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Contrast the following approaches, and try to identify the advantages and disadvantages associated with each before turning to the comment:

1. A restriction to a human right may be said to be "necessary" if it is the least restrictive of the right of the individual -- if, in other other terms, there exists *no other (less restrictive) means* through which the legitimate objective that is pursued could be fulfilled.
2. A restriction to a human right may be said to be "necessary" if the reasons to impose the restriction are of sufficient weight in comparison to the restrictive impacts on the rights of the individual. A *balancing of interests* is therefore required, to ensure that the restrictions are not disproportionate with respect to the benefits expected from the measure imposing the restriction.
3. A restriction to a human right may be said to be "necessary" if it is *both* the *least restrictive* way to achieve a particular objective recognized as legitimate and *if, on balance, the importance of the objective pursued outweighs the restrictive impacts* on the rights of the individual.
4. A restriction to a human right may be said to be "necessary" *either* if it is the *least restrictive* of the right of the individual, or *if, on balance, the importance of the objective pursued outweighs the restrictive impacts* on the rights of the individual.

What are the advantages and disadvantages associated with each of these four approaches? Try to answer for yourself before turning to the comment.

COMPLETION CHECKBOX (1/1 point)



I am ready to see the comment.



EXPLANATION

You have been presented with four approaches: (i) is a "strict necessity" test, that essentially requires from human rights bodies that they assess the restrictive measure they are confronted with to examine whether there was any alternative (and less restrictive) way to pursue the same objective; (ii) is a "balancing of interests" approach, not dissimilar to the classic "cost-benefit analysis" used to assess whether a particular policy is economically justified; approaches (iii) and (iv) build on the two earlier approaches, either to treat the two conditions above as cumulative

The main problem with the **first approach** (i) is that the human rights court or expert body applying this "strict necessity" approach will substitute its own judgment to that of the Executive or the Legislature whose choices are being assessed: this essentially deprives these other branches of government (in domestic settings) or national authorities (where the assessment is made at international level) from any margin of appreciation, which may be seen as problematic since human rights monitoring bodies in principle have less democratic legitimacy than the bodies having imposed the restrictive measure in the first place. (On the other hand, one might argue, human rights monitoring bodies are by nature "counter-majoritarian", and part of why they are needed is precisely because they can substitute their own judgment to that of the representatives of the majority.)

As to the **second approach** (ii), which sees the necessity/proportionality test as essentially a "balancing of interests" test, it supposes that there exists some methodology to compare, for instance, the importance of the maintenance of public order with the importance of freedom of expression even for those whose opinions may shock or disturb parts of the population. This may be heroic assumption. A question of "incommensurability" arises: there is no single metric along which to "weigh", respectively, the "benefits" from imposing the restriction and the "costs" to the rights of the individual. The very image of having to 'weigh' one right against another value or interest assumes that there would exist some common scale according to which their respective importance (or 'weight') could be measured. But this, as famously remarked by Justice Scalia, 'is more like judging whether a particular line is longer than a particular rock is heavy' (Bendix Autolite Cort. v. Midwesco Enterprises, Inc., et al., 486 U.S. 888 at 897 (1988) (Scalia, J., diss.)). (In this regard, "balancing of interests" in human rights cases differs from "cost-benefit analysis": the latter is performed on the basis solely of economic calculations, and a common metrics is therefore readily available).

The **third approach** (iii), in a way, combines the disadvantages of both approaches (i) and (ii). Not only does it oblige the human rights court or monitoring body to substitute its judgment to that of the author of the measure, by allowing that author to adopt only the measure that will be the least restrictive of the rights of the individual, excluding the choice of any other means of achieving the same objective; but in addition, it obliges the monitoring body to weight against one another values that appear generally "incommensurable", i.e., not reducible to any common metric.

The **fourth approach** (iv), while also facing the problems of approaches (i) and (ii) (since approach (iv) consists in using these two approaches as alternative ways to justify a particular restrictive measure), may be said at the same time to mitigate these problems somewhat: even where the measure concerned is not the least restrictive that could be imagined, this can be compensated by the author of the measure showing that the said measure pursues a legitimate objective, important enough to outweigh the costs to the right of the individual; and where the costs would seem to outweigh the benefits, the measure could still be saved by showing that it is the least restrictive possible, in other terms, that the same objective could not have been achieved by another means, resulting in a more minor infringement on the rights of the individual.

Check

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