. Particularly, s. 1 of the Charter requires that this Court look to the fact that there may be different social or political philosophies upon which justifications for or against the limitations of rights may be based. In such a context, where this Court is presented with competing social or political philosophies relating to the right to vote, it is not by merely approving or preferring one that the other is necessarily

¹⁵ Charter, s 3.

¹⁶ *Sauvé v Canada* [1993] 2 SCR 438.

¹⁷ Criminal Code, RSC c C-46, s 743 1.

¹⁸ *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SC 519.

¹⁹ *ibid* para16.

disproved or shown not to survive Charter scrutiny. If the social or political philosophy advanced by Parliament reasonably justifies a limitation of the right in the context of a free and democratic society, then it ought to be upheld as constitutional.²⁰

What is at stake in Justice Gonthier's comment is the very possibility of a justification that is non-instrumental in the proportionality framework. Moreover, this is particularly well illustrated by his comments regarding the all-or-nothing character of certain legislative purposes. Justice Gonthier explains: "In the case at bar, there is very little quantitative or empirical evidence either way. In such cases, the task of justification relates to the analysis of human motivation, the determination of values, and the understanding of underlying social or political philosophies – it truly is justification rather than measurement"²¹. Non-instrumental reasons cannot be framed as scalar purposes or "value-laden"²². Furthermore, since the end itself is not external to the legislation, you can either find it to be justified or unjustified. This is very problematic, especially with the necessity and proportionality *stricto sensu* analysis. The crucial point is that there is a kind of justification available for such piece of legislation but outside the consequentialist framework of proportionality analysis. It does not mean that, as long as a purpose is non-instrumental, everything is justified. It simply means that the kind of reasons that may justify a certain limitation of a constitutional right simply cannot always be accessed through a consequentialist analytical framework.²³ I will now explore briefly how this problem is rooted in the way the proper purpose requirement is framed.

SOME PROPER PROBLEMS WITH PROPER PURPOSES

As I explained in the first section with regard to the distinction between scalar and non-scalar purposes, scalar purposes always presuppose that there is an ideal situation, which we strive to achieve. Consequently, in a hypothetical problem-free society, there would be no use for legislation at all. The issue here is that some legislative action, though deontologically justified, can sometimes create problems rather than solve them²⁴. The "proper purpose" question must therefore be carefully probed. A purpose can be proper even if there is no problem to be solved. This is really well exemplified by the

²⁰ *ibid* para 67.

²¹ *ibid* para 90.

²² Barak (n 4) 343.

²³ See, Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*, (1996) 37.

²⁴ Larry Alexander & Michael Moore, *Deontological Ethics*, in *The Stanford Encyclopedia of Philosophy* (Edward N Zalta ed, Spring 2015).

retributive aspect of punishment. The retributive component of punishment is not about deterrence of future crimes or rehabilitating criminals. These last two principles are instrumental in nature. Retributivism, on the other hand, is a deontological reason for punishment. However, is this purpose proper? Moreover, how can we balance the purpose with the infringement of the right to liberty or the right to life? As Barak puts it: "Proportionality *stricto sensu* compares the positive effect of realizing the law's proper purpose with the negative effect of limiting a constitutional right. This comparison is of a value-laden nature"²⁵. However, a legitimate legislative objective is not necessarily a solution to a social problem. The adoption of a just principle (deontologically speaking) can make the overall situation worse. But if the principle itself is just, should we judge it only in light of the consequences it produces or should we recognise that it can be reasonable and have some kind of inherent coherence and moral value? The actual proportionality framework simply does not recognise that some pieces of legislation can be justified by these kinds of deontological reasons.

CONCLUSION

If proportionality were not useful, it would not have spread widely across so many different jurisdictions. The fact remains, nonetheless, that it can be refined to broaden the types of moral reasoning it is capable of considering without distortion. Proportionality is blind to some genuine moral considerations as its analysis is a straightforward consequentialist test. Despite the fact that most pieces of legislation are instrumental in nature, I have shown that some provisions are motivated by deontological considerations. A retributive consideration for punishment is a good example of such a case. Unfortunately, as we saw in the *Sauvé* case, courts deal only difficultly with deontological reasons. They lack, in a certain sense, the moral grammar of deontology. This is so because the way in which the proper purpose requirement is framed forces courts to find an external end and to see the legislation as a simple means to achieve this external social objective.

It is unclear whether it is possible or not to merge consequentialist and deontological considerations into one coherent analytical framework. It seems to me, however, that as an all-encompassing test to evaluate the constitutionality of every legislative provision, the proportionality test is too ambitious. The test suited to deontological provisions may have yet to be designed. Nonetheless, I have tried to highlight this problem and I hope that judges, lawyers and legal scholars will answer the call to resolve it.

²⁵ Barak (n 4) 343.