

# Demonstrating the Purpose of the Principle of Proportionality Through the Lens of Rawlsian Concepts of Fairness and Justice

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## Abstract

Rawls put forward two principles of justice in his theory of justice, one is the priority of liberty rights, and the other is distributive justice. Although this differential justice has caused a lot of discussions, there is no shortage of it as a guide to our thinking. From Rawls' justice, civil liberties are the first things we should protect, but society has the least beneficiaries. How to regulate rights, opportunities and incomes in the face of the fewest beneficiaries require a role for public power, but the public power cannot be expanded. The principle of proportionality can timely limit public power and excessively damage citizens' personal liberty. At present, the principle of proportionality adopted in our country is appropriateness, that is, the measures taken by public power authorities are for administrative purposes, necessity, it is necessary to take measures to achieve administrative purposes, and the principle of narrow proportionality, that is, when there are a variety of means to take measures that will cause the least damage to citizens; There is no review of the legality of public authorities. The legitimacy of purpose is to examine the legitimacy of the administrative purpose to be achieved by the legislature or the executive branch of public power. In Germany, the birthplace of the principle of proportionality, we have examined whether the purpose is legitimate as early as the pharmacy law case. Although the legitimacy of purpose is not explicitly stated, a number of courts have practiced the principle in practice and the normative inclusion of the legitimacy of purpose in the principle of proportionality cannot be ignored.

**Keywords:** Rawls Justice, principle of proportionality, legitimacy of purpose, four classes

## 1. Introduction

In Rawls' view, the gifts and talents of the individual are the wealth of society, the good of society rather than the wealth and the good of the individual, and the gifts and talents of the individual should be compensated for and differentiated for the most disadvantaged in society. Our country is a socialist country and adopts the collectivist idea that Rawls' principle of justice is compatible with many ideas and ways in the operation of our society, analyzing the relevant concepts of Rawls' justice to further argue whether the justification of the purpose of the principle of proportionality is necessary.

### 1.1 Rawlsian Justice

#### 1.1.1 Original State

The tone of fairness is the primary value involved in the original state, which Rawls describes in his theory of justice as "it is a state in which any contract reached in its course is fair, a state in which all parties are equally represented as moral persons, and in which the outcome of the choice is not determined by chance or by the relative balance of social forces. " The original state, though a pure hypothesis, not at the beginning of social civilization in terms of socio-historical changes, and even less a real historical state, is a logical premise and an important tool in the argument for Rawls' thought experiment on justice. The existence of the original state can be seen as the starting point of justice in society, and the idea envisages that any principles chosen by citizens

will serve the purpose of social justice by establishing a fair and just procedure, with the aim of using the purely procedural concept as the basis of the theory.

### 1.1.2 The Curtain of Ignorance

Another important theory of Rawlsian justice, the “curtain of ignorance”, is explained as the ideal way for citizens to discuss the proper and fair treatment of members of a society or organization in different positions, and to gather the members of the organization under a curtain, where the members of the organization agree with each other and fulfill their roles in the society or organization. Each member is unaware of the social role he or she will assume in society or in the organization when he or she steps outside the curtain. Firstly, the curtain of ignorance exists in order to place all citizens participating in political life on an equal footing in society and to exclude the influence of various factors on the members of social organizations in making decisions, such as personal wealth, class, and social status, and other external factors. Secondly, this theory makes every participant in political life start from the original intrinsic nature of social values such as freedom, equality, rationality, justice, etc., so that decisions are a more social good and thus promote social justice.

### 1.1.3 Two Principles of Justice

Rawls divides justice into two principles, which can be applied to the basic structure of society and regulate the distribution of social and economic benefits, the basic content of the first principle is equal civil liberties rights; the second principle corresponds to the issue of distributive justice and equality of opportunity, and in the relationship between the first principle and the second principle states that the first principle takes precedence and the second principle should contain the first principle, which The second principle is very controversial, the so-called difference principle is also to determine the least beneficiaries or the most vulnerable groups in a society, for the least beneficiaries, the difference principle requires that the socio-economic conditions allow the premise of increasing their social expectations, that is, to give the least beneficiaries benefit compensation. From Rawls’ two principles of justice, we can see that the priority of difference and liberty is the result of Rawls’ careful consideration of the trade-offs in thinking about the concept of justice.

### 1.1.4 The Concept of Fundamental Good

In the Doctrine of Justice Rawls’ principles of justice apply to the social structure, which is the way in which “social values” are distributed, and Rawls calls this social value distributed by society the “fundamentally good”, which includes rights and liberties, power and opportunity, income and wealth, and self-respect. income and wealth, and self-respect. The role of the notion of the fundamental good in the system of justice is to provide a benchmark for considering and distinguishing the most disadvantaged in society, and secondly, to provide the basis for the principle of difference, i.e., the principle of difference must distinguish the most disadvantaged, thus providing an incentive for the parties in the original state to make a reasonable choice. This is why Rawls’ criterion for distinguishing the good is not “the basic good that people enjoy” but “the expectation of the basic good”.

## 2. Extraterritorial Development of the Legitimacy of the Purpose of the Principle of Proportionality

Germany is the first country where the principle of proportionality was created. Although the ideas implied by the principle of proportionality can be found in many countries, Germany is the country with the most complete structure, the most in-depth theory and the most active use by the courts. limited, the principle of proportionality developed in Germany from the principle of necessity. The principle of proportionality was developed in Germany from the principle of necessity. The principle of proportionality was developed in Germany from the principle of necessity.

The principle of necessity was expanded in the era of the Basic Law, and soon after the Basic Law was enacted, the principle of proportionality in the narrower sense of the term became explicitly established in all police laws, and not only in the field of administrative enforcement and direct coercion, but also in the field of constitutional law, where the principle of proportionality was already explicitly established and included. The principle of proportionality has also been affirmed in the constitutional sphere, first of all in the Pharmacy case of 1958, in which the Federal Constitutional Court applied this legal principle, developed by the Prussian High Administrative Court, to the Constitution as an important criterion for examining whether the exercise of public power by the State has a chord of substance. Although the principle of proportionality has been confirmed as a criterion for reviewing the constitutionality of laws since the Pharmacy case, the Pharmacy decision merely illustrates that the restriction of fundamental rights must comply with the principles of necessity and narrow proportionality. It was not until the Oil Storage case in 1971 that the decision stated that the method adopted by the legislator to achieve the purpose sought by the enterprise must be appropriate and necessary. It was further stated that what is appropriate is “a method is appropriate if the assistance of such a method will lead to the desired result.”

The fact that the traditional “three-tier” principle of proportionality does not include a step of justification of

purpose is not an oversight on the part of the system's authors, but rather the background of the system behind it. The principle of proportionality first originated in Germany in the late 18th century in the field of police administrative law, when the concept of formal rule of law was generally recognized in Germany, and the ideas of "liberty, equality and fraternity" since the French Revolution had infiltrated Germany for a long time. In such a social context, the role of the executive power appears to be completely conservative, and its purpose is to carry out the passive and mechanical implementation of the law, and all administrative actions must be authorized by law, and must not violate the principle of legal reservation and legal superiority, i.e. "No law, no administration". Shaped by the idea of the supremacy of law, people simply do not think beyond the limits of "law and justice" to seriously consider the legitimacy of the law itself.

In Canada, the Supreme Court in the 1986 Oakes case established a four-tier Oakes standard, the first of which is the principle of sufficient importance of purpose, meaning that the purpose of the restriction of rights must be sufficiently important that the purpose is at least urgent and substantial; in the UK in 1999 in the De Freitas case, Lord Clyde paraded the standard of the three-tier test, which can be said to be a variation of the German proportionality principle, whose overriding criterion is also the principle of sufficient importance of purpose; in addition, courts in Australia, Ireland, Israel, South Africa and other countries have adopted a similar standard to the Oakes criterion.

Purpose justification review has not yet become the normative structure of the "trichotomy" doctrine of proportionality, but judicial practice in many countries has opened up a variety of ways to review the purpose justification of administrative acts. The Court of Justice of the European Union (CJEU) has held that the purposefulness of an administrative decision is a prerequisite for propriety and that an administrative decision meeting the requirement of propriety must first and foremost satisfy the requirement of purposefulness. In addition to its legality, an administrative act must fulfill the criterion of propriety, which is a requirement of a State governed by the rule of law that is progressively moving towards the substantive rule of law, achieving substantive justice, improving the quality of democracy and fully guaranteeing human rights. The principle of propriety does not judge the legitimacy of the purpose, the purpose is clear, the corresponding range of means can also be determined, can prevent the subsequent purpose means the relationship of the chaotic state, for the subsequent review of sub-principles to lay the foundation. It is the legal obligation of the administrative subject to ensure that the administrative purpose is justified, and the administrative action should not only have the appearance of legality, but also have the purpose and justice in the result. In modern society, the continuous expansion of administrative power poses a serious threat to the administration in accordance with the law, and the emphasis on substantive rationality and justice and good governance has become the mainstream rule of law ideology in many countries

### **3. On the Practice and Significance of the Review of the Legitimacy of Purpose**

#### *3.1 The Practice of Justification of Purpose Review*

The review of the justification of purpose should become the review of legislation and administrative acts should be the right, in practice many adjudication instruments will invoke the principle of proportionality to support or argue the point, and the justification of purpose is more or less reflected in the adjudication instruments, such as Sha Rongjun and Xinghua City Comprehensive Administrative Law Enforcement Bureau administrative punishment in the first instance administrative judgment of the plaintiff to claim that the administrative subject administrative purpose is not justified, the court decision also indicates "administrative action should have justification, administrative subject to make administrative action must be motivated by legitimate, in line with the legitimate purpose ... relevant functional departments for many years are not enforced and the deadline for the demolition of the house, the expropriation of the interests of the parties caused greater damage, does not meet the requirements of the principle of proportionality.

For example, the judgment of the second instance administrative verdict of administrative punishment between Xinghua Comprehensive Administrative Law Enforcement Bureau and Pan Ga Cai indicates that "the Court believes that administrative acts should be justified, and administrative subjects must be motivated by proper motives and meet proper purposes in making administrative acts...After it was difficult to reach a compensation plan for demolition after negotiation, the appellant Xinghua Comprehensive Administrative Law Enforcement Bureau then The appellant, Xinghua City Comprehensive Administrative Law Enforcement Bureau, issued a notice of demolition for a limited period of time for the house in question.

The procedure was legal, in accordance with the principle of proportionality and with a legal basis, and the demolition was lawful.

As far as the development of the principle of proportionality is concerned, the examination of the justification of the purpose is the basis for the subsequent selection of the appropriate means, and discussing the appropriateness of the means in isolation from the justification of the purpose would be to put the cart before the horse. It is only

when the end justifies the means that it is necessary and possible to proceed to the subsequent stages of the examination, and this is only with regard to the development of the principle of proportionality. Second, and more importantly, the addition of the review of the legitimacy of purpose is an important manifestation of the implementation of the concept of the substantive rule of law, which is conducive to the protection of human rights and the regulation of the exercise of legislative power. The obvious progress of the substantive concept of the rule of law compared with the formal concept of the rule of law is that human dignity and fundamental rights are the test of the legitimacy of the exercise of all state power, including legislative power, judicial power and executive power, which has changed the concept of the formal concept of the rule of law above the law, always protects the legislative power with suspicion and caution, and includes it among the objects of the fundamental rights test. Lastly, the review of the legitimacy of purpose is conducive to the standardized exercise of local legislative power in China, improving the quality of local legislation and promoting the modernization of local governance capacity and the governance system.

### *3.2 Significance of the Purpose Justification Review*

As the government is the voice of the public interest, any act of the government must be for a legitimate purpose, and since civil rights are not absolute, legislators and administrators may restrict civil rights for certain purposes, but such restrictions must first be for a legitimate purpose. Even the slightest restriction of civil rights is not permitted if the purpose of the act of public power is not justified, but only if the purpose of the act of public power is justified. The review of the legitimacy of the purposes of legislators and administrators is a necessary requirement of the substantive rule of law, which can effectively limit the discretionary setting of purposes, achieve substantive justice and protect human rights, and also promote the death of democracy and improve its quality.

However, the principle of proportionality, which is an important criterion for evaluating the legitimacy of administrative acts, is not included in the traditional normative structure of the “three-order theory”, which only judges whether the purpose of the act of public power is appropriate, whether the means chosen are the least harmful and whether the relationship between the means and the end is narrowly proportional. The traditional “three-order” normative structure does not contain the principle of legitimacy. The traditional “three-step theory” presupposes that the purpose of the legislation is unquestionable and justified and that the formal rule of law requirements for administration under the law does not necessarily entail a review of the purpose established by the legislation. Therefore, the principle of proportionality to whether the means to help achieve the administrative purpose as a logical starting point, the default purpose is legitimate, and if the administrative purpose of the review will lead to a lot of administrative acts lack of constitutionality, and will, in turn, produce legislative embarrassment. However, the principle of narrow proportionality is further advanced on the basis of the legitimacy of the purpose, evaluating the necessity of the realization of the purpose, and maintaining a balance between the means and the purpose to ensure the realization of the purpose, which is a higher requirement for public rights. Based on the reflection on the lack of review of the legitimacy of the purpose, the application of the principle of proportionality has also broken through the strict “three-step” class review standard in the courts of some foreign countries, and some scholars have enriched and expanded its connotation.

The traditional “three-step” proportionality principle, which regulates the choice of means, and the end-justification review, which regulates the end-justification discretion, can serve to effectively limit the end-justification discretion. Discretion is necessary for the modern state, especially since human society has entered the welfare state and risk society, and the type and scope of discretion of public authorities have been expanding. Discretion in the modern state is ubiquitous and pervasive, and while discretion fulfills its positive function, there is also a danger of abuse. The dramatic expansion of administrative discretion and the lack of good internal self-control and external oversight mechanisms make it more vulnerable to abuse, and administrators are more likely to abuse it in setting administrative purposes, a worrying fact in contemporary global countries. Achieving substantive justice and safeguarding human rights. The review of the legitimacy of the purposes of legislators and administrators by judges can achieve substantive justice and guarantee human rights. At the time of the formal rule of law state, when the principle of proportionality arose, the functions of government were still extremely limited and the rule-based actions of legislators and administrators were still relatively few. However, with the rise of the regulatory state, the various problems faced by the government are more numerous and complex than before, and a variety of problems have proliferated, thus causing the government to frequently solve problems by restricting the rights of citizens. The principle of justification of purpose helps to restrain the motives of legislators and administrators in the legislative political process and administrative process and thus can reduce the creation of unjust laws and regulations ex-ante and always.

## **4. A Review of Rawlsian Justice and Purpose Justification Associated Role**

The principle of justification of ends is a precondition for the other three sub-principles under the principle of proportionality, which examines more the appropriateness of the means, while justification of ends examines

whether the starting point of the public authority is in line with social justice. The beautiful pursuit of justice in human society can be traced back to as early as the Homeric period, in which Themis and Dick, the goddesses of justice, maintained social order to achieve justice, and later Plato and Aristotle, among others, harbored their own thoughts on the path of the following justice so that human beings are always aspiring to social justice. As Rawls said, "Justice is the primary value of social institutions, just as truth is the primary value of systems of thought, and a theory, however refined and concise, must be rejected or amended if it is untrue, in the same way, that laws and institutions, however efficient and methodical they may be, must be transformed or abolished if they are unjust. "Justice always represents a just and reasonable, expressing the idea of being as balanced and not excessive as possible. The idea of the principle of proportionality is always closely connected with justice and rationality, and the principle of proportionality regulates both means and ends, public and private interests, and its point of departure is to achieve a proper balance between the interests of these two relationships and to maximize the interests of these two relationships with each other, which is the characteristic held by the principle of proportionality itself, whether in guiding the conduct of administrative organs or in the application of legislation. The application of the principle of proportionality, whether in the conduct of the executive or in legislation, is the result of the proper distribution of justice in the public good and in the social order by a principle of difference. Rawls' discussion in the theory of justice is quite a metaphysical thought experiment, so much so that it is difficult for many people to implement, the typical thought concept is the "curtain of ignorance", but what is the meaning of the existence of the curtain of ignorance, "the original state is the proper initial state, the state which guarantees that the basic contract is fair." In such a state, decisions made by individuals are not based on individual interests, but rather place the individual in the context of society. If the sacrifice of the individual is necessary for the good of the State, society and the public interest, the individual should make the sacrifice, but the damage caused by the State's actions that benefit the public should not be borne by the individual. The State should therefore pay appropriate compensation to compensate the individual who has been harmed.

In Rawls's book, the basic good concept is explained as the fair distribution of social values, that is, not only the importance of civil rights but also the equal distribution of civil rights, which is in line with the spirit of the principle of proportionality. The principle of proportionality is an important symbol of the development of norms at the constitutional level, and an important watershed in the development of human rights theory. In Rawls' theory of justice, there are two major principles of justice, one of which advocates equal civil liberties. The second corresponds to distributive justice and equality of opportunity, and the principle of proportionality is applied on the basis of equality of civil rights to prevent the infringement of public rights, and at the same time, in order to achieve the maximum benefit of society in China, the principle of proportionality can play a role in promoting the reasonable distribution of social resources to achieve distributive justice; and the purpose of the legitimate review is to protect the purpose of the allocated resources is legitimate. The purpose is justified is the premise that the principle of proportionality can be carried out in-depth, if the legislative act itself is questionable in terms of the justification of the purpose, then the subsequent review of appropriateness, necessity and balance are all trying to whitewash the unjustified purpose, that is, in this sense, some scholars believe that if the purpose of the regulation itself is unjustified, then all the subsequent arguments will be reduced to a cover for the unlawful purpose "cover-up." The means are objective, while the end is subjective, and people, through objective means, assign subjective intent to the object of processing to satisfy the subjective needs of man. In the principle of proportionality, the three principles other than the justification of ends may be considered as reasonable limitations on means, while the object on which justification of ends acts is the subjective purpose, ensuring that the means carried out are guided by the right ends to achieve social justice.

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