

## **Strategies for Balancing the Decision of Being Under Surveillance with the Freedom of Movement of a Suspect in French and Iranian Law**

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### **Abstract**

According to jurists advocating proportional reasoning, balancing deals with the inevitable conflict between rights and norms, and aims to justify the preference of one competing right over another without dominance. In the preliminary investigation, being under surveillance stage is a coercive measure and infringes on the freedom of movement and the legal interests of the suspect. This infringement generally serves legitimate purposes, including the protection of societal rights, the protection of the victim's rights, and the efficiency of criminal investigations and proceedings. These purposes are considered equal status and importance to the suspect's freedom of movement. Therefore, the decision-maker is obliged to weigh the competing legal interests. Using an analytical and descriptive approach, the study highlights the mechanism for conducting this assessment. To address this rights conflict, various strategies have been including the severity of the crime, the hierarchical value of rights, adequation, necessity and the value-based diligence of the judge. The research indicates that none of these strategies on their own, can provide a desirable mechanism for weighing competing interests and achieving balancing. Nonetheless, decision-makers can draw on these strategies and, with skill and foresight, determine the weight and importance of conflicting rights and norms.

**Keywords:** Balancing, Weighing Interests, Being under Surveillance, Severity of the Crime, Adequation, Necessity.

### **Introduction**

Since ancient times, the "scale" has been regarded as a symbol of law and justice (Fin-Langer, 2002: 3). The origins of this metaphor and symbol trace back to ancient Greece. Themis which means "divine law and order"<sup>3</sup> was the goddess who embodied this symbol in Greek mythology. She was the second wife and advisor to Zeus sitting on his right side overseeing harmonious relations between the gods and possessing the ability to foresee the future. Consequently, Themis was depicted holding a scale in her left hand and a sword in her right with a blindfold

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<sup>3</sup> Loi et ordre divine

Habibzadeh covering her eyes. These features symbolize the ideals of justice: the sword represents punishment, the scale serves as a tool for measurement and evaluation and the blindfold signifies the impartiality of justice (Hafez, 2017: 156).

The scale symbol is found in ancient Egypt within both monotheistic and polytheistic religious traditions. In monotheistic faiths the scale represents the final and decisive judgment. In the Bible Job pleads with God to weigh his integrity and honesty on a just scale<sup>4</sup> as part of the struggle between good and evil (Bible, Job 31:6-16). In polytheistic beliefs the scale was used to weigh the souls of the deceased. Anubis the god along with his partner Ma'at who is the goddess of justice evaluated the purity of the hearts of the deceased by weighing them. On the other side of the scale was a feather representing Ma'at's thought, and if the heart was heavier than the feather, the deceased was condemned to hell. Otherwise, eternal life was granted (Wilkinson, 2003: 150-152). Thus, the scale has always been an instrument of prioritizing values.

In the light of Islamic teachings and the Quran the "scale" holds a unique status. Some commentators interpret the scale metaphorically as justice suggesting that God has commanded humans to be as upright as a scale in their dealings, interactions and relationships with others ensuring fairness among all. It is essential to recognize that the meaning of the scale varies among different sects and groups. Among Sufis the scale symbolizes "justice," while for jurists, it signifies "Sharia" and it also refers to a tool for measuring the deeds of people (Khazni, 1967: a).

The metaphor of the scale persisted throughout medieval Europe to represent an ultimate judgment<sup>5</sup> and later transformed into the "symbol of divine justice" (Robert, 1998: 54-59). With the rise of social contract theories and the decline of divine justice concepts criminal law entered the modern era (Ghanim, 1972: 42-44; Pound, 1921: 50-51). In this period the state's right to combat crime and punish criminals evolved significantly, and infringements on individuals' rights and freedoms became subject to specific order and regulation (Al-Sayfi, 1971: 38-47).

Since then once the crime was committed, there has been a connection established between the accused individual and either the state or the victim. Consequently, both parties involved violate each other's rights throughout the criminal proceedings leading to a conflict of rights crisis. Over time, concepts of proportionality and equilibrium have emerged as resolutions for this rights conflict (Sauvé, 2018: 9-10).

A clear example of the violation of rights and freedoms is the infringement on the freedom of movement of a suspect, particularly during the investigation

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<sup>4</sup> Balances justes

<sup>5</sup> Jugement dernier

phase by judicial officers. The institution of being under surveillance in France was initially implemented informally by judicial officers at the end of the 19th century. This practice aimed to ensure the presence of suspects before competent judicial authorities without the issuance of judicial orders. In 1897, the French legislature influenced by the inefficiency of investigative judges and the teachings of inquisitorial justice systems officially recognized the practice of being under surveillance by judicial officers without establishing clear limits or safeguards for the defense rights of suspects.<sup>6</sup> With the enactment of the Code of Criminal Procedure (1957), this institution was preserved, and a specific duration for detention was introduced. Under pressure from the Constitutional Council (Cons. const., 2015: n°2015-508; Cons. const., 2010: n°2010-14/22), the legislature made numerous reforms to account for conflicting interests when deciding on detention (Gelato, 2019: 115-120).

Although the Iranian Code of Criminal Procedure (2013) has introduced several changes, the concepts of proportionality and balancing appear to have not been adequately addressed. It is worth noting that being under surveillance in French law applies to both felonies and certain misdemeanors (Art.77 C.P.P.), provided that imprisonment is the prescribed punishment for the misdemeanor (Art.62-2 C.P.P.). However, in Iranian law all crimes regardless of their associated punishment are subject to being under surveillance (Molazemian et al., 2023: 130).

Being under surveillance is a coercive measure designed to enhance the effectiveness of investigations and safeguard those involved. However, it also restricts the suspect's freedom of movement. Therefore, balancing involves evaluating the relationship between the purpose of this measure and the fundamental right being violated. However, the mechanism for conducting such an assessment requires comprehensive consideration. In criminal cases, this evaluation is not straightforward, as the factors determining the weight and importance of norms vary significantly. Jurists and researchers have attempted to propose strategies for determining the weight and importance of competing rights during being under surveillance.

The legislative level generally takes into account factors such as the seriousness and intricacy of the offense, as well as giving importance to the human rights of the accused. Conversely, some jurists have proposed the necessity and appropriateness of being under surveillance as well as the value-based diligence of the judge, as strategies for balancing rights.

### **Discussion and Analysis**

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<sup>6</sup> Loi du 8 décembre 1897 ayant pour objet de modifier certaines règles de l'instruction préalable en matière de crimes et de délits, JORF du 10 déc. 1897, p.6907.

## **ii. The Concept of Balancing in Language**

The equivalent term for "balancing" in French is Équilibre, which originates from the Latin root Aequilibrium. The Latin word Aequilibrium in classical Latin is derived from the combination of two words: Aequus, meaning fair and equal and Libra, meaning scale. The word "balancing" literally refers to the equality of the pans of a scale, which can be translated as "the accuracy and precision of the scale" (Rey, 1998).

In the LeRobert dictionary synonyms for balancing include fair proportion, harmonious arrangement<sup>7</sup>, equilibrium (colloquial)<sup>8</sup>, equality<sup>9</sup>, harmony<sup>10</sup>, symmetry<sup>11</sup>, equivalence<sup>12</sup>, and rationality<sup>13</sup> (Dictionnaire LeRobert). The Larousse dictionary provides various definitions of balancing, in applied and theoretical sciences. Generally, "balancing is a state of rest or a stable condition of a system achieved by the equality of two opposing or conflicting forces." It is described as a fair proportion<sup>14</sup> between conflicting elements or opposing forces, leading to stability<sup>15</sup> and harmony<sup>16</sup>. "Balancing is the fair distribution<sup>17</sup> of the elements of an object." The state in chemistry known as "chemical equilibrium" is characterized by a lack of change in chemical activity over time or this equilibrium is reached when the rate of the forward reaction is equal to the reverse reaction." In psychology "the theory of psychological balancing refers to Fritz Heider's 1946 theory, which is based on the assumption that individuals tend to create consistent perspectives and attitudes with their surrounding environment" (Dictionnaire Larousse).

### **ii. The Concept of Balancing from the Perspective of Proportional Reasoning**

The concept of balancing is closely related to the ideas of "proportionality<sup>18</sup>," "comparison of means and ends," and "weighing interests<sup>19</sup>." In fact, the principle of proportionality which first emerged in late 19th-century German administrative jurisprudence significantly expanded into all areas of law after World War II (Bousta, 2011: 913 et seq.). A similar movement occurred in France where after World War II the principle was incorporated into the

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<sup>7</sup> Agencement harmonieux

<sup>8</sup> Balance (familier)

<sup>9</sup> Égalité

<sup>10</sup> Eurythmie

<sup>11</sup> Pondération

<sup>12</sup> Symétrie

<sup>13</sup> Raisonnable

<sup>14</sup> Juste proportion

<sup>15</sup> Stabilité

<sup>16</sup> Harmonie

<sup>17</sup> Juste répartition

<sup>18</sup> Proportionnalité

<sup>19</sup> Pesée des intérêts

jurisprudence constitutional (Pradel, 2019: 1131). In a landmark ruling on January 15, 1958, the German Federal Constitutional Court in the Lüth judgment stated: "Given that freedom of expression is regarded as a basic right, legislators and judges need to consider the significance and extent of this right and carefully evaluate its implications for conflicting and competing interests." (Voßkuhle, 2018: 59-60). Therefore, a legal mechanism for evaluating and comparing conflicting interests was recognized.

Balancing addresses the issue of conflicting norms by seeking to justify the preference for one norm over another. To achieve this, it is essential to analyze the consequences of imposing limitations on these conflicting rights and norms. Therefore, when deciding on being under surveillance, the decision-maker must evaluate the impact of this restriction on the intended goal and on the legal interests of the suspect. If the benefits of such a measure outweigh the harms, it can be implemented; otherwise, the decision should not be made.

Renowned American jurist Ronald Dworkin addressed the crisis of conflicts between norms. According to him, when faced with conflicting norms, the decision-maker must consider the relative weight of each (Dworkin, 1978: 26-27). German legal scholar Robert Alexy believes that conflicts between norms are resolved by weighing their relative importance, which depends on practical and legal conditions. In cases of conflicting rights, the resolution involves assessing the weight of these rights (Alexy, 2002: 50). French jurist Jean Pradel connects the concept of balancing to proportionality. He argues that the principle of proportionality, which involves the state, the offender and even the victim, refers to balancing conflicting or differing interests. The resulting preference leads to social moderation (Pradel, 2016: 56-57).

### **Strategies for Achieving Balancing in Legislation**

According to Alexy's law of balancing: "The greater the importance of fulfilling one principle, the greater the extent to which the other principle will be limited." He emphasizes the need to compare the "degree or intensity of interference with one right" and the "importance of achieving the competing consideration" (bayat komitaki & balavi, 2015: 27-28). Therefore, the violation of the suspect's freedom of movement is heightened by the seriousness and intricacy of the crime. Conversely, this infringement may harm the inherent dignity and physical integrity of the person under detention leading to the prioritization of the suspect's legal interests over other conflicting norms. This is because, in discussions of balancing a hierarchy of values between rights is recognized.

#### **i. Severity and Complexity of Crime**

Habibzadeh. The French legislator has adopted the term "proportionality of coercive measures to the seriousness of the crime"<sup>20</sup> in its preliminary article. Specifically, in cases of being under surveillance it uses the phrase "proportional to the seriousness of the acts the suspect is accused of committing or attempting to commit"<sup>21</sup> (Alin. 2 de l'art. 62-3 C.P.P.). In Iranian law, a more decisive approach has been used in determining the duration of being under surveillance. Article 46 of the Iranian Code of Criminal Procedure (C.C.P.) states that judicial officers cannot detain the accused for more than twenty-four hours. This duration is set for all crimes in the criminal procedure code (Khaleghi, 2024: 83-84). While the Iranian approach seemingly aligns with the principle of judicial security for citizens, it does not achieve a robust balancing.

A key question arises: Does the proportionality of coercive measures such as being under surveillance with the severity of the crime and punishment in the field of Formal criminal law follow the same logic and rationality as the proportionality of crimes and punishments? In such a way that the severity of the crime is considered a sufficient justification for attacking the suspect's freedom of movement?

In principle the severity of the crime reflected in the extent of legal sanctions influences the selection of legal procedures and actions that infringe on rights and freedoms. Additionally, the nature and characteristics of the attributed crime as well as the offender justify the anticipation of special procedures (Chetard, 2019: 138-139). On one hand, the connection between the severity of the crime and the imposition of detention cannot be denied and has various manifestations in French law. Accordingly, under paragraph 1 of Article 62-2 of the French Code of Criminal Procedure (C.C.P.) being under surveillance is issued for a person if there are reasonable grounds to suspect them of committing or attempting to commit a felony or a misdemeanor punishable by imprisonment (Alin. 1 de l'art. 62-2 C.P.P.). In such cases, the duration of being under surveillance generally cannot exceed twenty-four hours (Alin. 1 du II de l'art. 63 C.P.P.). Similarly if the individual is suspected of committing or attempting to commit a felony or a misdemeanor punishable by at least one year of imprisonment and if extending the detention is the only way to achieve one of the objectives listed in Article 62-2, paragraphs 1° to 6°, the prosecutor may, with written and justified authorization, extend the detention for another twenty-four hours (Alin. 2 du II de l'art. 63 C.P.P.).

Therefore, in both French legal systems, the severity and complexity of the crime influence the restrictions imposed on the suspect's rights yet French law

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<sup>20</sup> Proportionnalité à la gravité de l'infraction

<sup>21</sup> Proportionnalité à la gravité des faits que la personne est soupçonnée d'avoir commis ou tenté de commettre

provides a more nuanced and detailed approach to ensuring proportionality in such decisions.

Specific crimes and the individual offender on the other hand warrant the implementation of more stringent measures. Therefore, in French law for specific crimes covered by Article 706-73 such as organized crime drug trafficking, terrorism or economic and financial crimes particularly money laundering and counterfeiting the legislator has stipulated in Paragraph 1 of Article 706-88 of the Code of Criminal Procedure (C.P.P.) that, if the necessities of the initial investigation concerning any of these crimes require it the period of being under surveillance may be exceptionally extended for two additional periods of 24 hours (Alin.1 de l'art. 706-88 C.P.P.). If the remaining time for the investigation is insufficient at the end of the initial 48-hour period of being under surveillance, the judge for freedoms and detention or the investigating judge may decide to extend the being under surveillance for an additional 48 hours (Alin.5 de l'art. 706-88 C.P.P.).

Furthermore, the French legislator has provided for a special and additional extension for terrorist crimes mentioned in Paragraph 11° of Article 706-73 of the same law. It is stipulated that if the initial elements of the investigation or the custodial period indicate an imminent and serious risk of a terrorist act either in France or abroad or if international cooperation is necessary the judge for freedoms may exceptionally extend the being under surveillance for an additional 24 hours (Alin.1 de l'art. 706-88-1 C.P.P.). Therefore, the specific characteristics of these crimes are decisive and crucial in determining the extension of being under surveillance rather than the severity of the crime as reflected in the penalty (Guldner, 2018: 59).

It seems that the convergence between the severity of being under supervision and the severity and type of crime brings the proportionality of being under supervision with the severity and type of crime closer to the proportionality of punishments with crimes. Thus, severe and specific crimes reflect a distinct punitive logic whereby stricter measures are justified for more serious crimes or those associated with more dangerous and harmful criminal phenomena. But on the other hand in this respect unlike the proportionality between crimes and punishments the gradation of the intensity of being under surveillance does not follow a retrospective logic or one of correction and rehabilitation. In fact, criminal procedure falls under forward-looking rationality and always considers future-oriented objectives. These objectives are focused on maintaining public order, protecting individuals' rights, uncovering the truth and even upholding the state's right to combat crime and punish offenders.

Although the primary period of being under surveillance depends among other things on the punishment prescribed for the alleged crime, its regime cannot be regarded as a reflection of the proportionality between crimes and punishments. The function of being under surveillance is to support the course of criminal proceedings and the individuals involved including the suspect, victim or witnesses. This means that merely the severity of events or the punishment is not sufficient justification for issuing or extending such a measure. These considerations are taken into account only as exceptional and secondary interventions when the real necessity of being under surveillance has been established (Chetard, Op. Cit: 141).

The result is that the proportionality of being under surveillance with the severity of crime and punishment originates from a different rationality than what governs the proportionality of crimes and punishments. Being under surveillance follows the rationale of justificatory proportionality, and the main criterion for examining and testing this proportionality is the power of this action to empower the proceedings in order to realize its goals, but the severity and type of crime play a secondary and secondary role in determining the weight and importance of norms. In the sense that the words of the French legislator; "proportionality with the severity of the crime" and "proportionality with the severity of the events"" must be interpreted; Because the proportionality of the actions with the severity of the crime is not the same as the proportionality of the punishments with the severity of the crimes, but it reflects the idea that as risks and dangers increase, the justification for infringing on rights and freedoms becomes more acceptable (Chetard, Op. Cit: 141-142).

## **ii. Hierarchical Values Between Rights**

Proponents of proportionality and balancing when the effects and consequences of being under surveillance infringe upon more important rights have suggested a hierarchical values system among rights with infringements on inherent dignity and physical integrity being prime examples of this hierarchy (Alexy, 2002: 99). The development of this approach has been shaped by global agreements and principles of human rights and has been progressively integrated into the constitutional frameworks of numerous nations. Consequently, in French and Iranian law, a basic hierarchy can be seen, with certain rights or values given precedence over others. Thus, the French legislator has prioritized personal dignity and physical integrity of the person under being under surveillance over other interests stating in the preliminary article of the Code of Criminal Procedure: "Coercive measures <sup>22</sup>that the suspect or defendant may be subjected to [...] should not infringe on personal dignity." Additionally, regulations regarding being under

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<sup>22</sup> Les mesures de contraintes



surveillance state that: "being under surveillance must be conducted in conditions that guarantee the dignity of individuals" (Alin.1 de l'art. 63-5 C.P.P). The legislator has also prioritized the physical integrity of the person under surveillance requiring compatibility of being under surveillance with their health status whether during the initial period or its extension and mandated medical examination to assess the appropriateness of remaining in being under surveillance and to provide all useful findings (Art. 63-3, Alin.4 de l'art. 706-88, and Alin.3 de l'art. 706-88-1 C.P.P).

In Iranian law the legislator has stipulated the need to respect the dignity and honor of individuals when applying measures of deprivation of liberty in Article 4 of the Code of Criminal Procedure, and has provided for medical examination upon request of the person under surveillance in Article 51 of the same law. Additionally, in the 2021 directive on the rights of detainees and the oversight of detention facilities, the aforementioned regulations are emphasized (Yaghouti & Azizan, 2021: 173).

The primary criticism of this strategy is evident in its reasoning and inference as inherent dignity is fundamentally considered an unqualified entitlement and the foundation for additional rights, and is not governed by the rationale of weighing and evaluating interests.<sup>23</sup> A second criticism pertains to the limitation of the conflict to certain rights and values making it impossible to extend this conflict to other material and immaterial legal interests of the suspect that may be compromised due to deprivation of liberty. In practice, such a strategy may only be effective in cases where individual rights conflict with one another but in criminal disputes where public order, the state's right to combat crime and punishment have special significance, this strategy cannot be relied upon. In criminal cases limiting the scope of rights conflict to private rights without considering the public and collective aspects of criminal disputes undermines the nature of the conflict. Therefore, the hierarchical values strategy cannot provide a satisfactory and comprehensive mechanism for prioritizing rights and achieving balancing.

### **Strategies for Achieving Balancing in Practice**

Since weighing interests involves measuring social values and comparing the effects and consequences of being under surveillance on conflicting rights, and given that there is no objective conversion scale for this (Webber, 2010: 194-198) some legal scholars have suggested eliminating interest assessment and relying

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<sup>23</sup> Article 1 of the Annex to the Charter of Fundamental Rights of the European Union explicitly states: "Human dignity is not only a fundamental right in itself but also constitutes the foundation of fundamental rights [...], and none of the rights enshrined in this Charter [the Charter of Fundamental Rights of the European Union] may be used to weaken or violate the human dignity of others [...]." For more information, refer to: (Busana, 2015: 23-25).

Habibzadeh instead on the principle of "adequation and necessity" which does not encounter such issues (Petersen, 2013: 1394-1397). Accordingly, some believe that judges in Britain, Canada and South Africa tend to focus solely on the principle of "adequation and necessity" and ignore the balancing operations (Rivers, 2006: 179). Additionally, M. Marzal, in his doctoral thesis titled "The Dynamics of the Proportionality Principle: A Study on Freedom of Movement in EU Law" has demonstrated the disregard for interest assessment in the jurisprudence of this Court of Justice of the European Union (Marzal Yetano, 2013: 85-90). Conversely, Dworkin argues that a judge through skill and foresight can make value-based and impartial judgments by considering competing interests and choosing the best solution (Dworkin, 1978: 125-128).

#### **i. Necessity and Adequation**

Necessity and adequation hold significant positions in proportional reasoning and are considered prerequisites for balancing interests and establishing proportionality.

##### **a. Necessity**

Although the essence and nature of necessity as one of the criteria of proportionality are believed by some researchers to be similar to those discussed in substantive criminal law (Al-Harthi, 2021: 8), the reality is that necessity as a criterion of proportionality in issuing measures that infringe on rights and freedoms has a distinct nature and application. It involves selecting the least intrusive means to achieve objectives. According to this definition, among all available methods capable of achieving goals the one that causes the least interference with individual rights should be chosen (Haji Mola & Mohammadi, 2021: 34-35). Therefore, some legal scholars have referred to this type of necessity as "internal necessity" to differentiate it from other forms of necessity<sup>24</sup> (Hamrouni, 2021: 21).

Dr. Jean Pradel emphasizes that necessity as a criterion of proportionality addresses a fundamental issue concerning its nature and notes that German legal doctrine first addressed the principle of proportionality in the 19th century and identified its three components. Hence, necessity is a preliminary criterion for establishing proportionality in its narrower sense (balancing), and a better understanding of its nature is provided through the teachings of the German proportionality reasoning school (Pradel, 2019: 1131). According to Alexy "Failure to observe necessity is viewed as a failure to optimization one of the competing principles: if means are available to achieve and realize Principle (A) with less harm to Principle (B) than what the competent authority has chosen, then this authority violates Principle (B) because it has not maximized Principle (A). Conversely, if

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<sup>24</sup> Nécessité interne

the chosen means do not allow achieving Principle (A) and still restrict Principle (B), neither Principle (A) nor Principle (B) benefit from optimal and proportional realization" (Alexy, 2002: 67-68).

These statements suggest that necessity is considered by proponents of proportionality reasoning as a least invasive means and a last resort (Zarei & Berlian, 2014: 152). The French legislator has provided for the necessity of being under surveillance in Article 62-2 of the Code of Criminal Procedure (C.P.P.), stipulating that being under surveillance must be the only means to achieve one or more of six objectives. The goals encompass making sure that pertinent investigations are conducted with the person present or involved ensuring the person's presence before the prosecutor to assess important follow-ups for investigations, preventing tampering with evidence or material clues, preventing pressure on witnesses, victims and their families and close associates, preventing collusion with others who might be accomplices or supporters, and ensuring the implementation of measures aimed at ending the crime or offense (Alin.2 de l'art. 62-2 C.P.P.). The French Supreme Court consistently emphasizes the necessity of being under surveillance (Cass. crim, 2016, N°:16-81.904).

In Iranian law on one hand the Iranian legislator has not specified particular grounds for detention but has merely required judicial officers to record the reasons for detention in the report. On the other hand, the term "necessity of investigation" implies that detention serves only to enhance the efficiency of investigations leading to a one-sided assessment. However, Article 1 of the Citizen's Rights Act can be utilized, as it requires law enforcement to refrain from unnecessary and excessive detentions during the investigation and prosecution of crimes (Ashoori & saffari, 2023: 9-10). Additionally, according to Article 5 of the same law, the principle of prohibiting the arrest and detention of individuals necessitates that even in necessary cases it must be according to the procedures specified by law [...]. (Khaleghi, 2023: 95). Therefore, the mentioned necessity can be interpreted as the least intrusive action and the last resort.

#### **b- Adequation**

Adequation<sup>25</sup> refers to the ability of detention to achieve its objectives. Once the grounds for detention are established the decision-maker must examine whether there is a minimal causal link<sup>26</sup> between the detention and the intended objective ensuring that the measure is capable of achieving<sup>27</sup> the desired goal. Thus, assessing adequation involves more than merely identifying a causal relationship between the

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<sup>25</sup> Adéquation

<sup>26</sup> Lien de causalité minimal

<sup>27</sup> Aptitude

measure and the goal; the quality of this relationship is also crucial (Hamrouni, 2021: 6-10). Consequently, French law, in Article 64 of the Code of Criminal Procedure (C.P.P.), requires judicial officers to prepare a report justifying detention based on the objectives specified in Article 62-2 and further emphasizes in Article 63, Section 2 that judicial officers must inform the prosecutor from the beginning of the detention about the justifications based on the provisions of Article 62-2. In Iranian law as previously mentioned specific grounds for detention are not stipulated and judicial officers are only required to record the reasons for detention in the report (Article 53 of the Code of Criminal Procedure).

Eliminating the assessment of interests and relying solely on the principles of adequation and necessity, while advantageous, does not address the root of the problem; it merely shifts or reconfigures it. Detention is a time-bound measure with material and immaterial consequences for the suspect. Therefore, one cannot rely solely on necessity and adequation while ignoring other potentially detrimental effects.

## **ii- value-based diligence**

None of the previously discussed strategies can, on their own, provide an optimal mechanism for weighing competing interests and achieving proportionality. Nevertheless, decision-makers can draw upon these strategies to determine the weight and significance of competing values and rights. It should be noted that in cases of conflicting rights legislators generally do not prescribe specific solutions but rather delegate the task of evaluating the feasibility of imposing restrictions to the decision-maker based on the particular circumstances.

Dworkin explains his approach through a conceptual framework. He argues that in cases of unavoidable rights conflicts the "philosophical judge" endowed with exceptional skill, knowledge, patience and wisdom is tasked with resolving the conflict (Dworkin, 1978: 107). Today, the role of the judge extends beyond merely resolving disputes within the confines of legal texts; it involves preventing unnecessary infringements on rights and freedoms thus rationalizing government interventions in determining limitations on rights and freedoms. In the absence of a true hierarchy among competing rights and freedoms the judge strives to ensure their coexistence and realization through a process of balancing and weighing (Fourment, 2018: 2051). Judicial intervention during detention is recognized in both French and Iranian law. Therefore, the judge is obligated to consider the competing legal interests.

Based on this, utilizing the principles of adequation and necessity in the context of detention paves the way for achieving proportionality and justifiably prioritizing one conflicting right over another. Consequently, the judge must select

a reasonable solution considering the effects and consequences of detention on the suspect and the anticipated goal (Frydman & Haarscher 2000: 83).

### **Conclusion**

The concept of balancing can be succinctly described in the following manner: "Given the inherent logic in the relationships between rights and norms an unavoidable conflict arises whereby the exercise of one conflicting right or norm infringes upon another. To resolve this conflict and justify the preference of one competing right without superiority a method of relative assessment and proportional evaluation must be used to compare the effects and consequences of imposing limitations on conflicting rights and norms."

Although each of the proposed strategies alone cannot provide an optimal mechanism for assessing competing interests and achieving balancing, they still play a subsidiary role in this process. The seriousness and intricacy of the crime in French law justify greater interference with the suspect's freedom of movement whereas Iranian law does not follow this approach.

The French and Iranian legislatures have established a minimal hierarchical value framework for rights, prioritizing personal dignity and integrity over other rights and interests of the parties involved. The necessity of being under surveillance implies that this measure is only applied if it is less intrusive and a last resort. While French law explicitly provides for the necessity of being under surveillance Iranian law has overlooked this issue. Criminal justice practitioners must reconcile conflicting interests and strike a balancing between the negative impacts of limiting rights or freedoms and their positive effects considering the intended objective.

### **Suggestions**

In the last two decades, the concept of proportionality and balancing has been discussed a lot in the criminal laws of European countries, but in Iran's law, such a desire to observe balancing and weighing Interests in the stage being under observation is not noticeable, and the legislator has an inflexible approach. It has been used as determining the period of being under observation and has ignored the role of severity and complexity of the crime.

In Iranian law, the concept of the priority of the inherent dignity and physical integrity of the suspect over other competing interests does not have the desired clarity and prominence at the stage under consideration. It is better for the legislator to pay attention to the important.

The Iranian legislator did not stipulate that purposes and objectives for being under observation and only limited the necessity of investigation and mention the reason for being under observation. Of course, the necessity of investigation leads to the impression that the decision-maker is obliged to evaluate the necessity of being under observation only from the perspective of investigation efficiency.

Habibzadeh.  
This approach contradicts the concept of balancing and leads to the one-sided evaluation.

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