European Account on Human Rights, the Legislative Framework and the Doctrine of Proportionality: An Analytical Approach

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Abstract

The research article is a detail account on the doctrine of proportionality and its relationship with the human rights and its legal construction in Europe. The study based on an analytical approach to understand the philosophy of the doctrine. Its purpose is to examine the principle of proportionality in protecting human rights from abuses and exploitation in a manner that is in accord with democracy. As the proportionality provide a methodological framework for structuring transparent decisions about the contesting constitutional rights (for e.g., between state and freedom of press). The aim of the article is to analysed the subject from different perspectives, which will give a clear picture of this doctrine. Furthermore, the critics of the doctrine have also been taken, to argue on the doctrine of proportionality as a broader notion implementing as an assessment in judicial review. It also aims to examine alternate interpretations of the implementation of proportionality.

Keywords: Doctrine of proportionality, European Convention on Human Rights, European judicial system, burden of proof, normativism

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Introduction

The judicial system of the European Convention of Human Rights (ECHR) and courts in the United Kingdom are the indicator of the importance of the doctrine of proportionality. The focus is on the doctrine forms a theoretical framework, which further helps to explain the exact relationship between human rights and the rationale that justifies their limitations in a democratic society. The question of 'burden of proof' in judicial inquiries is also considered to study its link to the doctrine of proportionality, as it is the essential part of this doctrine. This principle's right application in jurisprudence is likely dependent on experience and interpretation of the philosophical contents of this principle. This epoch's ideology was dominated by legal pragmatism and normativism. Moreover, it is argued in this study that the doctrine of proportionality is an inclusive and deliberative methodology, and despite all the criticism, instead of excluding all of them at the outset, this doctrine takes all interests in the analysis into account and participates in deliberative weighing and balancing between them.

Alternative perspectives to the doctrine of proportionality

The work of Martin Luther King reveals that the confusion between two conceptions, both of which can be seen in academic and judicial writings which established the proportionality principle making it recognizable within academic and legal texts: "proportionality as balancing" and "proportionality between means and ends". We can regard proportionality in terms of its objectives and means of achieving them in benefiting the "principled practice" of judicial review. Martin Luther King attempted to outline the absent definition of this concept in theoretical encryption – "consequences that are intended" – and in the later edition, "consequences that are not intended".[1]

Martin Luther King's work outlines the reason for the double effect in ethics (first associated with Thomas Aquinas), which is to acknowledge the requirements which are necessary and ought to be wholly met for human actions, including good and bad effects, called *double* effects, to be morally justified. Proportionality between goal and *modus operandi* is ordinarily the fourth and final precondition of double effect ideology. The individual should not be criminated on differing grounds; the deed may not be intended to

[1] Martin Luther King, Clayborne Carson, and Tenisha Hart Armstrong. *The Papers of Martin Luther King, Jr., Volume VI: Advocate of the Social Gospel, September 1948-March 1963*. Vol. 6. (California: University of California Press, 1992).

produce a negative outcome or to extend a beneficial outcome. It is pertinent to mention here that King recommended reconstructing the concept of proportionality assessment, which ought to be focused on objectives and the steps to achieve them, as opposed to balancing. His reasoning is robust, giving means for resolving numerous types of constitutional opposition that are not witnessed in the general scope of balancing clashes of rights, welfares, and principles. Furthermore, on occasions when balancing results in a non-conclusive verdict on one right, there is a reformulated proportionality assessment that provides established rules that can resolve at least some modes of conflict.

King's evaluation that the principle of proportionality is formed from more than one origin is also acknowledged by other scholars of same discipline.[2] They extended the debate by evaluating the efforts of Julian Rivers,[3] who discovered that this principle can be seen as "state-limiting" or "optimizing". When appraising Young's arguments, it is apparent that the two notions act in harmony. Subsequently, while the restrictive conception of the state aims to resolve the appropriate limits of state intervention and focuses mainly on the issue of legality, the optimizing conception, in turn, tries to determine the essence and scope of the right in question.[4] Young claims that the state-limiting conception operates in tandem with a rights-prioritizing notion, encouraging policymakers to formulate legislation in the public interest and ensuring that legislative activity is subject to judicial review.[5]

In contrast, the optimizing definition of proportionality advocated by Robert Alexy and others who subscribe to his constitutional rights theory[6], matches up to an interest-based theory of rights: it does not inherently favour the right, but it can cause gains in the public interest to triumph. Therefore, it is paramount to analyze the reason for constitutional actions before moving to

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[2] Alison L Young and Gráinne de. Búrca, "Proportionality" In *General Principles of Law: European and Comparative Perspectives*, by Stefan Vogenauer and Stephen Weatherill (Oxford : Oxford Hart Publishing, 2017)

[3] Julian Rivers, "Proportionality and Variable Intensity of Review", *Cambridge Law Journal*, (2006): 174 - 207.

[4] Grant Huscroft, B. Miller, & G. Webber (eds.), "Introduction" in *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014), 1-18.

[5] Ibid.

[6] Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford : Oxford Scholarship Online, 2012).

test proportionality. This debate can additionally be extended in the instance that there is a general ethos to define the right: in this case, the "state limiting conception" of proportionality can be granted alongside a "corresponding immunity theory of rights". Yet, if such an ethos is not present and variation ensues, an improvement strategy is necessary to include the right as a component of the common culture. Pavlakos highlighted the principled method of proportionality. His stance was that the present structure and use of this principle connected a filter idea of proportionality. Using this source, the legislature is fundamentally about the means and ends and includes definite and complete whole ethical prohibitions only in exceptional cases. Yet, when these unique cases appear, the concept of proportionality stands in as a "moral filter" or "litmus paper" directed to ensure the justification of governing law. [7]

However, a paradox emerges from the moral-filter interpretation of proportionality: proportionality, in carrying out its governing role, creates a barrier between authoritative orders and the moral premises that can justify them in the first place. Proportionality appears to presume, along these lines, that authoritative legal directives are binding, regardless of their substantive validity.[8] Subsequently, the definite exclusion comes from another area and not one stemming from internal law. The paradox, according to Pavlakos, emerges from a positivist interpretation of legal duty paired with a negative freedom conception of autonomy. Autonomy as negative freedom implies that the role of autonomy is to create a space free of intervention for people's most important interests. All that remains outside of this sphere is about unprincipled politics, not freedom.[9]

The authoritative legal directives, in this view, function as principles of instrumental rationality, aligning the relevant means with whatever ends legislators have established. It is paramount to reference here that if these objectives are greatly conflicting, they ought to be "corrected" by *ad hoc* petition to categorical restrictions that are separate from law.[10] In examining the conceptual norms of the notion of proportionality, Pavlakos extends an

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[7] George Pavlakos, "Constitutional Rights, Balancing and the Structure of Autonomy ", *Canadian Journal of Law & Jurisprudence*, (2011)

[8] Huscroft, Miller, & Webber, "Introduction".

[9] Pavlakos, "Constitutional Rights, Balancing and the Structure of Autonomy".

[10] Alexander W. Cappelen and Bertil Tungodden, "Fairness and the Proportionality Principle", *Social Choice and Welfare*, (December 2017): 709-719.

idea of autonomy which connects a negative comprehension of legal power.[11] At this point, it is important to understand that Pavlakos expressed this method in lawful obligations that can be based on moral reasons, and rights which are safeguarded by the constitution ought to be considered by their traditional meaning, defined as "defensive," as it mirrors the adverse restrictions. Furthermore, space should be made for freedom, which must be examined under legal standards. To finalize his statement on the concept of proportionality, it ought not to act on the moral basis for the governing norms. He agreeably concludes that proportionality should serve as an interpretive concept that organizes a legal system as a collection of collectively endorsed norms aimed at realizing the autonomy of those who live under it, rather than as a moral filter for authoritative norms.

Relationship of the doctrine of proportionality with rights

To examine the relationship between rights and proportionality from a variety of perspectives, it is very important to understand their relationships and compatibility. One can agree with the view of Huscroft, who preferred the concept that rights are hypothetically linked to justice and are therefore governing and exemplary in what should be. In our analyses, his argument stems from the foundation of 'rights', from the Latin '*is*, examining the conjectural connection of the objective right (justice) and subjective right (rights). Inside this structure, in simple terms, human rights laws in true experience our lost rights.

The argument is that the conventional method for human rights in line with the concern for proportionality splits rights from what is morally correct, and in this manner, fails to secure the moral requirement of rights. To extricate rights from their inconsequentiality, we should focus on the ambiguity of the usage of the word "right" in catchphrases like "everyone has a right to...".[12] While considering the states of affairs and sets of interpersonal actions, forbearances, and omissions that realize community rights, affirming as definitive that one has a right to life, liberty, and so on simply begs the query. Nevertheless, the real-world query should be what, exactly, needs to be determined and created for the realization of individual rights. The compound method of practical reasoning can be summarized that this query

[11] Samue Estreicher, "Privileging Asymmetric Warfare: The Proportionality Principle Under International Humanitarian Law", *Chicago Journal of International Law*, (2011): 143-157.

[12] Nicholas Emiliou, *The Principle of Proportionality in European Law, A Comparative Study,* European Monographs Series Set. (London : Kluwer Law International, 1996).

places the theoretical right-bearer in a setting of other real and prospective right-bearers. The methods of justification are implemented by policymakers, who bear a great duty to their society to conclude, fairly and firmly, right relations between individuals. Here, I must argue that proportionality is to be determined as much as possible by the legislature.

Concerning the issue of power in proportionality examinations, Schauer outlines how the unique significance of rights surrounds proportionality examination. In Schauer's work, it is debated that every non-absolute right is eligible to restriction, and that proportionality communicates amongst validated and non-validated constrictions.[13] Non-rights-protected priorities or interests may be balanced, but stronger reasons are needed to constrain a right since each right is more relevant than non-rights-protected interests.[14] As a consequence, there is a presupposition in favour of freedom, placing the burden of evidence on those who wish to limit them. In a conventional cost-benefit study, this burden is not considered. We denote the notion of a "rule of weight" to standardize proportionality assessment: a second-order decree issues the weight of the initial order thoughts regarding what ought to be carried out.[15] Proportionality, therefore, surrounds the decision-making process: the assumptions are opposed to restricting a right; however, these assumptions can be disproven. The question raised by proportionality appraisal asks whether the degree to which a restriction on a right is valid in terms of an increase in social stability. Answer to this question can be found in Grant Huscroft's statement that as Webber argues, we must be concerned not only with what it means to have a right but also with the importance of one-of-a-kind rights we possess. It implies that we should look at the basic importance of the choice of political society to sanction a law of rights.

Some writers believe that rights are binding and immutable, and therefore not subject to proportionality (at least as formulated within the sense of "balancing"); others assume that proportionality only extends to unqualified rights. It is stated, Moller and Webber both hold the opinion that

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[13] Frederick Schauer, "The Exceptional First Amendment," In *American Exceptionalism And Human Rights*, by Michae lIgnatieffed (Cambridge : Princeton University Press, 2005), 29-56.

[14] Tungodden, "Fairness and the Proportionality Principle".

[15] Tor-inge Harbo, "Introducing Procedural Proportionality Review in European law", *Leiden Journal of International Law*, (2016): 1-23.

proportionality and rights are principally combined, but differ in the benefits of their linkage: Moller sees the advantages of subjecting government power to justification scrutiny as significant; Webber sees the loss of rights and the decision to distinguish rights from what is right as morally burdensome. The significance of the presence of what rights stand for, the query is linked to the unique role of weight in implementing proportionality evaluation; the query is a prerequisite to validating a decision to implement a proportionality review.

It can be claimed that to enact a bill of rights should be decided by representative societies as well as which rights should benefit from the extra safeguard that such a bill of rights offers. Bills of rights, are limited in scope; they cover some but not all potential rights and describe clear meanings of some of the rights they contain.[16] In other words, bills of rights represent a "constitutional compromise" on rights issues, which must be respected before a proportionality review can be performed.[17] Huscroft's argument that rights inflation supported by Moller is not justified, as the approaches to proportionality such as Mattias Kumm's that makes the mechanism of rights interpretation all but obsolete is one that one may agree with.[18] Some definitions of proportionality trigger fundamental changes to the constitutional order by extending the capacity of rights and hence judicial review and should be opposed on this basis, however beneficial an increased criterion of justification for state action might be.

The doctrine and the notion of Burden of Proof

In every case, the crucial task is to establish the facts of the case, and for this reason, evidence is the most vital component. The standard position is that the defendant bears the burden of demonstrating a *prima facie* or evidential restriction of a right; however, once it is established, the onus falls on the government to show that the restriction has passed the four-stage proportionality test. Notwithstanding this, in practice, courts sometimes require the plaintiff to show how the actions of the state have made

[16] Nicholas Emiliou, "*The Principle of Proportionality in European Law".*

[17] Tungodden, "Fairness and the Proportionality Principle".

[18] Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-based Proportionality Review", *Law & Ethics of Human Rights*, (2010): 142-175.

disproportionally confined the right.[19] When the theory of proportionality is applied, the burden of the proof method varies. The burden of proof is placed on the defendant in the Wednesbury doctrine.[20] Here, the burden of proof is used to explain the compelling burden of proof. The party that shoulders "this burden bears the prospect of non-persuasion: i.e., he may fail if both flanks of the case are similarly solid, or the court is unsure of which side is stronger".[21] This burden is to be clarified from the evidential weight, which is the responsibility of offering to illustrate that an issue is a live issue in a case.

It is pertinent to mention here that the burden of proof ought to be issued first by "reasons of principle societal judgments over the proper relationship between the parties and who should bear the risk of uncertainty in a case; and second, by practical considerations over the relative cases with which the parties can prove a point".[22] For example, the prosecution's standard of proof in criminal trials represents society's belief that the state must justify any use of force against people and that it is usually worse to prosecute an innocent man than to let a guilty man go free. The authority must pass the four-stage proportionality test in the theory of proportionality.[23] The Human Rights Act itself does not elucidate on which party the burden of proof falls.[24] Judiciaries have granted reverse onus in unique circumstances where the assumed worth of safeguarding the defendant is not as strong or does not uphold strongly, for instance in times where the penalties of persecution are fewer.

According to some scholars, the state faces practical challenges in defining a proportionality assumption in different cases, resulting in the complainant bearing the burden of demonstrating a lack of necessity or imbalance. Rivers identifies four functional challenges that the state faces. The first is the

[19] To see how the UK Supreme Court dismissed the Secretary of State's appeals, *Quila and another v Sec of State for the Home Dept .* [2011] UKSC 45, at familylawweek.co.uk/ site.aspx?i=ed87312.

[20] Nicola Padfiel, "The Burden of Proof Unresolved", *The Cambridge Law Journal*, (2005).

[21] Vicki C. Jackson, "Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality", *Harvard Law Review*, (2016).

[22] A. Ashworth, "Four Threats to the Presumption of Innocence", *International Journal of Evidence & Proof*, (2006): 249–267.

[23] Michael A. Newton, "Reframing the Proportionality Principle", *Vanderbilt Journal of Transnational Law*, (2018): 867-885.

[24] Jackson, "Conceptions of Judicial Review".

restriction which is made to pursue the legitimate aim, while the second is rationally associated with the aim, the third is proportionate and the last one is balanced.[25] It is important to identify that sometimes the implementation of the doctrine of proportionality as a yardstick to review human rights cases puts the court in a complex fix leading to long delays.[26] Here, the courts are quite reasonable about relaxing the intensity of review in different ways; they can skip one or two stages of the proportionality test, or they can combine both stages, depending on whether the measure is fair or allowable.[27] The reality in practice is that sometimes the court makes it obligatory for the plaintiff to exhibit disproportionality of the constraint of rights.[28] Julian Rivers has explained this practical difficulty faced by the plaintiff: once the State goes by the last two stages of the proportionality analysis – that the action was legitimate and rational – the burden of proof is on the plaintiff to establish that it was overall imbalanced. The elaboration of doctrine suggests that the state should accept the burden of proof, establishing a phenomenon that "a *prima facie* limitation of a right passes all stages of the proportionality enquiry".[29]

Proportionality and the balancing of competing interests

One way of understanding proportionality analysis in the narrower sense is thus imposing a "rule of weight" on the process of evaluating competing interests.[30] Competing obligations, duties, goals, interests, factors, and facts are evaluated in numerous aspects of our decision-making lives.[31] These are "rules of weight" and their use is relatively common (especially in the past) in the law of evidence in the jurisdictions of common law.[32] Viewed through the lens of rules of weight, we can understand proportionality analysis, as commonly practiced in the jurisdictions in which it predominates, as itself a

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[25] *Huang v Secretary of State for the Home Department.* [2007] UKHL 11. Visit publications.parliament.uk/pa/ld200607/ldjudgmt/jd070321/huang%20-1.htm.

[26] Thomas Wischmeyer, "Generating Trust though Law: Judicial Cooperation in the European Union and the Principle of Mutual Trust", *German Law Journal*, (2016).

[27] *Belfast City Council v Miss Behavin' Ltd.* UKHL 19 [2007] 1.

[28] *Bibi v Same .* [2011] UKSC 45 [2012] 1. Visit familylawweek.co.uk/site.aspx?i=ed87312.

[29] Julian Rivers' work mentioned in Cora Chan, "The Burden of Proof under the Human Rights Act".

[30] Frederick Schauer, "The Exceptional First Amendment".

[31] Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Cheltenham: Edward Elgar Publishing, 2018).

[32] Mirjan Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study", *University of Pennsylvania Law Review*, (1972).

rule of weight.[33] As applied to freedom of expression, for example, a proportionality analysis (and especially the final step of the analysis in those regimes in which the proportionality analysis is subdivided into multiple steps). Kirk will ask whether the restriction on freedom of expression is proportionate to the policy goal that supports the restriction: for example, the goal of preserving public order.[34] In some cases, the restrictions on freedom of expression will be superfluous, in the sense that a smaller restriction on freedom of expression will produce no less ability in preserving public order. In such cases, however, the very term "proportionality" seems unfit, because it is not that the constraint on freedom of expression is disproportionate, but simply that it is entirely superfluous and thus irrational. It would thus be unsuccessful at the initial or second stage of the standard proportionality test. If the same goal can be served to the same extent without restricting the right, then the problem is not that the restriction is disproportionate; rather, it is that the restriction is unnecessary.[35] More commonly, however, and consistent with the very emergence of the term "proportionality" in the first place, it is commonly understood that, to continue with the same example, fully serving the goal of preserving the public order will entail some restriction on freedom of expression, and, conversely, curtailing the ability to restrict freedom of expression will come at the price of at least some restrictions of the state's ability to preserve public order.[36] Here the genuine question on proportionality arises that of whether the amount of restriction on freedom of expression is justified in light of the increase in public order that the restraint on freedom of expression is expected to bring.

Framing the issue in this way not only explains why "proportionality" is the correct term in cases such as these but also exposes the fact that engaging in the appropriate proportionality analysis requires that we assign weights to the gains and losses on each side of the equation. However, the weighting method is shown by the fact that the study is run in one direction and not the other. The courts do not "typically say that the loss in public order can be no more than necessary in light of the goal of pursuing freedom of

[33] Tor-inge Harbo, "Introducing Procedural Proportionality Review".

[34] Tungodden, "Fairness and the Proportionality Principle".

[35] Robert Spano, "The Future of the European Court of Human Rights Subsidiarity, Process-Based Review and the Rule of Law", *Human Rights Law Review*, (2018).

[36] Brian J Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century (*Cambridge : Cambridge University Press, 2019).

expression, but they do say that the restriction on freedom of expression can be no more than necessary in light of the goal of pursuing public order"[37]. The disparity shows that there is a presumption at work that those who would limit freedom of speech bear the burden of proof, not those who would jeopardize public order, and that lurking beneath the presumption and the allocation of the burden of proof is a rule of weight, giving more weight to the right to freedom of expression than to the goal of public order, which the right to freedom of expression will arguably threaten.[38] However, this is not a matter of high moral or political principle, but simply because this rule of weight is implicit in the very idea of a right and in the very structure of how non-absolute rights intersect with non-right interests. If it were otherwise – if there were a right to live in a safe atmosphere but no right to freedom of expression, for example – then the rule of weight would be just the opposite, placing on any action that would jeopardize a safe environment merely to further the non-rights interest in increased expression. But it would still be a rule of weight. Thus, the idea of a rule of weight is implicit in the common structure of proportionality analysis, and, indeed, the rule of weight that is implicit in any rights-based proportionality analysis is a rule of disproportionate weight.[39]

The doctrine of proportionality a tool of judicial review

As the doctrine of proportionality is a broadly acknowledged and commonly implemented notion in the judicial appraisal of social acts at the state level, it subsequently has strong ties in legal writings with broader discussions on the significance of validating the use of governmental authority to legal authority for the reason of providing evidence for devotion to the rule of law.[40] In terms of the above, scholars believed that there has been an increase in what is expected of parliamentary directives when using state power, especially in light of increasing legal requirements placed on governments.[41] More specifically, according to Elliott, what the law demands in parliamentary states has become highly demanding. Proportionality, and its connections to broader discussions about the value of justifying the

[37] Valentina Vadi, *Proportionality, Reasonableness and Standards of Review*.

[38] Paul P. Craig, "Proportionality and Judicial Review: A UK Historical Perspective", *Oxford Legal Studies Research Paper No. 42*, (2016).

[39] Michael A. Newton, "Reframing the Proportionality Principle", *Vanderbilt Journal of Transnational Law*, (2018): 867-885.

[40] Brian Z. Tamanaha, *On The Rule of Law: History, Politics, Theory (*Cambridge: Cambridge University Press, 2004).

[41] Jackson, "Conceptions of Judicial Review, Factfinding, and Proportionality".

exercise of power, are particularly important when examining how judges review the exercise of governmental authority that affects the individual's rights and reasonable standards, as the sufficiency of any justification may be judged against additional, more challenging criteria.[42] Therefore, it can be analyzed that Elliott's claims require judges to be transparent about two things when reviewing the conduct of governing powers: first, that they would have proceeded in the same manner as the administrator. Second, even after the issue of the standard of justification, or analysis has been resolved, concerns about whether that standard has been met will arise prompting questions about the court's position in assessing the quality of any justifications provided by the decision-maker.

To reach an organized method when evaluating the actions of governmental powers, it is reasonable to refer to Elliot's suggestion that the judges ought to focus their efforts towards two separate queries. The first step is to figure out what the operative level of justification should be in the given circumstances. In other words, what should be the justificatory duty imposed on the decision-maker, and which must be discharged if the decision is found to be lawful by the reviewing court?[43] Second, as Elliott emphasis how the court should take into account the reason of the verdict concerning whether an unbiased balance has been made amongst contradictory interests.[44] The question Elliott poses admits that it boils down to a value judgment, with the acceptability of the compromise struck between two incommensurable variables impossible to decide unless those variables are first given inherently contestable values. The dispute regarding legitimacy is based on this: Why should the court produce other policy options to the legislature here? (i.e., amongst unlike principles). A frequent theme emphasized in the scriptures relating to the implementation of proportionality by the court is due to judges being forced to set equilibrium amongst two incommensurable variables.[45] According to Endicott, the incommensurability problem: if there is no logical reason for making a decision one way or the other, the outcome appears to be a deviation from

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[42] Mark Elliott, "Justification, Calibration and Substantive Judicial Review: Putting Doctrine in its Place", *UK Constitutional Law Association* (2013), visit at https://ukconstitutionallaw.org /2013/09/17/mark-elliott-justification-calibration-and-substantive-judicial-review-putting-doctrine-in-its-place/ (accessed 02 26, 2021).

[43] Ibid.

[44] Michael A. Newton, "Reframing the Proportionality Principle".

[45] Vicki C. Jackson, "Thayer, Holmes, Brandeis: Conceptions of Judicial Review".

the rule of law in favour of judge-made decisions.[46] Barak, conversely, seeks to support the use of proportionality by stating,

> …that it is a common base for comparison, namely the social marginal importance and that the balancing rules – basic, principled, concrete – supply a rational basis for balancing. A democracy must entrust the judiciary – the unelected independent judiciary – to be the final decision-maker – subject to constitutional amendments – about proper ends that cannot be achieved because they are not proportionality *strict sense*.[47]

One can agree with Barak that there is a general foundation for relating and an organized method of balancing that the court ought to have the capability to make the final judgment here. Referencing the instance of a judge choosing a case, assessing the right to family life as opposed to the state's right to restrict immigration, each option is socially significant, and subsequently, the judge can choose which way the case should be concluded, as only one condition is taken into account.[48] The only condition mentioned is the relative social significance assigned to each of the competing values or interests at the point of dispute, which weighs the importance to society of the benefits obtained by achieving the law's objectives against the importance of avoiding human rights limitations.

Other research has looked at whether proportionality is a normatively desirable term in the sense of the national relationship between the state and the citizen. Specifically, the principle has been understood in various ways due to the appearance of alternate theories of rights rules: for instance, Alexy argues that proportionality is a method of equilibrating between the interest of the society and the right of an individual.[49] It can be stated that Alexy depicts, rightly, that the theory of proportionality, in its limited sense, arises from the fact that values are optimization criteria in terms of what is

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[46] Timothy Endicott, "Proportionality and Incommensurability", in Huscroft, Miller, & Webber (eds.), *Proportionality and the Rule of Law,* 311-342.

[47] Aharon Barak, "Proportionality and Principled Balancing", *Law and Ethics of Human Rights* 4, no.1 (2010): 1-16.

[48] Huscroft, Miller, & Webber, "Introduction" In *Proportionality and the Rule of Law.*

[49] Alec Stone Sweet and Jud Mathews, "Proportionality, Balancing and Global Constitutionalism", *Columbia Journal of Transnational Law*, (2010): 68-149.

legally permissible. The need and suitability concepts follow from the essence of principles as optimization conditions to what is feasible.[50]

There are differences between formal concepts like legal certainty and substantive doctrines like justice, and there are times when a formal principle must be balanced against a substantive principle.[51] Alexy deduces that in the past, such balancing activities have been dealt with Germany after the fall of the German Democratic Republic in 1989 by applying the Radbruch's formula of "serious injustice is no rule".[52] In the judicial review of fundamental rights' limitations, Alexy believes that proportionality is inevitable. He claims that this theory is the only fair way to make a decision that considers both the reasons for restrictions on rights and the restrictions themselves.[53] According to the rule of colliding principles, a formula is a product of balancing the practical principle of justice against the formal principle of legal certainty:

> …the consequence of the procedure of the principle of justice over the principle of legal certainty under the conditions of extreme injustice is that under this condition the consequences required by the prevailing principle of justice applies and this is exactly what the Radbruch formula states.[54]

It can be argued that in cases involving serious injustice, using such a formula entail assigning justice a higher concrete weight than certainty. Proportionality, along with the judicial review, is the most effective legal transplant of the twentieth century, according to Mattias Kumm.[55]

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[50] Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press, 2009).

[51] Robert Alexy, "Formal Principles: Some Replies to Critics", *International Journal of Constitutional Law*, (2014)

[52] Ibid.

[53] Robert Alexy, *Theory of Constitutional Rights (Translatoion byJulian Rivers)* (Oxford: Oxford University Press, 2002).

[54] Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law (Translated by Bonnie L. Paulson and Stanely L. Paulson)", *Oxford Journal of Legal Studies*, (2006): 1-11.

[55] Mattias Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice", *International Journal of International Law*, (2004): 574-596.

Conclusions

It is demonstrated that in the key periods and currents of law theory, the moral or jurisprudential component of proportionality as a law principle has its content in the principles and philosophical categories that make up the contents of the principle of proportionality. As a result, it is shown that the proportionality doctrine is an integral part of a human rights adjudication structure. The first step is to prove that a right has been violated due to government action. The government must prove that it was pursuing a valid goal and that the violation was proportional in the second level. Given the value of this theory in contemporary law, such a scientific attempt can be said to be beneficial. Having undertaken a thorough discussion of the issue of the implications of proportionality in Europe, it is established that the principle of proportionality is an important criterion for ensuring the respect for human rights, especially when their exercise is limited by acts ordered by state authorities, and it is also an important criterion for distinguishing discretionary power from power excess in state authority operation.[56] The results can also be simply tied together within the conclusion that the principle of proportionality needs the Court to decide whether the steps implemented were necessary and whether they remained within the scope of the agreed direction of action, which could sensibly be tracked. Proportionality has more interest in the objectives and purpose of the legislator and whether the authority has met the proper balance. It is often concluded that, in contrast to irrationality, proportionality is often understood to bring the courts far closer to evaluating the merits of a decision by presuming that state intervention does not proceed beyond what is needed to achieve the adequate objective.

[56] Victor Ferreres Comella, "Beyond The Principle of Proportionality", in Gary Jacobsohn and Miguel Schor (eds.), *Comparative Constitutional Theory* (Cheltenham, Edward Elgar Publishing, 2018).