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# Proportionality

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When asked to choose a general principle which has most influenced the development of public law across Europe, it seems difficult—one might almost say manifestly disproportionate—to choose any principle other than proportionality. It is hard to deny the influence of proportionality, both as a general principle of EU law which pervades the case law of the European Court of Justice and as the means through which the European Court of Human Rights determines whether restrictions placed on Convention rights are 'necessary in a democratic society'. As such, proportionality is a principle which is frequently applied by domestic courts, even within those legal systems that have not adopted a specific or general test of proportionality. And once courts have had experience of applying proportionality, it seems almost inevitable that the principle will expand its influence into domestic law.

It seems also hard to conclude, in view of the extensive literature on the topic, that proportionality is anything other than a modern invention, an indication of the willingness of the judiciary to subject discretionary decisions of the administration to a more searching scrutiny. Proportionality, therefore, appears to be part of the recent move towards greater accountability, with more emphasis being placed on the enforcement of the rule of law by the judiciary in order to control actions of both the legislature and the executive. Proportionality is also seen by many as closely linked to the protection of human rights, both in terms of its role in decisions of the European Court of Human Rights and its influential role in German law. Hence if there is a tale to tell of the influence of proportionality, it seems to be one of its growing influence across Europe, leading to greater judicial scrutiny, more accountability and a stronger protection of human rights.

We hope that this collection of essays goes some way to telling a more nuanced, if not a different story. Although it is hard to deny the influence of the European Union and the European Convention on Human Rights (ECHR), it is not necessarily true that proportionality has its origins in German jurisprudence, or that the growing influence of the principle is due solely to the role of the European Union and the ECHR. Nor is the influence of either the Strasbourg or the Luxembourg courts the same across the Member States of the European Union and the signatory states of the ECHR. And while it is clear that there is a connection

between proportionality and human rights, it is not the case that proportionality is inevitably linked with human rights. When analysing different jurisdictions and the application of the proportionality test in the European Union we also see a role for proportionality in enforcing an aspect of distributive justice, ensuring in particular that administrative policies do not impose manifestly disproportionate burdens on particular individuals or groups. And whilst there may be, broadly speaking, a consensus surrounding what the test of proportionality comprises in the context of the ECHR, there is not necessarily a consensus surrounding the nature of the test of proportionality beyond this, particularly as concerns the connection between proportionality and the judicial control of rationality. Nor is the test of proportionality without its critics. If we learn anything from the fresh set of narratives contained in the chapters which follow, it is that the principle of proportionality is multifaceted and that a better understanding of its nature and practice may only be gleaned from separating out its different elements, assessing the extent to which different understandings of proportionality are suited to different subject matters, and examining how they are articulated and applied within different legal systems.

## I. The Origins of Proportionality and the Influence of Europe

Paul Craig's chapter provides the most robust challenge to the traditional narrative that the idea of proportionality in law is a modern creation, originating in German jurisprudence and strongly influenced by decisions of the German Bundesverfassungsgericht, which in turn influenced its adoption as a general principle of EU law and its role in the European Court of Human Rights. Craig's analysis of seventeenth-century case law in England suggests that it is untrue that legal tests of review based upon the idea of proportionality are an invention of the twentieth century, or that judicial control over the discretionary powers of the administration is a purely modern phenomenon. Craig's work also clearly demonstrates that, for English law at least, proportionality has a long history and a long pedigree of acceptance by both the judiciary and the legislature. It is no European import, originating instead in English law. Craig's research demonstrates the use by the judiciary and the legislature in the seventeenth century of the terms 'proportionable' and 'proportionability'. Proportionability was referred to expressly in legislation, prompting oversight by courts to ensure that a burden imposed upon an individual was proportionable. It seems that, where this was not referred to expressly in legislative provisions, the courts would nevertheless regard it as a principle of statutory interpretation, ensuring that benefits and burdens were allocated in a proportionable manner. Proportionability also operated as a stand-alone principle of judicial review in order to ensure a proportionable

distribution of benefits and burdens. It was also used as a condition of regulatory intervention, such that even if there was provision for the King to impose a levy, it would be subject to the proviso that any such levies were imposed in a proportionable manner.

Nor is the earlier existence of ideas of proportionality in domestic law, prior to the 'Europeanisation' of public law, unique to English law—although on the evidence of these chapters alone, proportionability in English law would appear to have the oldest pedigree. As Yoan Sanchez's account of French law demonstrates, the test of proportionality in French law is often regarded as deriving from the 1933 decision of the Conseil d'Etat in *Benjamin*. However, Sanchez argues that the approach in *Benjamin*, which requires the court to ensure that exercises of police powers to protect public order can only restrict human rights when strictly necessary, derives from an earlier 1909 decision of the Conseil d'Etat in *Abbé Olivier*. Although not as old a pedigree as the seventeenth-century decisions identified by Paul Craig in English law, this development in French law nevertheless pre-dates both the European Union and the European Convention of Human Rights. It also differs from English law due to its specific focus on human rights, as opposed to the focus of a notion of proportionability which seeks to facilitate an equal or fair distribution of benefits and burdens. Martinico and Simoncini's chapter on Italian law presents a similar picture to that of France, with the principle of proportionality arising originally as a tool to exercise control over the legitimate exercise of police powers.

It is, however, hard to deny the influence of European law on the development if not the origins of proportionality, be that through the influence of EU law or through the work of the ECHR and European Court on Human Rights. This is particularly true in English law, where the test of proportionality is mostly applied in the context of the application of EU law and ECHR rights incorporated into English law through the Human Rights Act 1998. The Supreme Court in *Keyu*[1] may have recently rejected the opportunity to adopt proportionality as a general test of review in English law—such a broad constitutional change requiring nine as opposed to five Justices of the Supreme Court—but it may well now be at least arguable that proportionality is the test of review for fundamental common law rights post *Youssef*,[2] as well as being used in the protection of substantive legitimate expectations. Despite the undoubted role of EU law in the development of proportionality in English law, it is clear that it is the ECHR which has had the most influence in this context. A similar story is to be found in Danish law, where Helle Krunke remarks that there has been a rise in the application of the principle of proportionality through the influence of both EU law and the ECHR,

[1] *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2015] 3 WLR 1665.

[2] *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [2016] 2 WLR 509.

noting in particular the way in which the Convention is used to supplement the constitutional protection of rights found in older, perhaps one even might say outdated constitutions, helping to strengthen the protection of human rights.

In Italian law, it is the European Union and not the ECHR which has had greater influence, with the application of proportionality in EU law leading to the development of the principle in Italian administrative law, its influence having culminated in the adoption of legislation requiring Italian administrative bodies to comply with EU law, regardless of whether their measures are based on EU law. There seems to be less of an influence, however, of either EU law or the ECHR in the Italian Constitutional Court, although the court is evidently more influenced by Strasbourg than by Luxembourg. In stark contrast, French law appears to be the least influenced by Europe, with Sanchez concluding that there is some influence of EU law when French courts apply proportionality in the field of EU law, as well as an influence of the ECHR in the domain of protection of rights in France. However, the French administrative courts have not been influenced by the structure of the proportionality test as applied by the Strasbourg court.

It is hard to deny that both the European Union and the ECHR have played an influential role in the development of the principle of proportionality and in its adoption as a standard of review in domestic law across Europe. However, as this account of the origins of the test of proportionality suggests, care must be taken not to overstate or exaggerate the European influence; it is clear from the various chapters contained here that the test of proportionality—albeit in a different and less developed form—has national origins as well, some of which long predate its adoption and development by the European Union and the ECHR. It is true that the application of proportionability in English law was not the same as the sophisticated four-part test as currently applied in English law in the field of judicial review under the Human Rights Act 1998, or when English courts apply proportionality within the scope of EU law. In a similar manner, there is no mention by the Conseil d'Etat in *Benjamin* of a clearly structured three- or four-stage test. Nevertheless, it was clear that the English courts had a wealth of experience of applying a principle which is very similar to that of proportionality, ensuring that burdens were distributed in a proportionate manner, whilst being sensitive to the need to give weight to administrative determinations and the purposes of legislation governing the situation before the court. In a similar manner, the insistence of the French courts that restrictions on rights and liberties can only occur when necessary to ensure public order bears a remarkable similarity to more modern understandings of proportionality. However we classify these accounts of the origins of proportionality in England and France, they begin to cast doubt on the traditionally perceived narrative that the legal notion of proportionality is predominantly a creature of European law, be that from EU law or the ECHR, or even from German law.[3] However, these accounts of the origins of proportionality

[3] A Stone Sweet and J Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008–09) 47 *Columbia Journal of Transnational Law* 73.

also raise further questions as to the nature of proportionality and the scope of its application.

## II. What Is Proportionality?

The test of proportionality would appear to have three key characteristics. First, it focuses in significant part on a control over outcomes (substance). Although this often includes an evaluation of the evidential basis on which the decision was made (process), proportionality is not limited to merely examining issues of process. Second, it is viewed as a more stringent form of control than a control of rationality. Third, it is a clearly structured three- or four-part legal test, depending on which elements are included. However, as the following chapters demonstrate, not all of these characteristics are uniformly present in all of the legal systems studied.

Proportionality is designed primarily to control outcomes, ensuring that restrictions placed upon rights are proportionate, that benefits and burdens are allocated in a proportionate manner, or that, when achieving a particular outcome, the means chosen to achieve this aim place the least restriction on a particular right, or are the least restrictive means to achieve this particular outcome. Sanchez's analysis of French law explains in particular that proportionality is meant to focus predominantly on outcomes, not on merely determining whether there is sufficient evidence on which to ground the administration's assessment of proportionality. He uses this analysis to criticise some of the recent decisions of the Conseil d'Etat scrutinising the imposition of restrictions on civil liberties under the emergency powers provisions enacted following the terrorist attacks in Paris in November 2015. The Conseil Constitutionnel, when determining the constitutionality of the emergency powers provisions, required that any decision to place an individual under house arrest had to be verified by the administrative judges, focusing in particular on ensuring that these decisions were 'adapted, necessary and proportionate'. Nevertheless, decisions of the Conseil d'Etat scrutinising house arrests did not refer to these provisions. However, the Conseil d'Etat was prepared to strike down a decision to place an individual under house arrest when the evidence on which this decision was based was not substantiated in fact. For Sanchez this fails to provide a proportionality control, given its focus on facts and evidence, as opposed to performing a substantive review as to whether placing an individual under house arrest is a proportionate response to the perceived threat to public security caused by this particular individual.

Whether we see this as a failure of the principle of proportionality or not, it is clear that there is evidence of a more procedural turn in other jurisdictions. Advocate General Juliane Kokott and Christoph Sobotta's analysis of EU law also points out the connection between factual assessments and the application of proportionality. As is well known, proportionality is a general principle in EU law,

applying to all areas of EU law. Kokott and Sobotta's analysis recognises a connection between the extent to which the CJEU applies a more substantive as opposed to procedural review and the area of law under review. As a general principle, proportionality in EU law applies to ensure that an act or measure does not exceed the limits of what is appropriate or necessary to achieve a particular objective, ensuring, where there is a range of means through which an objective can be pursued, that the EU adopts the least onerous means of achieving a particular objective. As a general principle, proportionality can apply to a range of situations. When applying proportionality, they argue, the CJEU performs a procedural as well as a substantive check. The Court ensures that the body under review provides an adequate statement of the reasons justifying its particular choice of means to achieve a certain policy objective. It also scrutinises decisions to ensure that the evidence on which the EU institution relies is factually accurate, reliable and consistent, and that it can substantiate the conclusions drawn by the body in question. Kokott and Sobotta suggest that the Court has been more prepared to carry out a full substantive review when faced with the application of proportionality to human rights, as in the recent *Schecke*[4] and *Digital Rights Ireland* decisions.[5] However, rather than seeing a procedural approach as a potential failure to apply the principle of proportionality, Kokott and Sobotta note that the CJEU applies a more procedural analysis when the subject matter to which the proportionality test applies is outside of the field of rights, to compensate for the less stringent application of proportionality over the outcome of the decision in these areas.

This assessment leads nicely to our second assumption: is proportionality automatically a more stringent form of review than other forms of rationality control or reasonableness review? It clearly has been perceived as such across the legal systems studied in this section. Martinico and Simoncini note that, in Italian law, proportionality control arose out of reasonableness controls, but is generally regarded as going further than the standard of reasonableness. Whereas proportionality focuses on fairness and necessity, reasonableness focuses on suitability, which is generally a less demanding standard of review. This results in proportionality review being regarded as a more stringent form of control. Helle Krunke's analysis of proportionality in Danish law notes not only that proportionality is generally regarded as a more stringent form of control, but remarks that the level of stringency found in the application of proportionality in EU law and the ECHR sits uneasily with the general attitude of judicial restraint in Denmark. This creates an element of 'double standards' and gives rise to reverse discrimination, where individuals whose circumstances fall within the scope of EU law may find that decisions governing them are subject to a more detailed scrutiny, including analysis of whether the administration has utilised the least restrictive means to achieve a particular objective,

[4] Case C-92/09 *Volker und Marcus Schecke GbR v Land Hessen* [2010] ECR I-11063, [2012] All ER (EC) 127.

[5] Case C-293/12 *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources* [2015] QB 127.

or whether a measure is proportionate to the pursued purpose of administrative action, than the application of the principle of proportionality in Danish law.

However, it is clear from a more detailed analysis of the chapters in this section that proportionality can be applied more or less stringently. It is not a monolithic or single-standard test, but is best understood as a variable standard of review. The theme of a variable standard of review runs through Craig's analysis of English law and Philip Sales LJ's account of the application of proportionality under the ECHR, with its well-known margin of appreciation. Sales argues that each of the aspects of the test of proportionality can be applied with varying degrees of stringency. This is recognised through the application of the margin of appreciation, which Sales regards as fulfilling three distinct purposes. First, it provides a means of recognising when weight should be given to democratic resolutions of rights, particularly in those areas that are politically sensitive and where there appears to be no general consensus across the signatory states to the Convention. Second, it serves the aim we associate more traditionally with the margin of appreciation, to allow each signatory state to develop its own culturally sensitive balancing of rights. Sales also advocates a new, further role for the margin of appreciation. He argues that the European Court of Human Rights has increasingly taken on the role of a superior constitutional court, scrutinising the decisions of national courts and national legislation when applying the proportionality test. His proposal for an application of the margin of appreciation in this application reflects concerns of what are usually referred to as comity, namely respect and consideration for the conclusions reached by other similarly legitimate and independent actors. All three roles or circumstances for an application of the margin of appreciation allow for a more or less stringent application of the proportionality test.

Kokott and Sobotta's analysis of EU law also recognises how the principle of proportionality may be applied more or less stringently, their focus being on how proportionality is applied less stringently in EU law in certain circumstances. In particular, the CJEU exercises restraint when it comes to the oversight of policy choices, or the evaluation of complex technological issues. When dealing with issues which might be described in this way, the Court has modified the standard of proportionality, striking down measures only when they are manifestly disproportionate. As discussed above, this weaker substantive control is, however, often coupled with a stronger procedural control, entailing a detailed scrutiny of reasons and evidence. The CJEU, however, applies proportionality more stringently when faced with the judicial review of measures affecting human rights. This modification of the stringency with which proportionality is applied is also remarked on in Giuseppe Martinico and Marta Simoncini's account of the test of proportionality in EU law, where they note the oscillations of the proportionality test, and the different meanings it is given in different contexts of EU law. They also remark on the fact that, although the European Union has a three-part test of proportionality, the Court of Justice does not always or even often reach the third stage—the stage of proportionality *stricto sensu*, where the Court balances the aim of the policy against the burdens that the policy may produce.

Third, proportionality is often regarded as a structured test, where the courts focus on whether the policy proposed by a public body has a legitimate aim, whether the measure taken is suited to achieving a particular aim, whether the measure is necessary to achieve this aim, and whether there is a proportionate balance between the aims pursued by the policy and the consequences of pursing this policy. In the field of human rights, the court is required to ensure that there is a fair balance between the impact on the right and the policy aim, or the impact on the rights of others. There is clear evidence of a structured test in the decisions of the European Court of Human Rights and in EU law, even given the evidence of Martinico and Simoncini that this three-stage test is not always applied. However, it is not the case that a structured approach to proportionality is always taken in domestic law outside the influence of the EU and the ECHR. Proportionality is still not a general standard of judicial review in English law and, as Craig's work makes clear, although proportionability has a long history in English law, the test may have required courts to balance benefits and burdens but it did not require the imposition of a structured three- or four-stage test. Martinico and Simoncini note that, although the Italian Constitutional Court does apply the principle of proportionality, it absorbs the test into its control for reasonableness and does not use the three- or four-part test of proportionality. Krunke's chapter illustrates how, although proportionality is used as a principle of interpretation in Denmark, it is not yet a constitutional principle given that it is not used in the pre-legislative scrutiny of legislation. Moreover, when applied in the administrative law and criminal law context, the Danish courts examine whether the least restrictive means is used, or whether the measure adopted is proportionate to achieve its particular purpose. However, Krunke's chapter makes no reference to the use by the Danish Supreme Court of a clearly structured test. In French law, Sanchez argues that the courts may pay lip service to the test of proportionality—noting in particular the reference to the requirements that a measure be necessary, adapted to its purpose and proportionate in the Conseil d'Etat's decision in *Dieudonné*. However, it is hard to find a clear focus on the use of these stages of the test in the decisions of the French courts.

The comparative analysis provided in these chapters, therefore, casts doubt on some of the traditional narratives of the proportionality test. However, several clear and important themes run through the chapters. The principle of proportionality does appear to require a more searching review and the third part of the proportionality test, in particular, entails a more searching review than just an analysis of how an administrative decision was made, or the evidence on which it was based. However, the principle of proportionality is not always applied in a way that is more stringent than the review of reasonableness, especially when judicial review of reasonableness is modified to apply more stringently. The principle of proportionality may be applied by courts in particular jurisdictions more stringently in certain circumstances and less in others, but we can nonetheless perceive a general trend towards a more stringent application in the context of decisions affecting human rights and its less stringent application to the evaluation of policy

choices, or of complex economic or technical decisions. The experience of France may be explained in part by the difficulty of applying the principle of proportionality in the national security context, with the focus on a detailed factual analysis appearing to be a more legitimate form of review over the decisions of a public body than a review which may require the court itself to evaluate substantive issues of national security policy. In addition, the more the test of proportionality is applied to issues of human rights; the more likely it is that the test will be applied in a more structured and rigorous form, ensuring that it also includes the final and perhaps most intrusive balancing stage.

## III. Is Proportionality Only or Best Suited to Rights Review?

It is hard to deny the connection between proportionality and the protection of rights. This is particularly true as regards the influence of the ECHR and the extent to which proportionality in certain jurisdictions is either applied only, or is applied more stringently, in the field of human rights. This close connection between proportionality and rights review is clearly evident in English law, as documented well in Sales's chapter which explains and evaluates the role of the ECHR in English law, in addition to the development of the protection of human rights through the common law. A similar connection can be found in Danish law, according to Krunke who notes the use by the courts of both the EU Charter of Fundamental Rights and Freedoms and the ECHR to provide a more stringent review of administrative powers through the use of proportionality. Both Sanchez's account of proportionality in French law and Martinico and Simoncini's account of Italian law also point to the way in which the use of proportionality review reflected a wish to exercise more stringent judicial control over police powers, with a view to ensuring that measures adopted to 'protect public order' should use the least restrictive means when limiting or impinging upon human rights, and particularly the right to freedom of expression. Moreover, as Kokott and Sabotta argue, although proportionality is a general principle of EU law, it is applied more stringently by the European Court of Justice in the field of human rights.

However, it is also clear that there are other areas of the law that tend to attract the application of the principle of proportionality by courts. This is particularly true, for example, as concerns the issue of judicial scrutiny of sanctions. One of the key elements of the historic principle of proportionability discussed in Craig's chapter was the need to ensure that sanctions are proportionate—it is unfair, for example, to punish all sailors equally for the depletion of the cargo of wine during its transit to England, such that no sailor was paid, when it may not be that all of the sailors drank the supplies, nor did those who partook of the wine necessarily drink the equivalent of their wages for the voyage. And although her chapter does

not focus on sanctions per se, Krunke explains how proportionality in Danish law is a principle of criminal law as well as of administrative law, suggesting again that proportionality plays a role in ensuring fair punishment. Sanchez also remarks on how the principle of proportionality has been applied to sanctions cases in French law, pointing out in particular its application to prisoners and the military. Martinico and Simoncini remark on the connection between the principle of proportionality and of equality in Italian administrative law. This connection to equality suggests not only a connection between proportionality and sanctions, but also a possible role for proportionality in ensuring a fair distribution of benefits. This was a clear dimension of the application of the principle of proportionablity in English law, according to Craig's analysis. In addition, concerns about a fair distribution of benefits and burdens is a common theme reflected in the understanding that the principle of proportionality requires that administrative bodies must select the least burdensome means of achieving a particular policy goal. This is evident from the analysis of Italian administrative law, in certain elements of French administrative law applying *le bilan* approach to proportionality, and in its more general application in EU law.

These commonalities suggest that the principle of proportionality should not merely be seen as a legal test particularly suited to judicial review of rights given its tendency to be applied more stringently in cases involving impact on individual rights, not least because, as we have seen in Sanchez's discussion of the recent cases in France following the state of emergency, proportionality can be applied by courts more or less stringently in cases involving adverse impact on individual rights just as it can when it is applied in other contexts. There would also appear to be some connection between the application of a proportionality principle in certain contexts and distributive justice requirements. Whilst it may not be the legitimate task of courts when applying a test of proportionality to ensure the equal distribution of all benefits and burdens resulting from all policy decisions, nevertheless the requirements of proportionality would appear to have clear implications when courts seek to ensure that policies do not excessively breach principles of distributive justice by imposing clearly disproportionate burdens or benefits on particular individuals or particular groups.

## IV. Conclusion

It is clear that proportionality is a multifaceted principle of administrative and constitutional law, having a role to play in the protection of rights and in ensuring distributive justice by challenging excessive inequalities, particularly in relation to burdens imposed but potentially also in relation to benefits conferred. Its flexible and multifaceted nature as a tool of judicial review is illustrated by the different origins and conceptions of proportionality across the legal systems discussed, in addition to the varied influence of the EU and ECHR legal systems. Whilst this

may be seen as an advantage, it does not come without its disadvantages. As Sales sharply notes, the lack of certainty and clarity in the application of proportionality can have consequences for the rule of law. This danger is also remarked upon by Martinico and Simoncini. Moreover, the principle of proportionality, in challenging assumptions about the appropriateness of judicial restraint, may be perceived as having the potential to undermine democratic legitimacy should the judiciary stray too far into the evaluation of policy decisions. This has clearly been a concern in Danish law, where there is a tradition of judicial restraint, and also in English law as reflected in the development of greater deference and a less stringent application of the principle of proportionality, and in the development over time of the margin of appreciation by the European Court of Human Rights. Nevertheless, whilst pointing to the potential problems created by the application and spread of the principle of proportionality as a tool of judicial review, the chapters in this section also suggest some responses to these difficulties in the form of greater dialogue and exchange between judiciaries from different legal systems, in addition to greater academic exchange of ideas and critiques. The chapters in this section are hopefully one step in this process. It is clear that across Europe, and no doubt across other jurisdictions beyond Europe, we still have much to learn from one another about the scope, application and value of the principle of proportionality as a principle of judicial control.