

# *New Zealand Journal of Public and International Law*



VOLUME 11 ■ NUMBER 3 ■ DECEMBER 2013

---

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Carlos Bernal Pulido  
Tim Cochrane  
Amy Dixon  
Justice Teresa Doherty

Matthew Groves  
John Parnell  
Ella Watt

---

NEW ZEALAND JOURNAL OF  
PUBLIC AND INTERNATIONAL LAW

© New Zealand Centre for Public Law and contributors

Faculty of Law  
Victoria University of Wellington  
PO Box 600  
Wellington  
New Zealand

December 2013

The mode of citation of this journal is: (2013) 11 NZJPIL (page)

The previous issue of this journal is volume 11 number 2, December 2013

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

# CONTENTS

The Migration of Proportionality Across Europe <i>Carlos Bernal Pulido</i> .....	483
A General Public Law Duty to Provide Reasons: Why New Zealand Should Follow the Irish Supreme Court <i>Tim Cochrane</i> .....	517
The Case for Publishing OPCAT Visit Reports in New Zealand <i>Amy Dixon</i> .....	553
Habeas Corpus, Justiciability and Foreign Affairs <i>Matthew Groves</i> .....	587
Review and Appeal in Civil Aviation De-Licensing Regimes: A Comparative Study of New Zealand, Australia and Canada <i>John Parnell</i> .....	623
The Application of the New Zealand Bill of Rights Act 1990 to New Zealand State Actors Overseas <i>Ella Watt</i> .....	661
Public Office Holder's Address	
Sexual Violence and the Role of International Courts <i>Justice Teresa Doherty</i> .....	693

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw, Informit and EBSCO electronic databases.

NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Manuscripts should generally not exceed 12,000 words. Shorter notes and comments are also welcome. Authors should see earlier issues of NZJPIL for indications as to style; for specific guidance, see the *New Zealand Law Style Guide* (2nd ed, 2011). Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Regular submissions are subject to a double-blind peer review process. In addition, the Journal occasionally publishes addresses and essays by significant public office holders. These are subject to a less formal review process.

Contributions to NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ\$100 (New Zealand) and NZ\$130 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc  
Gaunt Building  
3011 Gulf Drive  
Holmes Beach  
Florida 34217-2199  
United States of America  
e-mail [info@gaunt.com](mailto:info@gaunt.com)  
ph +1 941 778 5211  
fax +1 941 778 5252

Address for all other communications:

The Student Editor  
New Zealand Journal of Public and International Law  
Faculty of Law  
Victoria University of Wellington  
PO Box 600  
Wellington  
New Zealand  
e-mail [nzjpil-editor@vuw.ac.nz](mailto:nzjpil-editor@vuw.ac.nz)  
fax +64 4 463 6365

# NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

## *Advisory Board*

Professor Hilary Charlesworth  
*Australian National University*

Professor Scott Davidson  
*University of Lincoln*

Professor Andrew Geddis  
*University of Otago*

Judge Sir Christopher Greenwood  
*International Court of Justice*

Emeritus Professor Peter Hogg QC  
*Blake, Cassels and Graydon LLP*

Professor Philip Joseph  
*University of Canterbury*

Rt Hon Judge Sir Kenneth Keith  
*International Court of Justice*

Professor Jerry Mashaw  
*Yale Law School*

Hon Justice Sir John McGrath  
*Supreme Court of New Zealand*

Rt Hon Sir Geoffrey Palmer QC  
*Distinguished Fellow, NZ Centre for  
Public Law/Victoria University of  
Wellington*

Dame Alison Quentin-Baxter  
*Barrister, Wellington*

Professor Paul Rishworth  
*University of Auckland*

Professor Jeremy Waldron  
*New York University*

Sir Paul Walker  
*Royal Courts of Justice, London*

Deputy Chief Judge Caren Fox  
*Māori Land Court*

Professor George Williams  
*University of New South Wales*

Hon Justice Joseph Williams  
*High Court of New Zealand*

## *Editorial Committee*

Professor Claudia Geiringer (Editor-in-  
Chief)

Dr Mark Bennett (Editor-in-Chief)

Amy Dixon (Student Editor)

Professor Tony Angelo

Professor Richard Boast

Associate Professor Petra Butler

Dr Joel Colón-Ríos

Associate Professor Alberto Costi

Dean Knight

Associate Professor Meredith Kolsky

Lewis

Joanna Mossop

Professor ATH (Tony) Smith

Dr Rayner Thwaites

## *Assistant Student Editors*

Hilary Beattie

Harriet Bush

Paul Comrie-Thomson

Stevie-Rae Hart

Elena Mok

William Robertson

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

***Officers***

Director

*Professor Claudia Geiringer*

Associate Director

*Associate Professor Petra Butler*

Associate Director

*Dr Carwyn Jones*

Associate Director

*Dean Knight*

Associate Director

*Dr Rayner Thwaites*

Centre and Events Administrator

*Anna Burnett*

For further information on the Centre and its activities visit [www.victoria.ac.nz/nzcpl](http://www.victoria.ac.nz/nzcpl) or contact the Centre and Events Administrator at [nzcpl@vuw.ac.nz](mailto:nzcpl@vuw.ac.nz), ph +64 4 463 6327, fax +64 4 463 6365.

# THE MIGRATION OF PROPORTIONALITY ACROSS EUROPE

*Carlos Bernal Pulido\**

---

*Proportionality is one of the most successful legal transplants. However, there is disagreement on whether there is any justification for the migration of proportionality across jurisdictions. This article aims to answer this question concerning the migration of proportionality across Europe. Existing literature justifies this migration as a matter of conceptual necessity. The claim is that there is a necessary conceptual connection between constitutional rights and proportionality such that proportionality must be used whenever and wherever constitutional rights adjudication exists. In contrast, this article offers a normative justification for borrowing proportionality. A variety of reasons can justify a migration of proportionality to a new context. However, there is a common denominator between the different migrations, namely, that proportionality is normatively necessary for the adjudication of constitutional rights.*

---

## I INTRODUCTION

The principle of proportionality is a legal standard used around the world for the adjudication of constitutional rights. From its German origins, proportionality has migrated across jurisdictions and areas of law. There are several conceptions of proportionality.<sup>1</sup> However, most courts and scholars understand it as a set of three linked sub-principles: suitability, necessity and balancing (or

---

\* Associate Professor at Macquarie Law School. I presented drafts of this article at three special workshops at the Centre for Legal Governance of Macquarie Law School, the Julius Stone Institute of Jurisprudence at the Sydney Law School and the Melbourne Law School. I should like to thank the participants for helpful suggestions, in particular Adrienne Stone, Lael Weis and Jason White (at Melbourne), Denise Meyerson (at Macquarie), Alec Stone-Sweet (Yale Law School) and Kevin Walton (at Sydney). In addition, I should like to thank Stanley L Paulson (Kiel and St Louis) for valuable comments on earlier drafts of this text on substantive and stylistic matters, Cheryl Saunders (Melbourne) for her very thoughtful criticisms on some of my ideas, and Maria Viana (Sydney) for relevant substantial suggestions. Finally, I should like to thank Claudia Geiringer, Mark Bennett, a reviewer and the copy editor of the NZJPIL for very thoughtful formal and substantial suggestions. Translations of non-English texts are those of the author.

1 On the existence of different conceptions of proportionality, see Bernhard Schlink "Proportionality (1)" in Michel Rosenfeld and Andr s Saj  (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 721. See also Jacco Bomhoff "Genealogies of Balancing as Discourse" (2010) 4 LEHR 108.



proportionality in the narrow sense). Each sub-principle establishes a requirement that any limitation on a constitutional right ought to meet. The sub-principle of suitability requires that the limitation contribute to the achievement of a legitimate end.<sup>2</sup> The sub-principle of necessity requires that the limitation be the least restrictive of all means that are equally suitable to achieve the pursued end. The sub-principle of proportionality in the narrow sense requires that the limitation achieve the pursued end to a degree that justifies the extent of the constraint on the constitutional right.

The use of proportionality has given rise to strongly conflicting views. On the one hand, influential authors embrace proportionality with considerable enthusiasm. David Beatty, for example, claims that proportionality possesses "neutrality", "a capacity for rationality",<sup>3</sup> and the ability to make "the legal concept of rights the best it can possibly be".<sup>4</sup> On this basis, he contends that proportionality is "a universal criterion of constitutionality",<sup>5</sup> the ultimate rule of law,<sup>6</sup> and law's golden rule.<sup>7</sup> Along the same lines, Aharon Barak endorses the view that the constitutionality of every limitation on constitutional rights can only be determined by means of a proportionality analysis<sup>8</sup> and that there is no better alternative to it.<sup>9</sup> Similarly, Robert Alexy maintains that proportionality is unavoidable in the judicial review of limitations on constitutional rights. He argues that this principle provides the only rational way to make a judgement that takes into account both the reasons for limitations on rights and the limited rights as such.<sup>10</sup> Finally, Stephen

---

2 Some scholars and judges consider the two elements of the sub-principle of suitability (the legitimacy of the end, and the factual appropriateness of the limitation to achieve the end) as different sub-principles. Therefore, they maintain that proportionality has four sub-principles: see Alec Stone Sweet and Jud Mathews "Proportionality, Balancing and Global Constitutionalism" (2008) 47 Colum J Transnatl L 72 at 75. See also Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, Cambridge, 2012) at 3; and Aharon Barak "Proportionality (2)" in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 738, at 743. Barak distinguishes between "proper purpose" and "rational connection".

3 David Beatty *The Ultimate Rule of Law* (Oxford University Press, Oxford, 2004) at 171.

4 At 174.

5 At 162.

6 At 185.

7 David Beatty "Law's Golden Rule" in Gianluigi Palombella and Neil Walker (eds) *Relocating the Rule of Law* (Hart Publishing, Oxford, 2009) 99 at 103.

8 See Barak *Proportionality: Constitutional Rights and their Limitations*, above n 2, at 3.

9 At 8.

10 Robert Alexy *A Theory of Constitutional Rights* (Julian Rivers (translator)) (Oxford University Press, Oxford, 2002) at 74.

Gardbaum argues that balancing "appropriately bolsters the role of majoritarian decision-making about rights within a system of constitutional democracy".<sup>11</sup>

On the other hand, in older writings as well as several articles published during the last decade, proportionality is the target of scorn.<sup>12</sup> Stavros Tsakyrakis holds that this principle is "an assault on human rights", and "a misguided quest for precision and objectivity".<sup>13</sup> Grégoire Webber deplores that proportionality has created an unjustified "cult of constitutional rights scholarship" that has led to an excessively individualistic conception of rights and a correlative devaluation of popular legislation.<sup>14</sup> Some authors and judges denounce balancing as irrational. Other writers condemn the use of proportionality as subverting the priority of constitutional rights as constraints against the exercise of political power. Jürgen Habermas, for instance, maintains that this principle undermines the "firmness" of constitutional rights by requiring that sometimes they be outweighed by other legally protected interests.<sup>15</sup> Finally, a common concern is that proportionality allows the judiciary to interfere illegitimately with the competences of Parliament and the public administration. For example, Lord Ackner in *R v Secretary of State for the Home Department, ex parte Brind* argued that by employing proportionality, judges and courts cannot avoid performing an "inquiry into and a decision upon the merits".<sup>16</sup> In a democracy, decisions of this kind ought to be made only by political authorities.

According to Mattias Kumm, along with judicial review, proportionality is "the most successful legal transplant of the twentieth century".<sup>17</sup> However, this profound disagreement on the appropriateness of proportionality as a standard for the adjudication of constitutional rights raises the question whether there is any justification for the migration of proportionality across jurisdictions and

---

11 Stephen Gardbaum "A Democratic Defense of Constitutional Balancing" (2010) 4 LEHR 78.

12 On familiar objections to the balancing tests in American constitutional law, see Thomas Alexander Aleinikoff "Constitutional Law in the Age of Balancing" (1987) 96 Yale LJ 943.

13 Stavros Tsakyrakis "Proportionality: An Assault on Human Rights" (2009) 7 ICON 468.

14 Grégoire Webber "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23 CJLJ 179 at 180 and 190–191; and Grégoire Webber *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, Cambridge, 2009) at 88.

15 Jürgen Habermas *Between Facts and Norms* (William Rehg (translator)) (MIT Press, Cambridge (Mass), 1996) at 254. For a thoughtful analysis of this issue, see Mattias Kumm "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of Proportionality Requirements" in George Pavlakos (ed) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing, Oxford, 2007) 131.

16 *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL) at 762.

17 Mattias Kumm "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice" (2004) 3 ICON 595.

contexts. This question is also relevant because of the existing concerns about borrowing<sup>18</sup> constitutional ideas, in general.<sup>19</sup>

Whether the migration of proportionality is justified depends on two factors. First, whether there is any justification, in the abstract, for the use of proportionality. Second, whether there is any justification for the concrete transplantation of proportionality from foreign law into a given jurisdiction, at a certain time, and in a specific area of law (for instance, the adjudication of constitutional rights, the control of public administration or the enforcement of international treaties).

Up to the present, the most relevant literature in national and comparative constitutional law has focused on the analysis of the first factor, that is whether proportionality may be justified in the abstract. The abstract justification of the use of proportionality is usually associated with the possibility of giving a positive answer to three questions: rationality, legitimacy and priority. The rationality question is whether there can be a rational use of proportionality. The legitimacy question is whether courts have legitimate constitutional authority to employ this standard. Finally, the priority question is whether the application of proportionality enables courts to preserve the priority of constitutional rights within the legal system. In brief, there is abstract justification for judges to use proportionality if there can be a rational and legitimate way of applying this standard which simultaneously preserves the priority of constitutional rights.

Robert Alexy and Aharon Barak have introduced comprehensive models of proportionality that aim to meet the requirements of an abstract justification for its employment.<sup>20</sup> Other authors have

---

18 Despite the criticisms, this essay will use the widely accepted concept of constitutional borrowing for the purpose of referring to the adoption of foreign constitutional institutions or standards, such as proportionality. On the problems of "constitutional borrowing", see Kim Lane Scheppele "Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models" (2003) 1 ICON 296.

19 On these concerns, see Sujit Choudhry "Migration as a New Metaphor in Comparative Constitutional Law" in Sujit Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge, 2007) 1 at 7.

20 Robert Alexy introduced the core elements of his model in the original (German) publication of *A Theory of Constitutional Rights*, and then further developed the model in the postscript to the English translation of the work: see generally Alexy *A Theory of Constitutional Rights*, above n 10, generally and at 388–425. The most relevant developments in the postscript are the logical analysis of balancing by means of the "weight formula" (at 408, n 64) and the theories of discretion (at 394–397 and 414–425). Alexy further developed the weight formula in "The Weight Formula" in Jerzy Stelmach, Bartosz Brożek and Wojciech Załuski (eds) *Studies in the Philosophy of Law III: Frontiers of the Economic Analysis of Law* (Jagiellonian University, Kraków, 2007) 9. Barak's model takes basic elements from Alexy's conception of proportionality. Nonetheless, Barak disagrees with Alexy in substantial aspects that I cannot discuss here. His proposal concerning the structure of proportionality mirrors this disagreement: see Aharon Barak "Proportionality and Principled Balancing" (2010) 4 LEHR 8; Barak "Proportionality (2)", above n 2; and Barak *Proportionality: Constitutional Rights and their Limitations*, above n 2, at 243–455.

introduced variations of these models<sup>21</sup> and have justified the use of proportionality both in the abstract and in the context of specific jurisdictions by highlighting the advantages of this standard and replying to significant objections.<sup>22</sup>

In contrast to the existing literature, this article focuses on the second factor. Legal methods, much like proportionality, can be the object of constitutional borrowing and there must certainly be a connection between the abstract justification of a legal method and the justification of its migration. A valid reason for borrowing a legal method is derived from its rationality and legitimacy. Nevertheless, reasons justifying the use of a legal method, in abstract, or its concrete employment in its original context, cannot in itself be used to justify its migration. Constitutional law is, in part, an expression of national particularity.<sup>23</sup> This is true not only of constitutional provisions but also of methods of constitutional interpretation. Legal methods are entrenched in the attitudes and background knowledge of officials and lawyers in each constitutional culture. Furthermore, they can also partly determine the meaning of constitutional rules. Consequently, they have an undeniable influence on the definition of the scope of state powers and on the content of constitutional rights. As such, the borrowing of constitutional concepts and methods raises significant concerns. Radical opponents maintain that this sort of borrowing is undemocratic. They claim that it privileges foreign interests and ideologies and allows judges to manipulate the meaning and effect of constitutional norms. This would be at odds with the integrity of judicial procedures and the democratic principle which holds that constitutional norms should exclusively represent the will of the people.<sup>24</sup> Less extreme critics are sceptical of whether borrowed foreign constitutional concepts and methods can actually fit into the recipient political, social, cultural and legal contexts.<sup>25</sup>

---

21 Accounts of proportionality that enhance Alexy's model, or represent variations of it, can be found in Matthias Klatt and Moritz Meister *The Constitutional Structure of Proportionality* (Oxford University Press, Oxford, 2012) at 7–14 and 45–85; Carlos Bernal *El principio de proporcionalidad y los derechos fundamentales* (3rd ed, Centro de Estudios Políticos y Constitucionales, Madrid, 2007) (translation: *Proportionality and Constitutional Rights*) at ch 6; Carlos Bernal "The Rationality of Balancing" (2006) 92 *Archiv für Rechts- und Sozial Philosophie* 195; and Laura Clérico *Die Struktur der Verhältnismäßigkeit* (Nomos, Baden–Baden, 2002) (translation: *The Structure of Proportionality*).

22 On relevant literature on the advantages of proportionality and replies to criticism, see below: Part III.D. 2.

23 See Vicki C Jackson "Being Proportional about Proportionality" (2004) 21 *Const Commentary* 857.

24 On these arguments, in particular the attitudes to foreign sources of the judges of the United States Supreme Court during 2003 and 2004, see Choudhry, above n 19, at 7. See also Cheryl Saunders "The Use and Misuse of Comparative Constitutional Law: The George P Smith Lecture in International Law" (2006) 13 *Ind J Global Legal Studies* 37.

25 See Vlad Perju "Constitutional Transplants, Borrowing, and Migrations" in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 1321.

Thus, the reasons used to justify the use of proportionality in the abstract do not justify per se its migration across jurisdictions and areas of law. Moreover, while there are some politico-scientific explanations of the spread of proportionality around the world,<sup>26</sup> there is not sufficient analysis of whether its migration is justified. An analysis of this should answer two central questions. First, what reasons might justify the constitutional borrowing of proportionality,<sup>27</sup> and not of alternative standards.<sup>28</sup> Second, whether these reasons outweigh the concerns associated with borrowing constitutional methods.

This article aims to provide an answer to these questions concerning the migration of proportionality across Europe. Existing literature seems to justify the migration of proportionality as a matter of conceptual necessity. The conceptual necessity thesis claims that there is a necessary conceptual connection between constitutional rights and proportionality such that proportionality must be used whenever and wherever constitutional rights adjudication exists. In contrast to this thesis, this article offers a normative justification for borrowing proportionality. The main claim is twofold. A variety of reasons can justify every migration of proportionality to a new context. However, there is a common denominator between the different migrations, namely, that proportionality is normatively necessary for the adjudication of constitutional rights.

This inquiry has great significance, both practically and theoretically. On the one hand, were there no justification for the migration of proportionality, countries that have not yet engaged in the practice of proportionality would have a strong reason not to begin.<sup>29</sup> On the other hand, this investigation provides a case study for the analysis and assessment of the migration of constitutional ideas. Thus, it advances knowledge for the construction of a theory of constitutional borrowing.<sup>30</sup> Furthermore, it purports to contribute to the constitutional comparative law goal of developing a

---

26 See Sweet and Mathews, above n 2, at 175–210.

27 As Vlad Perju highlights, any kind of constitutional borrowing necessitates normative justification: see Perju, "Constitutional Transplants, Borrowing, and Migrations", above n 25, at 1321.

28 On the analysis of the reasons for borrowing certain constitutional institutions and not borrowing others for the purpose of understanding and assessing constitutional design, see Lee Epstein and Jack Knight "Constitutional Borrowing and Nonborrowing" (2003) 1 ICON 196.

29 For instance, in Australia, the reference to this principle by the High Court in the recent judgments of *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1; and *Wotton v Queensland* [2012] HCA 2, (2012) 246 CLR 1 reignited the discussion on whether proportionality should be accepted as a standard in judicial practice. It was held that, if there is no justification for borrowing proportionality, this question should be answered in the negative.

30 On the lack of such a theory and the importance of construing it, see Ran Hirschl "On the Blurred Methodological Matrix of Comparative Constitutional Law" in Sujit Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge, 2007) 43.

reflection on what the "normatively preferable best practices" are.<sup>31</sup> The relevant question at the heart of this inquiry is whether proportionality belongs to the group of best practices within the field of constitutional rights adjudication.

This article will proceed in two parts with different but interlocking agendas and methodologies. The first Part will account for the spread of proportionality across Europe in six migrations.<sup>32</sup> Naturally, building this account requires the use of certain simplifying assumptions. The six paths, describing the way in which proportionality passed through different jurisdictions and areas of law, are neither unidirectional nor exclusive. However, this simplification assists an understanding of certain trends associated with the justification of borrowing proportionality and the commonalities between them. The second Part has a normative agenda. It assesses the different justifications of the concrete borrowing of proportionality in the six studied migrations. It also evaluates the conceptual necessity thesis and highlights its weaknesses. The second Part then establishes the main claim of the essay: that a common denominator between the different migrations is the normative necessity of proportionality for the adjudication of constitutional rights.

## **II SIX MIGRATIONS OF PROPORTIONALITY ACROSS EUROPE**

### **A *The First Migration: From Political Philosophy to the Prussian Law Applicable to the Police Force***

The core idea underlying proportionality is that limitations on constitutional rights must not be excessive or go beyond what is necessary. This idea first arose in political philosophy during the Enlightenment alongside the explanation of the origin of the state and the justification of limits on its power. Philosophers endorsing the contractual theory of natural law claimed that human beings are endowed with liberty and that liberty preceded all political associations. According to Locke, whose work was ground-breaking in this field, in the state of nature every human being is "master of himself and proprietor of his own person".<sup>33</sup> He may exercise liberty without constraints. However, in this "lawless state of savagery" – as Kant called it – human beings are constantly susceptible to seeing their liberty usurped by the law of the survival of the fittest.<sup>34</sup> Thus, individuals are compelled to join in a civil pact whereby they subject the exercise of their liberties to restrictions

---

31 On this aim of comparative constitutional law, see Vicki Jackson "Comparative Constitutional Law: Methodologies" in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 70.

32 On the relevance of accounting for the historical migration of constitutional ideas as a method of analysis in comparative constitutional law: see Jackson, above n 31, at 59.

33 John Locke *Two Treatises of Government: Book II* (Cambridge University Press, Cambridge, 1988) at 298.

34 Immanuel Kant "Idea for a Universal History with a Cosmopolitan Purpose" in Hans Reiss (ed) *Kant: Political Writings* (HB Nisbet (translator)) (Cambridge University Press, Cambridge, 1991) 47.

imposed by laws of the state. In exchange, the state accords protection to their lives, their liberty and their property.

Three basic politico-philosophical assumptions grounding proportionality stem from this familiar justification of the state. First, liberty should be protected in civil society as something inherent to the individual. Second, the state has the power to limit liberty in order to fulfil claims deriving from the rights of others and the common good. These two assumptions give rise to a "liberty paradox", whereby the state is empowered to limit liberty and, at the same time, liberty ought to be protected from limitations. This paradox is to be solved by means of a third assumption. The state has the power to limit liberty only where it is necessary and only to the extent that it is required for fulfilling claims deriving from the rights of others<sup>35</sup> or the common good.<sup>36</sup> A corollary of these assumptions is that the broadest possible enjoyment of liberty ought to be a general rule and that state limitations on liberty ought to be exceptional with their effects restricted to only what is required.

These assumptions ground the claim that state limitations upon individual liberties ought to be proportionate. One of the earliest instantiations of this claim stems from Cesare Beccaria's claim of the need for proportionality vis-à-vis criminal punishments.<sup>37</sup> Article 8 of the Declaration of the Rights of Man and of the Citizen, approved by the National Assembly of France on 26 August 1789, subsequently recognised this as a right.<sup>38</sup>

---

35 According to Kant: "All law consists solely in the restriction of the freedom of others, with the qualification that their freedom can co-exist with my freedom within the terms of a general law". See Immanuel Kant "On the Common Saying: This May be True in Theory, but it does not Apply in Practice" in Hans Reiss (ed) *Kant: Political Writings* (HB Nisbet (translator)) (Cambridge University Press, Cambridge, 1991) at 75–76.

36 John Locke claims that the power of the legislature is "limited to the public good of Society": see Locke, above n 33, at 357.

37 Cesare Beccaria *Crimes and Punishments* (James Anson Farrer (translator)) (2nd ed, Chatto & Windus, London, 1880) at 196. He writes that:

The more opposed therefore that crimes are to the public welfare, and the more numerous the incentives to them, the stronger should be the repellent obstacles. This principle accordingly establishes the necessity of a certain proportion between crimes and punishments.

The claim to proportionality of criminal punishments had already been accepted in ancient philosophy and Roman law. On this acceptance, see Franz Wieacker "Geschichtliche Wurzeln des Prinzips der Verhältnismäßigen Rechtsanwendung" in Marcus Lutter, Walter Stimpel and Herbert Wiedemann (eds) *Festschrift für Robert Fischer* (Walter de Gruyter, Berlin, 1979) 867 (translation: "Historical Roots of the Proportional Adjudication in Law" in *Festschrift for Robert Fischer*).

38 This article states that: "The law shall provide for such punishments only as are strictly and obviously necessary".

However, it was only in the eighteenth century Prussian law applicable to the police force (*Polizeirecht*) that proportionality first arose as a legal – and not just as a politico-philosophical – standard to solve the liberty paradox.<sup>39</sup> Section 10, pt II, Title 17 of the codification of Prussian Law (*Allgemeines Landrecht für die Preußischen Staaten*) of 1794 stated that "the police ought to take the measures necessary for the maintenance of the public peace, security and order...".

The work by Carl Gottlieb von Svarez, who outlined the ideas underpinning proportionality, was highly influential in the issuance and interpretation of this provision, which later came to be considered as a fundamental principle of Prussian administrative law.<sup>40</sup> Von Svarez claimed that "the first principle of public law" was that "the state is entitled to restrict private freedom only if it is necessary for rendering compatible liberty and security".<sup>41</sup> He also endorsed the view that the legitimacy of any state limitation on individual liberties ought to depend on its intensity and on its ability to achieve the end pursued by the public authority.<sup>42</sup> Not every end entitles political powers to limit individual liberties. An entitlement of this sort might be greater where the state is attempting to prevent harm or to reduce the risk of a pressing danger – in other words, where it is performing a defensive role – than where it is seeking to "promote the welfare of the community, or beauty, or to sponsor other secondary goals of a similar nature".<sup>43</sup> Finally, von Svarez also wrote that "[t]he damage avoided by restricting liberty ought to be deemed more important than the disadvantage felt by the community and private individuals as a result of such a restriction",<sup>44</sup> which outlines the content of proportionality in the narrow sense.

---

39 For an overview of the political and legal context of the Prussian law governing police power during the eighteenth century, see Michael Stolleis *Geschichte des öffentlichen Rechts in Deutschland: Volume 1* (CH Beck, Munich, 1988) at 386 (translation: *History of Public Law in Germany*).

40 On proportionality as a principle of the Prussian law governing police power and later throughout the whole German administrative law, see Adolf Julius Merkl *Allgemeines Verwaltungsrecht* (Springer, Vienna and Berlin, 1927) at 249 (translation: *General Administrative Law*).

41 Carl Gottlieb von Svarez "Vorträge über Recht und Stadt" in Hermann Conrad and Gerd Kleinheyer (eds) *Wissenschaftliche Abhandlungen der Arbeitsgemeinschaft für Forschung des Landes Nordrhein-Westfalen* (Westdeutscher Verlag, Cologne, 1960) at x (translation: "Lectures on Law and the State" in *Scientific Discussions of the Research Society of Nordrhein/ Westfalen*).

42 On this claim, which became the foundation for the sub-principle of suitability, and its development in Prussian law governing police power, see also Barbara Remmert *Verfassungs und verwaltungsrechtsgeschichtliche Grundlagen des Übermaßverbotes* (CF Müller, Heidelberg, 1995) at 200 (translation: *Constitutional and Administrative Historical Foundations of the Prohibition of Excess*).

43 Svarez, above n 41, at x.

44 At 486.



## ***B The Second Migration: The Expansion within Administrative Law***

Ever since its genesis in the Prussian law governing police power, proportionality has grown and has been expanded within European public law. This principle acquired relevance in wide-ranging areas of Prussian administrative law during the nineteenth century. An important factor in this expansion, linked to the liberty paradox, was the general acceptance of the idea that state actions ought to be respectful of individuals' natural liberties and that the intensity of each and every limitation on them ought to reflect a legitimate purpose. For instance, Otto Mayer wrote at the end of the nineteenth century that "natural rights demand that the use of police powers by the government be proportionate".<sup>45</sup> For the purpose of controlling this kind of proportionality, the courts began to protect liberty in the form of natural or individual rights. The institutionalisation of an independent administrative jurisdiction, namely, the Higher Prussian Administrative Court (*Oberverwaltungsgericht*), also contributed to the development of proportionality. This court began operating in 1875 and assiduously invoked the violation of proportionality as a reason for overturning coercive measures that excessively limited individual rights.<sup>46</sup> The Higher Prussian Administrative Court understood proportionality mainly as a sub-principle of necessity; that is, as a test related to the least restrictive means.<sup>47</sup> Because of these factors, at the end of the nineteenth and the beginning of the twentieth century, proportionality became a general principle of administrative law in Germany.<sup>48</sup>

After the enactment of the Basic Law of the Federal Republic of Germany (1949), Rupprecht von Krauss spelled out for the first time proportionality as a linked set of the sub-principles of suitability, necessity and proportionality in the narrow sense.<sup>49</sup> Peter Lerche further developed the

---

45 Otto Mayer *Deutsches Verwaltungsrecht* (1895): Volume 1 (Dunker & Humblot, Berlin, 2004) at 267 (translation: *German Administrative Law*).

46 For a detailed historical account of the evolution of proportionality during the eighteenth and nineteenth centuries, see Remmert, above n 42, at 200; and Peter Lerche *Übermaß und Verfassungsrecht. Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit* (Carl Heymanns, Cologne, 1961) at 234 (translation: *Prohibition of Excessive Regulation and Constitutional Law. On the Subjection of the Legislature to the Principles of Proportionality and Necessity*).

47 On the use of proportionality by the Prussian Higher Administrative Court, see Klaus Stern "Zur Entstehung und Ableitung des Übermaßverbots" in Peter Badura and Rupert Scholz (eds) *Wege und Verfahren des Verfassungslebens. Festschrift für Peter Lerche zum 65 Geburtstag* (CH Beck, Munich, 1993) 168. (translation: "On the Origin and Derivation of the Prohibition on Excess" in *Ways and Procedures of Constitutional Life. Festschrift for Peter Lerche on his Sixty-fifth Birthday*).

48 Lothar Hirschberg *Der Grundsatz der Verhältnismäßigkeit* (Otto Schwartz & Co, Göttingen, 1981) at 4 (translation: *The Principle of Proportionality*).

49 See Rupprecht von Krauss *Der Grundsatz der Verhältnismäßigkeit. In seiner Bedeutung für die Notwendigkeit des Mittels im Verwaltungsrecht* (Appel, Hamburg, 1955) at 14 (translation: *The Principle of Proportionality. Its Significance regarding the Necessity of the Means in Administrative Law*).

structure of proportionality.<sup>50</sup> However, Lerche divided proportionality, which he called "prohibition of excess", into only two sub-principles: necessity and proportionality in the narrow sense. He deemed the requirements of the sub-principle of suitability to be implicit in the other two sub-principles. These initial conceptual statements of proportionality would become enormously influential in the case law. Since the Second World War, German and Swiss administrative judges have actively employed proportionality in the course of reviewing the constitutionality and legality of acts of public administration.<sup>51</sup>

During the last 60 years, one European country after another has adopted the German doctrine of proportionality in the various fields of administrative law that protect individual rights as constitutional or as legal rights. To mention just three instances of this development: French, Italian and Spanish judges employ this principle as their standard for the judicial review of administrative acts, especially when these acts involve the exercise of discretionary powers limiting individual rights.<sup>52</sup> Although there is no provision institutionalising proportionality in French administrative law and the principle is not usually mentioned explicitly in the jurisprudence, administrative judges will very often apply it implicitly.<sup>53</sup> The judicial review that is exercised through the standards of

---

50 See Lerche, above n 46, at 19.

51 On the role that proportionality has played in German administrative law since 1949, see Hans Henning Lohmann "Die Praktikabilität des Gesetzesvollzugs als Auslegungstopos im Verhältnismäßigkeit" (1975) 100 AöR 415 (translation: "The Practicability of the Application of Legislation as a Technique of Interpretation in Proportionality"); Michael Jakobs *Der Grundsatz der Verhältnismäßigkeit* (Heymanns, Cologne, 1985) at 97 (translation: *The Principle of Proportionality*); and Erich Dahlinger "Gilt der Grundsatz der Verhältnismäßigkeit auch im Bereich der Leistungsverwaltung?" [1966] Die Öffentliche Verwaltung 818 (translation: "Is the Principle of Proportionality also Valid in the Field of Administrative Law Concerning the Welfare State?"). On the role of this principle in Swiss administrative law, see Hans Huber "Über den Grundsatz der Verhältnismäßigkeit im Verwaltungsrecht" in Marcus Lutter, Walter Stimpel and Herbert Wiedemann (eds) *Festschrift für Robert Fischer* (Walter de Gruyter, Berlin, 1979) 1 (translation: "On the Principle of Proportionality in Administrative Law" in *Festschrift for Robert Fischer*).

52 On the use of proportionality as a standard to review the exercise of discretionary powers in France, see Xavier Philippe *Le Contrôle de Proportionnalité dans les Jurisprudences Constitutionnelle et Administrative Françaises* (Économica, Aix-en-Provence, 1990) at 261 (translation: *Proportionality Review in French Constitutional and Administrative Case Law*). Philippe stresses the fact that, thanks to its "versatility", proportionality simplifies the judicial review of the exercise of discretionary powers, for it enables the judge to establish a balance between the exercise of discretion and the subjection of the authorities to the law.

53 On the implicit use of proportionality in French administrative law, Philippe points out that "the French judge – administrative or ordinary – has always preferred to avoid the term [proportionality] and apply the content or essence thereof, having recourse to similar notions, paraphrasing, or synonyms". The author maintains, nevertheless, that a change in this trend began to be noted in the last decade of the twentieth century, as a result of the influence that decisions by the European Court of Human Rights and the European Court of Justice had on French judges, leading the latter to make explicit and direct references to proportionality: see Xavier Philippe "El principio de proporcionalidad en el derecho público francés" (1998) 5 Cdp 256 (translation: "The Principle of Proportionality in French Public Law").

abuse of power, manifest error, necessity of the act and the balance of the costs and benefits of acts by the state essentially incorporates proportionality reasoning.<sup>54</sup> In Italian administrative law, courts now apply this principle automatically. Nevertheless, proportionality is still sometimes regarded as an element of reasonableness, coherence, suitability, or equality and excess of power, all of which are criteria that are used for judicial review of administrative acts.<sup>55</sup> Finally, proportionality has also become a general principle in Spanish administrative law, a field in which the German legal tradition has long been influential.<sup>56</sup>

### ***C The Third Migration: From Pre-War German Administrative Law to Post-War German Constitutional Law***

The use of proportionality has evolved in Europe in a more remarkable way within the field of constitutional law. Chapter one of the German Basic Law institutionalised liberty by means of a set of constitutional rights. At the same time, it empowered political authorities to limit these rights and created a Constitutional Court with the function of reviewing the constitutionality of limitations on these rights. In this way, the liberty paradox was instantiated in the field of constitutional rights.

Not so many years after the enactment of the Basic Law, the German Constitutional Court began to apply proportionality as a standard to solve this paradox. As Alec Stone Sweet and Jud Mathews maintain, writing from the point of view of political science, several facts explain why the Court began to apply this principle.<sup>57</sup> First, the core elements of proportionality were already present in

---

54 See George Xynopoulos *Le Contrôle de Proportionnalité dans le Contentieux de la Constitutionnalité et de la Legalité en France, Allemagne et Angleterre* (LGDJ, Paris, 1995) (translation: *Proportionality in French Constitutional and Administrative Review*) at 64; Guy Braibant "Le Principe de Proportionnalité" in *Mélanges Offerts à Marcel Waline, le Juge et le Droit Public* (LGDJ, Paris, 1974) (translation: "The Principle of Proportionality" in *Essays in Honour of Marcel Waline, the Judge and the Public Law*); and Francis Teitgen "Le Principe de Proportionnalité en Droit Français" in *Deutsche Sektion der Internationalen Juristen-Kommission* (ed) *Der Grundsatz der Verhältnismäßigkeit in Europäische Rechtsordnungen* (CF Müller, Heidelberg, 1985) 61 (translation: "The Principle of Proportionality in French Law" in *The Principle of Proportionality in European Legal Orders*).

55 See Stefano Villamena *Contributo in tema di proporzionalità amministrativa: ordinamento comunitario, italiano e inglese* (Giuffrè, Milan, 2008) (translation: *A Contribution to the Subject of Administrative Proportionality in European, Italian and English Law*); Diana Urania Galletta *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo* (Giuffrè, Milan, 1998) (translation: *The Principle of Proportionality and Judicial Review in Administrative Law*); Aldo Sandulli *La proporzionalità dell'azione amministrativa* (Cedam, Padua, 1998) (translation: *Proportionality of administrative action*); and Aldo Sandulli "Eccesso di Potere e Controllo di Proporzionalità. Profili Comparati" (1995) 2 RTDP 360 (translation: "Excess of Power and Proportionality Review. Comparative Perspectives").

56 See generally Daniel Sarmiento Ramírez-Escudero *El control de proporcionalidad de la actividad administrativa* (Tirant Lo Blanch, Valencia, 2004) (translation: *Proportionality Review of Administrative Action*); and José Ignacio López González "El principio de proporcionalidad en derecho administrativo" (1998) 5 Cdp 143 (translation: "The principle of proportionality in administrative law").

57 Sweet and Mathews, above n 2, at 108.

German legal culture. Second, law professors acquainted with this principle dominated the German Constitutional Court. Finally, owing to the general determination of the German people to distance themselves from the Nazi era, the Court enjoyed enormous legitimacy in its commitment to protect constitutional rights. It is also worth noting that the Basic Law similarly entrenched this commitment. The Basic Law not only guaranteed a bill of rights (arts 1 to 19, 20.4, 33, 38, 101, 103 and 104) and created the German Constitutional Court (arts 93 and 94) but also institutionalised two kinds of procedures for constitutional review. There is a procedure for abstract constitutional review of legislation (art 93(1) n 2), and a procedure for concrete constitutional review by means of the question of unconstitutionality (art 100.1) and of the so-called constitutional complaint (*Verfassungsbeschwerde*, art 93(1) n 4a).<sup>58</sup>

In its decision regarding the Pharmacies Case (*Apothekenurteil*) (11 June 1958), the German Constitutional Court stated for the first time its doctrine on proportionality.<sup>59</sup> In this case, a citizen, through a constitutional complaint based on an alleged violation of the freedom of professional choice, objected to a decision by the Upper Bavarian (*Oberbayern*) Government that was based on art 3.1 of a statute regulating pharmacies in Bavaria.<sup>60</sup> The plaintiff held the view that the Government's refusal to grant him permission to open a pharmacy in Traunreut violated his freedom of professional choice as guaranteed under art 12.1 of the Basic Law. The aforementioned statute set forth the requirements that any applicant had to meet before a new pharmacy may be opened. Included among these requirements was a rating of the applicant, matters concerning sanitation and also concerning economic conditions and circumstances of commercial competition with other pharmacies. The administrative decision, the target of the objection, was based strictly on the terms of this legal regulation. The Upper Bavarian Government contended that the opening of a new pharmacy at the place requested by the applicant was not in the public interest and that it would reduce the potential profits of existing pharmacies by 40 per cent, owing to an insufficient demand

---

58 The constitutional complaint is a specific procedure for protecting constitutional rights. It enables any individual to file a complaint alleging that his or her constitutional rights were violated. This procedure makes it possible for the constitutional courts of the *Länder* or states and the German Constitutional Court to control the proportionality of limitations on constitutional rights in situations that concern specific individuals.

59 The German Constitutional Court had made a short mention of this principle six years before in a case concerning a law of the state of North Rhine Westphalia regulating elections: see (1952) 1 BVerfGE 167 at 178 (German Constitutional Court). See also Dieter Grimm "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 UTLJ 385.

60 Art 3.1 of the Bavarian Law of Pharmacies of 16 June 1952: "(1) Permission to carry on business can only be given for a new pharmacy if: a) it is in the public interest that the pharmacy should be established in order to secure the provision of the public with medicines, and b) it is to be assumed that the economic basis of the pharmacy is ensured and the economic basis of neighbouring pharmacies is not impaired by it to such an extent that the prerequisites for a proper pharmacy business are no longer ensured. The permission can be combined with a condition that the pharmacy is to be established in a certain location in the interests of uniform provision of medicine".

for pharmaceutical products in that area. The new pharmacy would, therefore, not only be unviable but its opening would also endanger those in the area. With an eye to a solution in this case, the German Constitutional Court submitted art 3.1 of the Bavarian statute to constitutional review and declared it unconstitutional. After a historical summary of the reasons for the need to publicly regulate the opening and operation of pharmacies, which provided the legal basis for the limitation on the constitutional right, and after taking into account the nature and content of the right to choose and exercise a profession, the Constitutional Court referred to proportionality as the appropriate standard to arrive at a correct decision. The Court maintained that the greater the extent of the limitation on the right to choose and exercise a profession, the greater the public interest must be to justify the limitation.<sup>61</sup> The Court also stated that the sphere of individual freedom may only be restricted by the least restrictive means,<sup>62</sup> and it established the theory of the levels of legislative limitations on constitutional rights. According to this theory:<sup>63</sup>

The legislator may regulate Article 12.1 of the Basic Law only by the means representing the least limitation on the freedom of professional choice, and may progress to the next level only when it is highly likely that the feared dangers cannot be effectively offset by means of the constitutional measures stated at the preceding level.

The decision by the German Constitutional Court in *Apothekenurteil* marked the beginnings of a development whereby proportionality established itself as the cornerstone for the adjudication of constitutional rights in Germany. In 1963, in a case concerning the right to physical integrity, the Court stated that proportionality ought to be applied in all cases where the state limits the "sphere of freedom".<sup>64</sup> The Court has repeated and developed this idea in countless subsequent decisions.<sup>65</sup> According to this jurisprudence, any limitation on a constitutional right that fails to meet the requirements of proportionality ought to be declared unconstitutional.<sup>66</sup>

---

61 *Apothekenurteil* (1958) 7 BVerfGE 377 (German Constitutional Court) at 408.

62 At 405.

63 At 409.

64 (1963) 16 BVerfGE 194 (German Constitutional Court) at 201.

65 On the leading judgments of the German Constitutional Court relating to proportionality in the adjudication of constitutional rights, see Lothar Michael "Grundfälle zur Verhältnismäßigkeit" (2001) 9 JuS 866 (translation: "Leading Cases on Proportionality").

66 On the role of proportionality in present-day German law in the field of the adjudication of constitutional rights, see generally Alexy *A Theory of Constitutional Rights*, above n 10, at 66–69 and 394–414; Robert Alexy "Balancing, Constitutional Review and Representation" (2005) 3 ICON 572; Clérico, above n 21; and Martin Borowski *Grundrechte als Prinzipien: Die Unterscheidung von prima facie – Position und definitiver Position als fundamentaler Konstruktionsgrundsatz der Grundrechte* (2nd ed, Nomos, Baden-Baden, 2007) (translation: *Constitutional Rights as Principles: The Difference between prima facie Position and definitive Position as fundamental Principle for the Construction of Constitutional Rights*).

### ***D The Fourth Migration: From German Constitutional Law to European Union Law and European Human Rights Law***

The European Court of Human Rights<sup>67</sup> and the European Court of Justice<sup>68</sup> have followed the German approach. The European Court of Human Rights uses proportionality as the standard to determine whether states' limitations on individual rights protected by the European Convention of Human Rights are in breach of the Convention. Within this context, proportionality is especially relevant in determining whether states have overstepped the so-called "margin of appreciation"; that is, the space of discretion that they have for implementing European Convention rights, taking into account the particular national circumstances. The European Court of Justice applies proportionality as its standard in reviewing two kinds of measures: measures taken by the institutions of the European Union and measures taken by the state members. Within this field proportionality is used, in particular, to provide a solution to issues associated with the legality of state measure limitations on the "four fundamental freedoms" of the European Union (freedom of movement of goods,

---

67 On the role of proportionality in the case law of the European Court of Human Rights, see Yukata Arai-Takahashi *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerpen, 2001); Jeremy McBride "Proportionality and the European Convention on Human Rights" in Evelin Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) 23; George Letsas "Two Concepts of the Margin of Appreciation" (2006) 26 OJLS 711; Steven Greer "Constitutionalizing Adjudication under the European Convention on Human Rights" (2003) 23 OJLS 409; Sébastien van Drooghenbroeck *La proportionnalité dans le droit de la convention européenne des droits de l'homme* (Bruylant, Brussels, 2001) (translation: *Proportionality in the law concerning the European Convention of Human Rights*); Josefa Fernández Nieto *La aplicación judicial europea del principio de proporcionalidad* (Dykinson, Madrid, 2009) (translation: *Adjudicating proportionality in Europe*); and Bardo Fassbender "El principio de proporcionalidad en la jurisprudencia de la Corte Europea de Derechos Humanos" (1998) 5 Cdp 52 (translation: "The principle of proportionality in the case law of the European Court of Human Rights").

68 On the role of proportionality in the case law of the European Court of Justice, see Takis Tridimas *The General Principles of EU Law* (Oxford University Press, Oxford, 2006) at chs 3, 4 and 5; Nicholas Emiliou *The Principle of Proportionality in European Law, A Comparative Study* (Kluwer Law International, Cambridge (Mass), 1996) at chs 4, 5, 6 and 7; Francis G Jacobs "Recent Developments in the Principle of Proportionality in European Community Law" in Evelin Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) 1; Tor-Inge Harbo "The Function of the Principle of Proportionality in EU Law" (2010) 16 ELJ 171; Oliver Koch *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (Dunker & Humblot, Berlin, 2003) (translation: *The Principle of Proportionality in the Case Law of the European Court of Justice*); Angelika Emmerich Fritsche *Der Grundsatz der Verhältnismäßigkeit als Direktive und Schranke der EG – Rechtsetzung* (Dunker & Humblot, Berlin, 2000) (translation: *The Principle of Proportionality as Directive and Limit of the European Community Law Implementation*) at 96; and Anna N Georgiadou "Le Principe de la Proportionnalité dans le Cadre de la Jurisprudence de la Court de Justice de la Communauté Européenne" (1995) 4 ARSP 532 (translation: "The Principle of Proportionality in the Framework of the Case Law of the European Court of Justice").

persons, services, and capital)<sup>69</sup> and for deciding whether European Union institutions' limitations on constitutional rights are justified.<sup>70</sup> Proportionality was also specifically mentioned in art 52.1 of the Charter of Fundamental Rights of the European Union, signed and proclaimed in Nice (France) on 7 December 2000. This article reads:<sup>71</sup>

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

### ***E The Fifth Migration: From European Union Law and European Human Rights Law to the Constitutional Law of all European Countries***

The application of proportionality by the European Court of Human Rights and the European Court of Justice accounts for the migration of this principle to the constitutional law of virtually all European countries. The main reason explaining this migration is the binding force that the judgments of the European Court of Human Rights and European Union law have on the national jurisdictions. On the one hand, European constitutional courts have transplanted the proportionality arguments used by the European Court of Human Rights for protecting European Convention rights to the realm of the national protection of constitutional rights. On the other hand, courts and judges of the member states have taken into account the doctrine of proportionality, as developed by the European Court of Justice, as a means of honouring the principle of supremacy of European Union

---

69 See Jukka Snell *Goods and Services in EC Law: A Study of the Relationship Between the Freedoms* (Oxford University Press, Oxford, 2002) at 194; Jan H Jans "Proportionality Revisited" (2000) 27 LIEI 239; and Stefan Enchelmaier "Four Freedoms, How Many Principles?" (2004) 24 OJLS 169.

70 See the explicit reference to this principle that was made in the Protocol to the Treaty of Amsterdam (Amending the Treaty on European Union, the Treaties Establishing European Communities and Certain Related Acts) on the application of the principles of subsidiary and proportionality [1997] OJ C340/1 (signed 2 October 1997, entered into force 1 May 1999):

... when exercising the competences conferred on it, each institution should guarantee ... that the principle of proportionality is adhered to, according to which, no action by the community shall exceed what is strictly necessary for achieving the goals of the Treaty.

71 On the significance of this article for the protection of constitutional rights within the framework of the European Union, see Martin Borowski "Limiting Clauses: On the Continental European Tradition of Special Limiting Clauses and the General Limiting Clause of Art 52(1) Charter of Fundamental Rights of the European Union" (2007) 1 Leg 197 at 199–240.

law. According to this principle, European Union law that conflicts with the laws of European Union member states is to prevail and to take effect.<sup>72</sup>

As a consequence, proportionality has become a standard for the adjudication of constitutional rights in Spain,<sup>73</sup> France,<sup>74</sup> Italy,<sup>75</sup> Portugal,<sup>76</sup> Belgium,<sup>77</sup> Austria,<sup>78</sup> Greece,<sup>79</sup> Switzerland<sup>80</sup> and,

---

72 On this principle as a reason for the expansion of proportionality, see Jean Marc Favret "La Primauté du Principe Communautaire de Proportionnalité sur la Loi Nationale" (1997) 2 RFDA 389 (translation: "The Supremacy of the European Proportionality Principle over National Law").

73 See Bernal *El principio de proporcionalidad y los derechos fundamentales*, above n 21; Markus Gonzalez Beilfuss *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional* (Thomson-Aranzadi, Madrid, 2003) (translation: *The principle of proportionality in the case law of the Constitutional Court*). The Spanish Constitutional Court began to apply proportionality as it is understood by the German Federal Constitutional Court, the European Court of Human Rights and the European Court of Justice in the judgment [1996] STC No 66. Other leading cases are [1996] STC No 55; [1997] STC No 161; [1999] STC No 136; [2005] STC No 261; [2005] STC No 300; [2005] STC No 327; [2006] STC No 11; and [2006] STC No 90.

74 See Valérie Goesel-le-Bihan "Réflexion Iconoclaste sur le Contrôle de Proportionnalité Exercé par le Conseil Constitutionnel" (1997) 30 RFDC 227 (translation: "An Iconoclastic Reflection on the Proportionality Review Undertaken by the Constitutional Council"). The author makes a distinction between the principle of proportionality that the *Conseil Constitutionnel* applied until late 1990, and the version of proportionality applied in later judgments. Goesel-le-Bihan claims that only in the later judgments is this principle understood as the linked set of the sub-principles of suitability, necessity and proportionality in the narrow sense.

75 An important part of the Italian constitutional literature considers that proportionality is one concrete form of the principle of *ragionevolezza* (reasonableness): see Andrea Morrone "Constitutional Adjudication and the Principle of Reasonableness" in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds) *Reasonableness and Law* (Springer, Dordrecht, 2009) 215; Giuseppe Scaccia *Gli "strumenti" della ragionevolezza nel giudizio costituzionale* (Giuffrè, Milan, 2000) at 348 (translation: *Instruments of reasonableness in constitutional review*); and Gustavo Zagrebelsky *Giustizia Costituzionale* (2nd ed, Il Mulino, Bologna, 1988) at 147 (translation: *Constitutional Justice*).

76 See MA Vaz "O Princípio da Proibição do Excesso na Constituição: Arqueologia e Aplicações" in Jorge Miranda (ed) *Perspectivas Constitucionais: Nos 20 Anos da Constituição de 1976 – Volume II* (Almedina Coimbra, 1996) 323 (translation: "The Prohibition of Excess in the Constitution: Archeology and Applications" in *Constitutional Perspectives: 20 years under the 1976 Constitution*); José Joaquim Gomes Canotilho *Direito Constitucional e Teoria da Constituição* (7th ed, Almedina, Coimbra, 2009) at 259 (translation: *Constitutional Law and Constitutional Theory*); and Anabela Costa Leão *Notas sobre o princípio da proporcionalidade ou da proibição do excesso* (Almedina, Coimbra, 2001) (translation: *Notes on the Proportionality Principle or Prohibition of Excess*).

77 See Gernot Brammer *Das Verhältnismäßigkeitsprinzip nach Deutschem und Belgischem Recht* (Shaker Verlag, Aachen, 2000) (translation: *The Principle of Proportionality in German and Belgian Law*).

78 See Christiana Pollak *Verhältnismäßigkeitsprinzip und Grundrechtsschutz in der Judikatur des Europäischen Gerichtshofs und des Österreichischen Verfassungsgerichtshofs* (Nomos, Baden-Baden, 1991) (translation: *The Principle of Proportionality and the Protection of Constitutional Rights in the Case Law of the European Court of Justice and Austrian Constitutional Court*); and Manfred Stelzer *Das*



most recently, in Eastern European Countries including Bulgaria, Croatia, Lithuania, Slovakia, Slovenia, the Czech Republic,<sup>81</sup> Poland, Estonia, Hungary and Romania.<sup>82</sup>

### ***F The Sixth Migration: From European Union Law and European Human Rights Law to British Law***

Even the British legal system, despite being markedly different from continental European law, has contributed to the convergence in the use of proportionality. It is true that the idea of reasonableness has been a part of British legal culture at least since the nineteenth century.<sup>83</sup> Moreover, since *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* in 1948, a principle of manifest unreasonableness has been adopted as a generally applicable standard in the context of administrative law.<sup>84</sup> According to the traditional interpretation of this principle, judges may override discretionary decisions made by public authorities only if those decisions go beyond a certain irrationality threshold that renders their purpose and their sense incomprehensible. However, only certain aspects of the principle of unreasonableness, under the traditional interpretation, bear

---

*Wesensgehaltsargument und der Grundsatz der Verhältnismäßigkeit* (Springer, Vienna, 1991) (translation: *The Essential Core Argument and the Principle of Proportionality*).

- 79 Proportionality was established explicitly under art 25 para (1) of the Greek Constitution (as amended in 2001), which provides that:

Restrictions of any kind which, according to the Constitution, may be imposed upon these rights [the rights of the human being], should be provided either directly by the Constitution or statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality.

On proportionality in Greek law concerning the protection of constitutional rights, see Sarantis K Orfanoudakis and Vasiliki Kokota "The Application of the Principle of Proportionality in Greek and Community Legal Order: Similarities and Differences" (2007) 4 HREL 691.

- 80 See Ulrich Zimmerli "Schlußwort auf der 112 Jahresversammlung des Schweizerischen Juristenvereins zum Thema 'Das Verhältnismäßigkeitsprinzip im Öffentlichen Recht'" (1978) 97 ZSR 559 (translation: "Conclusions of the One Hundred and Twelfth Conference of the Swiss Association of Jurists on the Topic: 'The Principle of Proportionality in Public Law'"); and Furgler Kurt "Das Verhältnismäßigkeitsprinzip im Öffentlichen Recht" (1978) 97 ZSR 555 (translation: "The Principle of Proportionality in Public Law").
- 81 See Pavel Holländer "Verhältnismäßigkeitsgrundsatz: Variabilität seiner Struktur?" in Jan R Sieckmann (ed) *Die Prinzipientheorie der Grundrechte. Studien zur Grundrechtstheorie Robert Alexys* (Nomos, Baden-Baden, 2006) 179 (translation: "The Principle of Proportionality: Variability of its Structure" in *The Theory of Principles of Constitutional Rights. Studies on Robert Alexy's Theory of Constitutional Rights*).
- 82 See Wojciech Sadurski *Rights Before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe* (Springer, Dordrecht, 2005) at 266; and Wojciech Sadurski "Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?" (2009) 42 Israel L Rev 519.
- 83 On the roots of the idea of reasonableness in British law, especially within the fields of tort law, administrative law and human rights, see Tom R Hickman "The Reasonableness Principle: Reassessing Its Place in the Public Sphere" (2004) 63 CLJ 167.
- 84 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA).

some resemblance to proportionality. Paul Craig is right when he claims that achieving this degree of irrationality would require something quite extreme.<sup>85</sup> As Lord Ackner explained in *Brind*, proportionality is a "different and severer test" than the irrationality standard.<sup>86</sup>

The incorporation of proportionality into British law is a direct consequence of the influence of European Union law.<sup>87</sup> In 1985 Lord Diplock suggested "the possible adoption in the future of the principle of 'proportionality' that is recognised in the administrative law of several of our fellow members of the European Economic Community".<sup>88</sup> Nevertheless, in 1991 in the judgment of *Brind*, the House of Lords made some statements against the possibility of applying the doctrine of proportionality into United Kingdom law. For instance, Lord Ackner said: "Unless and until Parliament incorporates the Convention into domestic law, a course which it is well-known has a strong body of support, there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country."<sup>89</sup>

After *Brind* there was neither a consensus among legal scholars nor among judges on the admissibility of proportionality in United Kingdom law. Despite this, some English judges began to use proportionality. As Craig and de Búrca claimed, this principle was applied during this time, particularly in cases – like *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*<sup>90</sup> and *R v International Stock Exchange, ex parte Else*<sup>91</sup> – in which European Union law was at stake.<sup>92</sup>

---

85 Paul Craig "Unreasonableness and Proportionality in UK Law" in Evelin Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) 94.

86 *Brind*, above n 16, at 15.

87 See Jonathan E Levitsky "The Europeanization of the British Legal Style" (1994) 42 Am J Comp L 347 at 376, where Levitsky notes that "the contemporary introduction of proportionality as a concept in British public law is recent and can be traced directly to the experience of Community membership".

88 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 410 (HL) at 410E.

89 *Brind*, above n 16, at 16. The focus of this case were several directives issued by the Secretary of State for the Home Department placing restrictions on the appearance of terrorists on television, namely, that the voices of the terrorists when making a statement on television would be dubbed by an actor. Seven journalists and a union official applied for judicial review. One of the grounds of the review was that prohibiting terrorists from speaking directly on the screen was disproportionate to the pursued end, that is, the fight against terrorism.

90 *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 2 AC 418 (HL) at 157.

91 *R v International Stock Exchange, ex parte Else* [1992] BCC 11 (Ch).

92 Craig, above n 85, at 89. See also Grainne de Búrca "Proportionality and Wednesbury Unreasonableness: The Influence of European Legal Concepts on UK Law" (1997) 4 EPL 577.

Nevertheless, at the end of the 1990s, the principle of unreasonableness underwent a transformation and experienced a certain revitalisation.<sup>93</sup> In its new form, called "super-Wednesbury", the principle of unreasonableness implied that the courts were to engage in a more severe scrutiny of administrative decisions, namely, in performing an "anxious scrutiny", an "enhanced level scrutiny" or a "rigorous examination".<sup>94</sup> In this sense the super-Wednesbury principle no longer required that the administrative decision be absurd or perverse for the judge to determine that the interference with human rights was justifiable.<sup>95</sup> However, this principle could not guarantee the same level of protection to constitutional rights that proportionality offers. In *Smith & Grady v the United Kingdom*, the European Court of Human Rights found that even this super-Wednesbury test:<sup>96</sup>

... effectively excluded any consideration by the domestic courts of the question whether the interference with the applicants' rights answered a pressing social need or was proportionate to the ... aims pursued.

This decision made clear that the European Convention of Human Rights required the use of proportionality and not only the standard of reasonableness.

The enactment of the Human Rights Act 1998 (UK) strengthened the application of proportionality. This Act allowed for the doctrine of proportionality, consistently used by the European Court of Human Rights, to play a role in the decisions made by United Kingdom administrative authorities and judges. Section 6 of this Act establishes that "it is unlawful for a public authority [the definition of which does not include Parliament] to act in a way which is incompatible with a Convention right".<sup>97</sup> Section 2 requires that United Kingdom courts or tribunals:

... determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights.

---

93 Craig, above n 85, at 95.

94 On the application of the super-Wednesbury test in the field of human rights, see Hickman, above n 83, at 185.

95 On this and other tests of reasonableness in judicial review, see Andrew Le Sueur "The Rise and Ruin of Unreasonableness" (2005) 10 JR 39.

96 *Smith & Grady v United Kingdom* (1999) 29 EHRR 493 (ECHR) at 138.

97 As stated in s 1 of the Human Rights Act 1998 (UK), "Convention rights" means:

... the rights and fundamental freedoms set out in: (a) Articles 2 to 12 and 14 of the [European] Convention [of Human Rights], (b) Articles 1 to 3 of the First Protocol, and (c) Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention.

Because of this requirement the proportionality doctrine of the European Court of Human Rights became more influential for United Kingdom courts and tribunals in the interpretation of the European Convention.<sup>98</sup>

As a result of these developments, in *R v Secretary of State for the Home Department, ex parte Daly* the House of Lords explicitly accepted that proportionality is a principle of United Kingdom public law particularly as concerns the adjudication of European Convention rights.<sup>99</sup> After explaining the differences between proportionality and the principle of unreasonableness, Lord Steyn claimed that it was "important that cases involving convention rights must be analysed in the correct way"; namely, by means of the application of proportionality.<sup>100</sup> The other members of the Committee approved his speech. Since *Daly* many other cases have followed the doctrine stated in this judgment.<sup>101</sup>

### III JUSTIFYING THE MIGRATION OF PROPORTIONALITY ACROSS EUROPE

#### A The Conceptual Necessity of Proportionality

The second Part of this article addresses the question whether there is any justification for the various migrations of proportionality across Europe. It is possible to justify constitutional migrations and constitutional borrowing by means of stronger and weaker reasons.<sup>102</sup> References to natural law<sup>103</sup> and *ius gentium* (the law of nations)<sup>104</sup> provide stronger reasons to justify borrowing substantive constitutional institutions or rights. For instance, that a right is a fundamental natural right, or that there is an emerging world consensus about its moral and legal validity, constitutes a strong reason for a court to borrow it.<sup>105</sup> Weaker justifications point to the engagement of national

---

98 See David Feldman "Proportionality and the Human Rights Act" in Evelin Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) 121. See also Tom R Hickman "The Substance and Structure of Proportionality" (2008) 4 PL 694.

99 *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532.

100 At 28.

101 See generally *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247; *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68; *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100; and *Huang v Secretary of State for Home Department* [2007] UKHL 11, [2007] 2 AC 167.

102 See Perju "Constitutional Transplants, Borrowing, and Migrations", above n 25, at 1324.

103 On the possibility of a natural law justification of this kind, see Roger P Alford "In Search of a Theory for Constitutional Comparativism" (2005) 52 UCLA L Rev 639.

104 On the possibility of a *ius gentium* justification of this kind, see Jeremy Waldron "Foreign Law and the Modern *Ius Gentium*" (2005) 119 Harv L Rev 139.

105 Of course, the strength of this reason depends on the assumption that there is indeed a natural law or a *ius gentium*.

courts in a cosmopolitan dialogue with their peers. Its purpose would be to generate a normative reflection on the appropriateness of their own institutions in light of a comparison with foreign alternatives.<sup>106</sup>

A stronger justification for borrowing proportionality can be drawn from the idea that proportionality is conceptually necessary for the adjudication of constitutional rights. Let me refer to this as the conceptual necessity thesis. According to this thesis, a proposition that is necessarily true about the very nature of constitutional rights is that these rights are applied by means of proportionality. This would mean that wherever and whenever there are constitutional rights, judges will apply them by using proportionality.<sup>107</sup> If the conceptual necessity thesis were true, once constitutional rights are established in a legal system, borrowing proportionality would not only be justified but also unavoidable. If constitutional rights necessarily imply proportionality, it would be impossible to apply them without using this standard. Proportionality would not only be binding to a certain degree; it would be a standard that must be applied. This would also have an impact on the abstract justification of the use of proportionality, particularly as concerns the legitimacy question. The conceptual necessity of proportionality would mean that the use of proportionality cannot be considered as illegitimate. Once a state adopts a charter of constitutional rights and empowers judges to adjudicate them, they would also necessarily be empowered to use proportionality. Therefore, borrowing proportionality would be a necessary consequence of the institutionalisation of constitutional rights.

### ***B Proportionality as a Set of Sufficient and Necessary Conditions of Constitutionality***

There can be at least two versions of the conceptual necessity thesis. A stronger version can be drawn from Aharon Barak's claim that "[a] limitation on a constitutional right ... will be constitutionally permissible if, and only if, it is proportional".<sup>108</sup> This claim is identical to the claim that proportionality expresses sufficient and necessary conditions for the constitutionality of limitations on constitutional rights. Were this claim true, then there would be a double implication of sufficiency and necessity between the proportionality requirements and the requirements for the constitutionality of limitations on constitutional rights. A limitation would be constitutional if and

---

106 See Vlad Perju "Comparative Constitutionalism and the Making of a New World Order" (2005) 12 *Constellations* 464.

107 On an analogous use of the idea of conceptual necessity as applied to the discussion of the nature of law, see Joseph Raz "Can There Be a Theory of Law?" in Martin P Golding and William A Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, Oxford, 2005) 324 at 324–325; and Robert Alexy "On the Concept and the Nature of Law" (2008) 21 *Ratio Juris* 284.

108 Barak *Proportionality: Constitutional Rights and their Limitations* above n 2, at 3. Barak explains further (again at 3) that: "The constitutionality of the limitation, in other words, is determined by its proportionality".

only if it meets the proportionality requirements. Meeting those requirements would necessarily imply the constitutionality of the limitation. Failing to meet at least one of these requirements would be sufficient for the limitation to be unconstitutional. As such, there cannot be constitutional review of limitations on constitutional rights without proportionality. At the same time, all instances and all aspects of the constitutional review of limitations on constitutional rights could be reduced to the proportionality analysis.

The stronger version of the conceptual necessity thesis does not seem plausible. Each one of the sub-principles of proportionality expresses a necessary condition for constitutional limitations on constitutional rights. If a limitation fails to meet any of the requirements expressed by the sub-principles then it should count as a violation of the right; therefore, it should be declared unconstitutional. However, the sub-principles of proportionality neither express jointly nor separately sufficient conditions of constitutionality. Limitations on constitutional rights can be unconstitutional for other reasons, for example, explicit contradiction to the constitutional text or violations of the procedure for their enactment. There are instances of constitutional review of limitations on constitutional rights that neither require nor imply the use of proportionality. Examples are the adjudication of an easy case under concrete rules that, for instance, require certain parliamentary majorities for the approval of limitations on constitutional rights, prohibit torturing prisoners or require arrested persons to be put before a judge in the first 48 hours after the arrest.

### ***C The Necessary Implications between Proportionality, Principles and Constitutional Rights***

A weaker version of the conceptual necessity thesis can be drawn from the ideas endorsed by Alexy, particularly in his article "Constitutional Rights and Proportionality".<sup>109</sup> Alexy does not claim that all instances of constitutional review of rights can be reduced to a proportionality analysis. He acknowledges that there are constitutional rights norms that ought to be applied by means of a legal syllogism. He refers to these kinds of norms as "rules" and distinguishes them from "principles".<sup>110</sup> However, Alexy claims that "there exists some kind of a necessary connection between constitutional rights and proportionality analysis."<sup>111</sup> In spite of the fact that he does not classify this connection as conceptual, some of his assertions provide support for interpreting it, at least in part, as such.

Alexy's argument moves in two steps. First, Alexy claims that there are kinds of constitutional rights norms – principles – which have a necessary connection to proportionality. Principles are

---

<sup>109</sup> Robert Alexy "Constitutional Rights and Proportionality" [2010] China Yearbook of Constitutional Law 221.

<sup>110</sup> On the difference between rules and principles, and their application, respectively, by means of a legal syllogism and balancing, see Alexy *A Theory of Constitutional Rights*, above n 10, at 44; and Robert Alexy "On Balancing and Subsumption: A Structural Comparison" (2003) 16 Ratio Juris 433.

<sup>111</sup> Alexy "Constitutional Rights and Proportionality", above n 109.

"optimisation requirements" demanding that "something be realised to the greatest extent possible given the legal and factual possibilities".<sup>112</sup> According to Alexy, all three sub-principles of proportionality express the idea of optimisation:<sup>113</sup>

Principles *qua* optimization requirements require optimization relative both to what is factually possible and to what is legally possible. The principle of suitability and necessity refer to optimization relative to the factual possibilities. The principle of proportionality in the narrower sense concerns optimization relative to the legal possibilities.

This would establish that there is a necessary conceptual connection between proportionality and principles. The second step of Alexy's argument aims to show that there is also a necessary connection between principles and constitutional rights. If this is accepted then Alexy would have established that constitutional rights conceptually require proportionality; that constitutional rights cannot be adjudicated if proportionality is not employed.

The existence of a conceptually necessary connection between principles and constitutional rights would imply that whenever and wherever there are constitutional rights, necessarily some of them would have the normative structure of principles and must, therefore, be applied by means of proportionality. The existence of this connection would entail something that Matthias Jestaedt has recently rejected, namely, that Alexy's principles theory is a "universal methodological and doctrinal key" to constitutional rights.<sup>114</sup> Jestaedt acknowledges that in some practices of constitutional rights there is indeed a need for balancing.<sup>115</sup> However, in his view this does not lead to the conclusion that constitutional rights are, in essence, principles.

In his reply, Alexy considers that Jestaedt defends a version of what can be called the contingency thesis. According to the contingency thesis, the connection between principles and proportionality on the one hand, and constitutional rights on the other, depends exclusively on the specific decision of the political authorities – above all, the framers of the constitution.<sup>116</sup> Thus, constitutional rights would be principles only if the framers of the constitution shape them as such in the positive law or make compelling the use of proportionality for the adjudication of cases under them.

---

<sup>112</sup> On the concept of "principles", see Robert Alexy *A Theory of Constitutional Rights*, above n 10, at 47–49.

<sup>113</sup> Alexy "Constitutional Rights and Proportionality", above n 109, at 222.

<sup>114</sup> Matthias Jestaedt "The Doctrine of Balancing – its Strengths and Weaknesses" in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, Oxford, 2012) 152 at 159 and 172.

<sup>115</sup> At 159.

<sup>116</sup> Robert Alexy "Comments and Responses" in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, Oxford, 2012) 319 at 332–333.

Alexy opposes the contingency thesis with an argument that supports the weaker version of the conceptual necessity thesis. The argument states that constitutional rights have a dual nature. They are indeed positive law. However, they also bear an ideal nature that "lives on, notwithstanding their positivization". According to the ideal nature they are moral and abstract human rights; "substantive principles" that the constituent power transforms into positive law.<sup>117</sup> As abstract rights that "refer *simpliciter* to objects like freedom and equality, life and property, and free speech and protection of personality", these objects inevitably collide with each other.<sup>118</sup> This explains why the practice of adjudication of constitutional rights must necessarily deal with the collisions between those abstract human rights. Finally, proportionality is necessary to solve those collisions. As such, these reasons concerning the very concept and nature of constitutional rights, as substantial abstract moral principles transformed into positive law, render the use of proportionality necessary to any practice of constitutional rights adjudication.

Alexy's argument gives rise to two concerns. The target of both of them is the second step. Let me call them the ontological concern and the methodological concern. The ontological concern is that Alexy relies heavily on the existence of "substantive principles" behind constitutional rights. Without any doubt, the existence of these substantive principles would prove that there is a necessary conceptual connection between principles and constitutional rights. Moreover, there are linguistic reasons that support the existence of such "substantive principles". That constitutional provisions refer to equality, freedom and due process could provide a reason to assume that there is indeed such a thing as a substantive principle of equality, freedom and due process. They would be the senses or the thoughts of the propositions expressed by constitutional provisions, for instance, in something like Gottlob Frege's third realm.<sup>119</sup> Nevertheless, Alexy's argument can neither convince sceptics that do not believe in this assumption, nor those who are sceptical about the existence of things like pre-positive moral abstract human rights or substantive principles.<sup>120</sup> Current theorists of moral human rights claim that these rights do not exist and that they are only ethical proposals that advance views on what rights ought to be protected by the law.<sup>121</sup> Alexy's argument cannot

---

117 At 333–334.

118 At 334.

119 According to Gottlob Frege, thoughts expressed by propositions have an objective existence. Their existence is independent from the mind. Frege claims that thoughts exist in a "third realm" which is different from both the mental and the physical realms: see Gottlob Frege "Über Sinn und Bedeutung" in Peter Geach and Max Black (eds) *Translations from the Philosophical Writings of Gottlob Frege* (3rd ed, Blackwell, 1980) 56 (translation: "On Sense and Reference").

120 The Benthamite diatribe against natural rights is a famous instance of this skepticism: see Jeremy Bentham "Anarchical Fallacies" in J Bowring (ed) *The Works of Jeremy Bentham: Volume II* (Simpkin, Marshall & Co, London, 1843) 485 at verses 230 and 730.

121 On these theories, see Hillel Steiner "Moral Rights" in David Copp (ed) *Oxford Handbook of Ethical Theory* (Oxford University Press, Oxford, 2006) 459 at 460.



persuade these theorists either. Therefore, an argument that is able to achieve a greater overlapping consensus would be desirable. Such an argument would provide a stronger foundation for a necessity thesis concerning proportionality and, in this way, for the justification of the migration of proportionality.

The methodological concern is that, even if there were an agreement about the existence of substantive principles behind the constitutional rights provisions, it does not necessarily follow from this agreement that the collisions among these rights must be decided through the use of proportionality. There can be, and indeed there are, practices of constitutional review that use alternative methodologies to resolve these collisions. Proportionality is not the only doctrinal tool available for the adjudication of constitutional rights. Alternative standards include: the categorical analyses used for enforcing the rights of the First Amendment to the United States Constitution; the analyses linked to the existence of an absolute inalienable core of rights (*Wesensgehalt*), the so-called internal theories of rights endorsed by some German constitutional doctrine and used by some case law for adjudicating the constitutional rights of the Basic Law; the British unreasonableness test; and some of the equality tests used in United States constitutional law.<sup>122</sup>

The existence of these practices proves that there is not a conceptually necessary connection between constitutional rights and proportionality.<sup>123</sup> There can be, and indeed there is, constitutional rights adjudication without proportionality. This shows that the conceptual necessity thesis does not provide a justification for the migration of proportionality. It is not plausible to claim that it is necessary to borrow proportionality because it must be used in every practice of constitutional rights adjudication.

### ***D The Normative Necessity of Proportionality***

On the basis of an analysis of the six migrations presented in Part III, I would like to introduce an alternative weaker justification for borrowing proportionality. The analysis shows that a variety of reasons can justify each migration. However, there is a common denominator to the different migrations, namely, the use of proportionality for solving various instances of the liberty paradox. Grounded on this commonality, I will argue that proportionality is normatively necessary for the adjudication of constitutional rights and that this necessity outweighs the concerns associated with borrowing proportionality.

---

122 On alternative standards, see Barak "Proportionality and Principled Balancing", above n 20; and Bernal *El principio de proporcionalidad y los derechos fundamentales*, above n 21, at chs 3 and 4.

123 A rebuttal to this claim could be that the practices of adjudication of constitutional rights based on these alternative standards hide or disguise the requirements of proportionality. I cannot pursue this line of argument here. Alec Stone Sweet and Jud Mathews suggest something along this lines concerning the various United States standards for the adjudication of constitutional rights: see Alec Stone Sweet and Jud Mathews "All Things in Proportion? American Rights Doctrine and the Problem of Balancing" (2011) 60 Emory LJ 799.

### 1 *Particular justifications for the migrations of proportionality across Europe*

Different reasons explain why European courts, constitutions and European Union legal treaties borrowed proportionality. What justified the institutionalisation of the politico-philosophical idea of proportionality into the Prussian law applicable to the police force in the first migration was the suitability of these requirements to solve the liberty paradox. They provided a solution for the tension created when, on the one hand, the police force is empowered to limit liberty and, at the same time, liberty ought to be protected from limitations. The solution was that the police force had the power to limit liberty only when it was necessary and only to the extent that it was required.

In the second migration, the omnipresence of the liberty paradox in administrative law justified the spread of proportionality across into this field. Not only the police force but all administrative authorities are empowered to limit individual liberties. Nevertheless, the intensity of every limitation ought to reflect a legitimate purpose and be only extended to what is necessary.

Similarly, the constitutionalisation of the liberty paradox justified the third migration of proportionality. The transformation of liberty into constitutional rights in the German Basic Law and in the subsequent continental European constitutions of the post-war era justified constitutional courts borrowing proportionality in order to offer the highest protection to constitutional rights after the Holocaust. A reputational or legitimacy-generating factor was also present in this, as well as in the fourth and fifth migrations.<sup>124</sup> The German Constitutional Court, the European Court of Human Rights, the European Court of Justice and the other European constitutional courts (such as the Spanish and Portuguese) intended, by using proportionality, to signal their efforts to break with the recent undemocratic past by committing to high-level protection of constitutional and human rights.<sup>125</sup>

Analogous reasons justified the fourth migration. This migration was a consequence of the institutionalisation of liberty in the form of the rights of the European Convention of Human Rights and the four fundamental freedoms of the European Union. In addition, the flexibility of proportionality, which enables judges to take into account the reasons for limiting rights, serves as a justification for its use by the European Court of Human Rights in evaluating whether states had overstepped their margin of appreciation.

Finally, the fifth and the sixth migrations find their justification in the primacy of European Union law and the binding force of the judgments of the European Court of Human Rights. In order to guarantee state compliance with the obligations found in the European Convention of Human

---

124 On this factor as a justification of judicial borrowing, see Perju "Constitutional Transplants, Borrowing, and Migrations", above n 25, at 1321.

125 As Vicki C Jackson highlights, the idea of proportionality captures the aim of achieving justice in the relationship between the exercise of political powers and the liberty of the individuals: see Vicki C Jackson *Constitutional Engagement in a Transnational Era* (Oxford University Press, Oxford, 2009) at 63.

Rights and from the primary and secondary norms of European Union law, national constitutional and supreme courts borrowed proportionality for reviewing limitations on constitutional rights. The courts of Luxembourg and Strasbourg actively enforced this requirement.<sup>126</sup>

## 2 *A common denominator*

These various justifications for the migration of proportionality across different contexts share a common feature. The common feature is the use of proportionality with the purpose of solving various instances of the liberty paradox. This politico-philosophical paradox is instantiated in administrative law, constitutional law, European Human Rights law and European law. In each of these fields the law empowers authorities to limit rights and, at the same time, protects rights from limitations. Judges use proportionality to establish that the law only authorises legitimate, suitable, necessary and measured limitations.

It is undoubtedly possible to employ alternative standards for the purpose of solving the liberty paradox. Categorical analyses and the internal theories of rights interpret the scope of rights in a narrow way, such that political authorities are empowered to undertake any action that does not infringe upon the scope of a right.<sup>127</sup> The absolute inalienable core of rights (*Wesensgehalt*) establishes a zone in every right that cannot be the object of state interference.<sup>128</sup> Finally, the British reasonableness doctrine allows any kind of limitations on rights unless they go beyond a certain irrationality threshold that renders their purposes and their sense incomprehensible.

Thus, a relevant question arises: is there any justification for the fact that European courts borrowed proportionality and none of the alternative standards?

In the remainder of this article, I would like to argue for the proposition that the justification for that fact is that proportionality is normatively necessary for the adjudication of constitutional rights. In order to ground this claim, I will introduce an argument in three steps and present my conclusion:

- I It is normatively necessary to adopt a means if two conditions are met: (1) It is either the only means to an end, or it is the best available means to that end (and the means is not

---

<sup>126</sup> *Lustig-Prean and Beckett v United Kingdom* (1999) 29 EHRR 448 (Section III, ECHR) illustrates this enforcement. For an analysis of this case, see Kumm "What Do You Have in Virtue of Having a Constitutional Right?", above n 15, at 137.

<sup>127</sup> On the adjudication of constitutional rights by means of categorical analysis (with reference to relevant United States literature), see Barak "Proportionality (2)", above n 2, at 752. On the so-called internal theories of rights, see Friedrich Müller *Die Positivität der Grundrechte* (Duncker & Humblot, Berlin, 1990) (translation: *The Positive Nature of Constitutional Rights*) at 23.

<sup>128</sup> For an explanation and critique of this theory, see Alexy *A Theory of Constitutional Rights*, above n 10, at 192.

prohibited); and (2) the end is required.<sup>129</sup> The best available means is the one that achieves the end in the highest degree.

- II The adjudication of constitutional rights takes place under specific circumstances in which judges should pursue certain values (ends) deriving from constitutionalism, deliberative and representative democracy and the rule of law.
- III There are several available standards (means) that judges can use to pursue those values. In comparison to the alternatives, proportionality achieves those values at the highest level.

Conclusion: given that III meets condition I(1) and II meets condition I(2), the use of proportionality is normatively necessary for the adjudication of constitutional rights.

An explanation of II and III runs as follows.

- (i) The circumstances of constitutional rights adjudication

The adjudication of constitutional rights takes place under particular circumstances.<sup>130</sup> Those circumstances include the facts that:

- (1) Constitutional rights are the result of the positivisation of political ideals of freedom and equality in constitutional provisions.
- (2) Constitutional rights provisions are vague, ambiguous and open textured because they are the product of dilatory formulaic compromises, whereby the creators of the constitution postpone a decision in a given matter by using intentionally vague legal terms.<sup>131</sup>
- (3) These dilatory formulae give rise to collisions between competing claims that the jurisdiction needs to solve in the adjudication of constitutional rights.
- (4) From (1), (2), (3), it follows that there might be uncertainty and disagreements on the content and scope of constitutional rights and on the way to solve collisions between them.<sup>132</sup>

---

129 Kant's principle, according to which, "Whoever wills the end must will the means", can provide some theoretical foundations for this concept of normative necessity that I cannot further elaborate here. On this principle, see Immanuel Kant *Critique of Practical Reason and Other Writings in Moral Philosophy* (University of Chicago Press, Chicago, 1949) at 417.

130 These circumstances are analogous to John Rawls' circumstances of justice: see John Rawls *A Theory of Justice* (Harvard University Press, Cambridge (Mass), 1999) at 109. In a constitutional society, there is a continuum between the circumstances of justice and the circumstances of constitutional adjudication. I cannot spell out this continuum here.

131 The concept of "dilatory formulaic compromises" was created by Carl Schmitt: Carl Schmitt *Constitutional Theory* (Duke University Press, Durham, 2008) at 85.

132 Jeremy Waldron "The Core of the Case against Judicial Review" (2006) 115 Yale LJ 1346.

- (5) In a democracy the legislature has the main power to determine the content and scope of rights and solve collisions between them by means of imposing limitations on constitutional rights.
- (6) However, if, at the same time, there is constitutional review, judges are empowered to control constitutional rights limitations in the circumstances of disagreement described in (4); this requires for judges to make choices between the views at stake. This creates an unavoidable tension with (5).
- (7) Judges need to use legal methods such as proportionality, or any of the alternative standards, to ground their choices about the scopes of rights, the collisions between them and the validity of the limitations on rights.

Under these circumstances, it is impossible to imagine an objective standard for the adjudication of constitutional rights, that is, a standard leading to answers that do not give rise to uncertainty and disagreement. This is not only true about proportionality but about all alternative standards. However, this does not imply that all that is left is arbitrariness. In European jurisdictions (and in other countries), the entrenchment of enforceable constitutional rights in a written constitution sits together with the acceptance of constitutionalism, deliberative and representative democracy and the rule of law. These principles imply at least seven values that judges should pursue in the adjudication of constitutional rights. Those values are: rationality; impartiality; non-arbitrariness; predictability; respect for the separation of powers; legitimacy in the way that judges conduct judicial review; and the priority of constitutional rights.

Deliberative democracy implies the values of rationality and impartiality. Deliberative democracy provides an ideal of political legitimacy. Political decisions aiming to solve social coordination and moral problems are legitimate when they are made through a discursive procedure that rationally takes all relevant arguments into account. In this procedure, it is necessary to justify all political decisions and to make them through a public exchange of arguments "offered by and to participants who are committed to the values of rationality and impartiality" in which all those affected by the decision can take part directly or through their representatives.<sup>133</sup> Within this context, impartiality requires giving "adequate consideration to the interests of all concerned parties";<sup>134</sup> and rationality refers to the requirement that a judicial decision should be stated in conceptually clear and consistent terms. Further, the requirements of complete premises, logic, and normative consistency and coherence must all be respected.<sup>135</sup>

---

<sup>133</sup> Jon Elster "Introduction" in Jon Elster (ed) *Deliberative Democracy* (Cambridge University Press, Cambridge, 1998) 1 at 8. See also Amy Gutman and Dennis Thompson *Why Deliberative Democracy?* (Princeton University Press, Princeton, 2004) at 3.

<sup>134</sup> For a discussion on this concept of impartiality, see Troy Jollimore "Impartiality" in *Stanford Encyclopedia of Philosophy* (2nd ed, 2011, online ed).

<sup>135</sup> See Bernal "The Rationality of Balancing", above n 21.

The rule of law implies non-arbitrariness, predictability of decisions by judges and political authorities, the respect for the separation of powers and impartiality. Because of the rule of law, decisions concerning the adjudication of constitutional rights cannot be arbitrary.<sup>136</sup> Consequently, these decisions should be justifiable and, indeed, justified with plausible reasons. Furthermore, they should be predictable so as to enable individuals and authorities to know the law that applies to them. Moreover, they should observe the integrity of the competences of other political powers.<sup>137</sup> In particular, they should be the result of a legitimate exercise of judicial power that respects the margin of discretion afforded to political representatives in making political choices. In a representative democracy, the legitimacy associated with political representation mitigates the uncertainty surrounding what are the most appropriate political choices and the normative and empirical appreciations relevant to them. Finally, aligning with the ideology of constitutionalism, the adjudication of constitutional rights should observe the priority that these rights have over other political collective and individual goods and interests.

(ii) Proportionality as the best standard

This leads us to the final step of the argument. The use of proportionality enables judges to achieve the values mentioned above to a higher degree than can be achieved using alternative methods.

At this point, the argument for the normative necessity of proportionality relies on the abstract justification of its use and the critique of alternative standards.<sup>138</sup> Relevant literature has advanced views on these issues. Proportionality protects the priority of constitutional rights to a higher degree than the United Kingdom principle of reasonableness.<sup>139</sup> Furthermore, proportionality has a rational and transparent argumentative structure that reasonableness lacks.<sup>140</sup> Proportionality is also more impartial and transparent than the categorical and internal theories of rights; it structures an

---

136 On the proposition that the rule of law excludes arbitrariness, with an analysis of relevant literature, see Martin Krygier "Rule of Law" in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 233 at 235 and 241. See also TRS Allan "Constitutional Rights and the Rule of Law" in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, Oxford, 2012) 132 at 137.

137 Allan claims that when the rule of law is interpreted as a principle of constitutionalism, it implies the principle of separation of powers: see TRS Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2003) at ch 2.

138 On these matters, see Barak *Proportionality: Constitutional Rights and their Limitations*, above n 2, at 482–516.

139 As Lord Diplock highlighted in *Council of Civil Service*, above n 88, at 410, unreasonableness requires a kind of irrationality only found in a "decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it." This undermines the priority of constitutional rights.

140 See Barak *Proportionality: Constitutional Rights and their Limitations*, above n 2, at 375 and 460.

argument that openly takes into account all relevant legal, methodological and moral reasons for and against the constitutionality of a limitation on a particular right and also takes into consideration all relevant parties.<sup>141</sup> Accordingly, proportionality allows for informed criticism of judicial decisions. It also prevents arbitrariness as it requires that judges and political authorities justify rights limitations after having taken into account all these reasons and interests.<sup>142</sup> In contrast, categorical and internal theories, and the idea of rights as trumps, focus only on whether the area of freedom limited by the state is covered by a constitutional right.<sup>143</sup> Similarly, absolute theories of the inalienable core narrow the judicial analysis to the question of whether the limitation infringes the core of the right. Conceptual analysis of the language of rights can neither fully account for the scope or core of rights nor comprehend a deliberation with all relevant reasons for the constitutionality of their limitations.<sup>144</sup> Paradoxically, this leads to a decreased protection of rights.<sup>145</sup> Furthermore, proportionality is more respectful of the separation of powers and representative democracy, and enables courts to exercise judicial review in a way that is more legitimate than that afforded by the alternative standards. The structure of proportionality can encompass an analysis of the margins of discretion of political authorities.<sup>146</sup> Moreover, it encourages dialogue between courts, the legislature and the executive.<sup>147</sup> Finally, the practice of proportionality leads to predictable outcomes. Judicial decisions using this standard make up a network of precedents that, by means of spelling out the reasons why certain types of measures are unsuitable, unnecessary or disproportionate in the strict sense, allows constitutional rights to be applied in a consistent and coherent manner.

The normative necessity of proportionality outweighs the concerns associated with borrowing proportionality. Proportionality's normatively necessary connection to relevant values grounded on

---

141 See Kai Möller "Proportionality: Challenging the Critics" (2012) 10 ICON 709 at 717 and 726; Charles-Maxime Panaccio "In Defence of Two-Step Balancing and Proportionality in Rights Adjudication" (2011) 24 CJLJ 109; and Sweet and Mathews "Proportionality, Balancing and Global Constitutionalism", above n 2, at 77.

142 See Matthias Kumm "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4 LEHR 142.

143 Mark Tushnet "Comparative Constitutional Law" in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006) 1226 at 1251.

144 See Alexy *A Theory of Constitutional Rights*, above n 10, at 192.

145 Barak *Proportionality: Constitutional Rights and their Limitations*, above n 2, at 515.

146 For the development of a proportional theory of the margins of discretion, see Alexy *A Theory of Constitutional Rights*, above n 10, at 394; Julian Rivers "Proportionality and discretion in international and European law" in Nicholas Tsagourias (ed) *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press, Cambridge, 2007) 107 at 108; and Matthias Klatt and Johannes Schmidt "Epistemic Discretion in Constitutional Law" (2012) 10 ICON 69.

147 Barak *Proportionality: Constitutional Rights and their Limitations*, above n 2, at 465.

constitutionalism, democracy and the rule of law make it implausible to consider the migration of this principle as undemocratic, or as a judicial strategy to manipulate the meaning of the constitution. Finally, the structural nature of proportionality allows for different conceptions of it that can better adapt to distinct contexts,<sup>148</sup> for the recognition of specific national margins of discretion,<sup>149</sup> and for complementing the use of this standard with other non-incompatible methodologies.<sup>150</sup>

---

148 For example, see a comparison between the Canadian and the German conceptions of proportionality in Grimm, above n 59.

149 On proportionality and specific national margins of discretion, see Julian Rivers "Proportionality and Variable Intensity of Review" (2006) 65 CLJ 175.

150 For a proposal of this kind, see Kumm "What Do You Have in Virtue of Having a Constitutional Right?", above n 15, at 137.



