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THE CONSTITUTIONAL TEST OF NECESSITY: PROBLEM STATEMENT

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The subject-matter of the research is the constitutional test of necessity. This element of proportionality could be found in doctrine and case-law in the form of metaphors. The necessity as a prong of proportionality consists in testing the available alternatives in comparison with the measures that the legislator has chosen to achieve public aims. The notion of a least restrictive means can be used as a synonym for this element of proportionality. Although this term is cumbersome, it more precisely defines the nature of constitutional litigation, where the admissibility of interference with fundamental rights is assessed.

The purpose of the research is to argue that this element of proportionality implies the assessment of the least restrictive alternatives for the rights-holder in order to achieve the goal chosen by the legislator.

The methodology of research includes the method of analogy. Accordingly, the analogical reasoning is used in constitutional adjudication when testing necessity of legislative measures, but not the methods of logical subsumtion or judicial balancing. The sources of such analogy can be the rules of international law, ordinary legislation and comparative legal materials.

The main results of the research and the scope of their application. The expression necessity is widely used in international law and ordinary legislation. Such approaches are relevant to constitutional adjudication. Thus, the ultima ratio principle, which initially appears in criminal and administrative law, acquires universal application in constitutional justice. This criterion, which requires the use of the most severe legal measures only as a last resort, with the ineffectiveness of softer alternatives, can be extended to the constitutionalization of other branches of legislation.

The test of necessity, which is often expressed in metaphors, in the case-law of constitutional justice is based on the method of analogy. In the decisions of the constitutional justice bodies, the least restrictive means are often mentioned in comparison with those which were originally chosen by the legislator. At the same time, the discovered alternatives should be equally or at least minimally suitable in comparison with the existing legislative solutions. Comparative law, international law, or ordinary legislation are often an auxiliary source for constitutional judges to identify and formulate least restrictive alternatives.

Conclusions. The value of the analogical reasoning, including the appeal of constitutional justice to comparative law materials, lies in the possibility of identifying some experimental legal regimes. Moreover, the perception of specific alternatives, their clarification or modification remains within the discretionary powers of the legislature. Thus, avoiding the well-known counter-majoritarian difficulty, constitutional justice conducts a dialogue with the parliament, and in the end, contributes to the optimal implementation of fundamental rights.

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1. Introduction

The test of necessity is explicitly included in the text of the Constitution of the Russian Federation[1]. Proceeding from the literal reading of Art. 55(3), restrictions on constitutional rights are permissible "only to the extent necessary to protect" significant aims. Accordingly, the most precise term for this sub-principle is that of necessity. A similar terminology has been developed in German doctrine (from German: Erforderlichkeit) [1, s. 8; 2, s. 430]. In the jurisprudence of the Federal Constitutional Court, the necessity test is primarily associated with the availability and evaluation of alternative measures. In a decision of 5 February 2002 concerning taxes on interest on social mortgage certificates [from German: Sozialpfandbriefe], it was indicated that in the sphere of housing policy "there is no obligation on the legislature to establish any equally effective means that would not restrict the basic rights of the applicants or constitute markedly less restrictive means... the tax legislator enjoys a wide degree of discretion as regards choice and technical regulation. In such cases the necessity of the measure can only be denied when the alternative less restrictive means is clearly one which achieves, in all respects, an inherently equivalent specific aim."[2] As a general rule, representative bodies have discretion in determining whether regulatory policy measures are necessary. This element of proportionality is violated where the alternatives justified by the applicant are equivalent to available legislative solutions but are more favourable to the individual.

English-language legal doctrine more commonly refers to the concept of a less restrictive means or alternative (from English: The Least Restrictive Means; [3] The Less-Restrictive-Alternative, [4] The Minimal Impairment Test). [5, p. 238] According to a popular legal dictionary, the less restrictive means test is "the rule that a law or governmental regulation, even when based on a legitimate governmental interest, should be crafted in a way that will protect individual civil liberties as much as possible, and should be only as restrictive as is necessary to accomplish a legitimate governmental purpose". [6, p. 910] The expression "less restrictive means" has been explicitly included in the text of the Constitution of the Republic of South Africa of 8 May 1996 (Art. 36(1)(e))[3]. Of course, this terminology is rather complicated, and therefore for the purpose of convenience there is an abbreviation (LRM). [7, p. 139] This expression more accurately defines the meaning of the doctrine in question. The concept of necessity loses out to it because it is abstract and can be used in other meanings.

The general rule of Art. 55(3) of the Russian Constitution establishing the necessity test is implicitly expressed in several specific constitutional provisions. Under Art. 35(3), forced confiscation of property is only permissible for "governmental needs". Such a restriction on the constitutional right to private property needs to be justified by a genuine public necessity in the absence of less restrictive means for private persons.

The case-law refers to the necessity test without reference to the constitutional text. According to Judgment of 6 February 2018, No 6-P, the government, when imposing a tax obligation that affects economic rights, is "limited by tests of necessity, equity, proportionality and other constitutional provisions."[4] In this case, necessity is seen as an independent criterion for reviewing the constitutionality of legislation, although it is not subject to the generic principle of proportionality.

At the same time, the doctrine has no established understanding of the necessity test. This element of proportionality has been overlooked by Russian lawyers, for example, as compared to the requirement for a balance of interests. A similar point is made by foreign researchers. According to Alan O. Sykes "despite the extensive use of least restrictive means requirements in the law, their meaning has rarely been explored with care." [8] In part, this conclusion can be explained by the self-evidence meaning of the concept, as proved by the spread of related metaphors.

2. Necessity as a metaphor

In law, necessity is often expressed in metaphors. A Latin legal maxim says: mitius imperánti melius parétur (The more mildly one commands the better is he obeyed). [9, p. 162] Mild regulatory options support a bona fide compliance with legal norms. In this respect, necessity is in contrast to the practice of draconian laws that provide for excessively harsh and ruthless measures. This metaphor was used by Judge Pinto de Albuquerque in

[1] Constitution of Russian Federation of December, 12, 1993 г. Rossiyskaya gazeta. 1993. December, 25.

[2] Beschluss des Zweiten Senats vom 5. Februar 2002, 2 BvR 305, 348/93 [Sozialpfandbriefe] // Entscheidungen des Bundesverfassungsgerichts (BVerfGE). 2003. Bd. 105. P. 17, 36.

[3] Constitution of the Republic of South Africa, adopted on 8 May 1996 (as amended 1 February 2013). URL: https://www.gov.za/sites/default/files/images/a108-96.pdf (last visited: 01.07.2021)

[4] SZ RF. 2018. № 8. Item 1272. (In Russian)

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a case where the police dispersed a peaceful rally[5]. According to the Portuguese judge "it cannot be said that the police's action would satisfy the necessity test. Instead of detaining and handcuffing the applicant, who remained silent and inert, without any threatening attitude towards the socialist demonstrators or any inciting attitude towards the right-wing demonstrators, the police could have kept the situation under control and countered any possible danger by less draconian measures, such as strategic positioning between the demonstrators and close surveillance of the evolving situation".

Another metaphor is the famous definition of proportionality by the German scholar of administrative law Fritz Fleiner that "the police should not shoot at sparrows with cannons... The harshest means must remain ultimo ratio [last resort]. Police interference must be in line with the threat, it must be proportionate." [10, S. 323] This metaphor forbids the use of those public law measures which, although suitable for the purpose (a cannon can kill a bird), are excessive and inhumane. A similar metaphor is found in English case-law. In the judgment of the House of Lords of the United Kingdom of 20 January 1983, the essence of proportionality was reduced to that: "you must not use a steam hammer to crack a nut, if a nutcracker would do". [6]

Similar metaphor for the element of proportionality is the doctrine of 'narrow tailoring' [11, 12, 13] developed in American constitutionalism. This doctrine makes reference to dressmaking. A well-made suit means the tailor has to adjust it precisely to the figure of the client. Similarly, the legislative body should 'tailor' a particular measure to suit the public purpose when drafting a bill. The legislative measure shall have a narrowly tailored impact on the objective. For constitutional justice, the doctrine in question makes it possible to test the individualisation of the means adopted by the legislature. The doctrine of narrow tailoring has been applied in US Supreme Court jurisprudence in cases concerning freedom of speech and racial discrimination. The rationale behind this doctrine is that, despite the importance of the aim, there are restrictions on "in how it may pursue that end: the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose"… [, applied] "in a flexible, non-mechanical way." [7]

The doctrine of narrow tailoring is considered to be a complement to the traditional necessity test. Sometimes researchers distinguish between the necessity test and the doctrine of narrow tailoring: "the word 'necessary' seems to demand a much closer fit between the 'ends' and the 'means' than the words 'narrowly tailored'. Thus, adoption of the new language might have been a way of the Court saying that the second step of the strict scrutiny test was going to be more lenient and more factually driven". [14, p. 655] Thus, the doctrine of narrow tailoring does not exclude variation in the intensity of judicial review depending on the circumstances of the dispute. This is the approach expressed by the US Supreme Court Justice Lewis F. Powell, Jr. in a case, which concerns employment quotas for African Americans to work in an administrative agency of the state of Alabama. [8] Concurring, the Justice Powell emphasised the importance of the five factors for compliance with the doctrine of narrow tailoring in the case: "(i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties". [9] Hence the American judicial doctrine in question involves an assessment of available alternatives, and may also require a flexible consideration of the material, temporal, personal and other limitations of the relevant legislative measures. The metaphors reviewed, while expressively outlining the necessity test, draw attention to the method of analogy in constitutional adjudication.

3. Method of analogy

The necessity test differs in the legal methodology used. In addition to the deductive method, the test involves analogical reasoning. In English-language doctrine, this type of argumentation is considered as central to the law, concerning the doctrine of judicial precedent. [15, 16, 17] The reference to previous judicial decisions to resolve a new dispute is reduced to an

[5] Fáber v. Hungary, no. 40721/08, 24 July 2012 (Concurring opinion of Judge Pinto de Albuquerque). URL: http://hudoc.echr.coe.int/fre?i=001-112446 (last visited: 01.07.2021)

[6] United Kingdom House of Lords, 20 January 1983, "Regina v. Goldstein". Weekly Law Reports (W.L.R). 1983. Vol. 1. P. 155.

[7] United States Supreme Court, decided June 23, 2003 «Grutter v. Bollinger et al» No.02-241. United States Supreme Court Reports. 2003. Vol. 539. P. 333, 334.

[8] See: United States Supreme Court, United States v. Paradise, decided February 25, 1987, No. Bollinger et al» No.02-999 // United States Supreme Court Reports. 1987. Vol. 480. P. 149.

[9] Ibid. P. 187 (Powell, J., concurring).

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explanation of the similarities and differences between them. However, some US scholars emphasise the inadmissibility of reducing analogy to precedent. [18]

In Russian doctrine, analogy in law, due to explicit normative recognition (prohibition),[10] is considered to be one of the means of eliminating lacunae in the legislation. [19 Such use of analogy is largely a method of overcoming extreme positivism, and in fact serves as a camouflage for judicial law-making. Moreover, the method of analogy in the continental tradition differs from conventional mechanical jurisprudence. In this context, it is worth noting Zdeněk Kühn's remarks on the transformation of the judicial style in post-socialist countries. "We can find a certain trend, – thinks the judge of the High Administrative Court of Czech Republic, – from the demonstration of deductive logic to discursive justification; from closed to a more 'open' form of judicial thinking; from the trend of mere authority of the judicial body to a dialogical choice between various possible alternatives". [20, p. 538] In the post-socialist perspective, if a judge chooses from various alternatives or turns to figurative comparisons, this indicates his or her freedom as compared to the conventional formalism.

In constitutional adjudication, due to the abstract nature of the principles and rules of the Constitutional Law, judges increasingly shift from the deductive method to analogy. It has been rightly pointed out that the use of analogy in constitutional justice relates not only to the issue of precedent, but also to the use of foreign jurisprudence. [21, p. 222] In addition to the form of law, it is necessary to stress the substantive issues of such reasoning. Reasoning by analogy means looking for and evaluating available alternatives. Comparing the similarities and differences of similar remedies helps to select humane alternatives.

The method of analogy partially removes one of the drawbacks of necessity. According to Eva Brems and Laurens Lavrysen the issue of the least restrictive means is purely hypothetical. "It may be very difficult to establish, – as the Belgian researchers emphasize, – whether an alternative is less restrictive, particularly because… it involves comparing in concreto the advantages and disadvantages of an alternative means that by definition has not been adopted in reality". [7, p. 143.] Reasoning by analogy excludes purely speculative argumentation, despite being based on someone else's legal experience. Such an elimination of the empirical problem raises the issue of the relevance of borrowed experience. International law and ordinary legislation serve as subsidiary sources for analogy in constitutional justice. These sources shall be examined in more detail.

4. Necessity in international law

In constitutional adjudication, necessity allows for the application of international law approaches. Universal rules of this element of proportionality in the use of force by the state [22, 23] have been sufficiently developed. As such, the necessity was invoked by Judge V.O. Luchin in the 'Chechen' case.[11] According to the dissenting opinion of the judge, the 'extraordinary' situation in Chechnya dictated "the necessity of restoring constitutional order in the Republic. However, whatever the situation might be... there is always an alternative to the use of the armed forces in resolving internal conflicts (all the more so because it is illegal!) and there is always the option for peaceful negotiations, compromises and political solutions".[12] Despite the emergency situation, alongside the use of the armed forces in internal conflicts, there were alternatives which were more humane for the citizens.

Constitutional justice applies the approaches to this element of proportionality established in the law of the Council of Europe. [7, 24] For example, the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR)[13] refers to "necessary in a democratic society" in several provisions (Art. 6, 8-11, Art. 1 of Protocol No. 1, Art. 2 of Protocol No. 4, Art. 2 of Protocol No. 7). Moreover, in the case-law of the European Court of Human Rights (ECtHR), necessity is essentially identical to proportionality. German scholars argue that "little by little, the ECtHR developed this phrase to embrace the principle of proportionality noting that the adjective is not synonymous with 'indispensable''. [25, p. 53]

The statutory basis for necessity is Art. 4(3)(b) of the ECHR, which allows for an exemption from compulsory military service on grounds of belief. This provision establishes an alternative, less onerous restriction on freedom of work and freedom of religion. Initially, the ECHR recognised alternative service only in relation to states that had legislated for it. However, it subsequently was held that "almost all the member States

[10] See: Article 6(1) of the Civil Code of the Russian Federation (Part I) of 30 November 1994, No. 51-FZ (rev. of 28 June 2021). SZ RF. 1994. № 32. Item 3301; Art. 3(2) of the Criminal Code of the Russian Federation of 13 June 1996, No. 63-FZ (rev. 1 July 2021). SZ RF. 1996. № 25. Item 2954.

[11] See: Judgement of 31 July 1995, № 10-P. SZ RF. 1995. № 33. Item 3424. (In Russian)

[12] See: VKS RF. 1995. № 5. (In Russian)

[13] See: URL: http://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited: 01.07.2021)

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of the Council of Europe which ever had or still have compulsory military service have introduced alternatives to such service in order to reconcile the possible conflict between individual conscience and military obligations. Accordingly, a State which has not done so enjoys only a limited margin of appreciation and must advance convincing and compelling reasons to justify any interference. In particular, it must demonstrate that the interference corresponds to a 'pressing social need'"[14]. Therefore, the alternatives to a serious interference with individual freedom are linked to the evaluation of the real needs of society. The indication of less restrictive means serves for the dialogue between international and national courts. As a whole, the analysis of the principles and norms of international law makes it possible to establish human rights standards in a particular sphere. Where there is universal acceptance by states or an emerging consensus in a particular geographic region, such standards define a minimum guarantee of fundamental rights beyond which the necessity test will be violated.

5. Necessity in ordinary legislation

Rules of ordinary legislation may serve as a source of analogy in constitutional proceedings. The idea of necessity is not an invention of constitutionalism. A sufficiently succinct definition of this legal concept can already be found in Roman law – necessárium est quod non pótest áliter se habere (that is necessity which cannot be dispensed with). [9, p. 166] In this case, necessity is the absence of alternatives in legal regulation. A similar expression of this concept is found in some rules of public and private law.

5.1. Criminal policy

The necessity in the field of criminal policy is manifested in the humanisation of measures in criminal law and criminal procedure. According to A.I. Aleksandrov, "a humane criminal policy and criminal procedure is an attribute of a state governed by the rule of law, which puts the individual, his or her needs, interests, rights and freedoms at the centre of social life". [26, c. 416] For the legislator, humanisation of the criminal branches means reducing the arbitrary appeal to abstract social necessity to impose harsh criminal law measures. From the point of view of citizens, this element of proportionality consists in minimising repressive interference with their individual freedom. For example, the Constitutional Court of the Russian Federation considers house arrest to be a preventive measure "more humane than taking into custody". [15]

In the constitutional jurisprudence, criminal and procedural means are defined as extreme measures *(ultimo ratio*) restricting the constitutional rights of citizens. According to the legal reasoning of the Constitutional Court of the Russian Federation "criminal legislation is by its nature an extreme (extraordinary) means by which the government reacts to facts of unlawful behaviour in order to protect social relations, if such protection cannot be adequately guaranteed by the legal norms of other branches of law".[16] This legal opinion draws attention to the general principle of law *in dubio mitius* (more leniently in case of doubt). [27, p. 144] Earlier, E.V. Vaskovskii, together with the requirements of equity and expediency, included among the 'ideal' (not positively formulated by statutes) principles of interpretation the tendency to provide a merciful regulation of relations between citizens. According to this pre-revolutionary scholar, the principle of the most merciful interpretation is that "the law should not subject citizens to excessive constraints and restrictions". [28, p. 84] This principle was applied not only in criminal law, but also in civil law. Modern criminal law doctrine has a similar understanding of the principle of the most lenient interpretation, according to which "in doubtful cases the criminal law shall be interpreted in the least restrictive manner". [29, p. 351, 353]. Consequently, more humane alternatives to available criminal law measures satisfy the necessity test.

In the field of criminal policy, necessity is expressed by the prohibition of general and nonselective legal regulation. This aspect of proportionality was normatively enshrined in the early days of constitutionalism. Art. 10 of the Virginia Declaration of Rights of 12 June 1776 states that "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted." [17] A similar provision was provided in Art. XXIII of the Maryland Declaration of

[14] *Bayatyan v. Armenia* [GC], no. 23459/03, § 123, 7 July 2011, ECHR 2011. URL: http://hudoc.echr.coe.int/eng?i=001-105611 (last visited: 01.07.2021)

[15] Judgement of 6 December 2011, № 27-P. SZ RF. 2011. № 51. Item 7552.

[16] Judgement of 10 February 2017, № 2-P. SZ RF. 2017. № 9. Item 1422.

[17] The U.S. National Archives and Records Administration. URL: https://www.archives.gov/founding-docs/virginia-declaration-of-rights (last visited: 01.07.2021)

Rights of 1776[18].

Comparable reasoning can be found in the dissenting opinion of A.L. Kononov in a case concerning a citizen's access to information on investigatory measures brought against her / him. [19] The judge drew attention to the fact that "all interference ... shall be strictly selective and not general-searching. It cannot be universal, total, and cast doubt on every person and suspect him of being involved in an offence".[20] The phraseology used by the constitutional judge links general prohibitions with the risks of a totalitarianism restoration. Consequently, nonselective and non-individualised criminal law measures, whether in personal or material scope, are contrary to the necessity test.

5.2. Private Law

In private law, the idea of necessity is expressed in the methods in which civil legal rights are exercised and protected. Under Art. 14 of the Civil Code of the Russian Federation, "the methods of self-defence shall be proportionate to the violation and shall not go beyond the limits of actions that are necessary to suppress it"[21]. This rule not only explicitly establishes the requirement of necessity but also links it to the concept of proportionality. In civil law, necessity is expressed in more detail in tort liability in relation to the state of justifiable self-defence (Art. 1066 of the Civil Code[22]) and absolute necessity (Art. 1067). In this context, it is interesting to note that Art. 1067 of Part 1 of the Civil Code attributes absolute necessity to the infliction of harm in circumstances where the danger could not be eliminated by other means. This provision prescribes courts to impose the liability to compensate for harm on a third party or to exempt from liability in whole or in part, taking into account the circumstances in which the harm was inflicted. Therefore, judges have the discretion to establish alternative remedies in a particular case.

In this regard, it is worth noting the reasoning of G.A. Gadzhiev, who links the notion of absolute necessity in private law with proportionality. "In a state of absolute necessity, – writes the judge, – there is also a clash of interests, the protection of which is important and socially meaningful. A person acting in a state of absolute necessity, in order to protect an interest that seems more socially valuable, "sacrifice" a less significant interest...". [30, p. 23] Despite the self-evident character of such conclusions, necessity is rarely interpreted in Russian private law as an element of proportionality.

6. Conclusions

Necessity test, as an element of proportionality, consists of a review by the constitutional courts of available alternatives to the means adopted by the legislature to achieve the public aims. The concept of a less restrictive means may be regarded as synonymous with this element of proportionality. In constitutional jurisprudence, the necessity test, which is often expressed in figurative comparisons, is based on the method of analogy. The concept of necessity is widely used in ordinary legislation and international law, which can also serve as a source of inspiration for constitutional justice. The value of the analogy method, when constitutional justice refers to comparative materials, lies in the possibility to identify experimental legal regimes. The specific alternatives remain within the discretion of the lawmaker.

[18] The Avalon Project. Documents in Law, History and Diplomacy. URL: https://avalon.law.yale.edu/17th_century/ma02.asp (last visited: 01.07.2021)

[19] Decision of 14 July 1998, № 86-O. SZ RF. 1998. № 34. Item 4368.

[20] VKS RF. 1998. № 6.

[21] Civil Code of the Russian Federation (Part I) of 30 November 1994, No. 51-FZ (rev. of 28 June 2021). SZ RF. 1994. № 32. Item 3301. (In Russian)

[22] Civil Code of the Russian Federation (Part II) of 26 January 1996, No. 51-FZ (rev. of 1 July 2021). SZ RF. 1996. № 5. Item 410. (In Russian)

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