



Proportionality in Comparative Law

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Proportionality in Comparative Law

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Abstract: Investigations of proportionality's role in contemporary public law are complicated by the way the topic straddles so many binaries familiar within the discipline of comparative law. These include those of substance and form, discourse and practice, 'function' and 'culture', and – perhaps most importantly – similarity and difference. Comparative legal scholarship, this entry argues, will have to grapple with the contradictory tasks of simultaneously investigating and questioning proportionality's (real or purported) hegemony. To this end, the paper presents brief overviews of work concerned with the (1) identification, (2) explanation, (3) interpretation, and (4) critique, of proportionality's global diffusion and 'success'.

Keywords: rights, courts, constitutional law, legal reasoning, culture, technique

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I. INTRODUCTION

Over the past decades and across a wide range of jurisdictions and fields of law, the language of proportions and weights has become perhaps *the* central common vocabulary for scholarly and judicial arguments over rights and powers, justification and legitimacy. But despite this striking discursive prominence, the more practical, material extent of the centrality and reach, in contemporary law and legal thought, of some specific object that we could call ‘proportionality’ is in fact rather difficult to capture. One reason for this is that ‘proportionality’ (*Verhältnismäßigkeit*, *Proporcionalidad*) can refer to a broad array of different yet related and often overlapping artifacts. These range from a strictly formatted legal doctrine to a broad constitutional or philosophical principle, and from a technical knowledge practice to a ‘key symbol’, summarizing or elaborating a background understanding of rights, of judging, or perhaps even of modern law generally (Ortner [1973]). It is very difficult to ascertain, *a priori*, the extent to which, for the purpose of analysis, these different manifestations should be kept strictly separate or rather be seen together, possibly as part of some still broader phenomenon, such as, say, a ‘culture of justification’ or an ‘age of rights’. A second reason is that, in at least some of these different guises, ‘proportionality’ may well be largely constitutive of many of our domestic and cross-jurisdictional contemporary legal worlds. This likely is true, in particular, of proportionality’s most famous contemporary manifestation, as ‘proportionality review’ – the familiar multi-step legal doctrine most commonly used to scrutinize governmental interferences with fundamental rights. ‘Proportionality review’ is an artifact constructed by jurists who, in turn, have cast themselves as participants in transnational legal communities by fashioning ‘proportionality’ into their instrument of choice, and through tacit agreement that they are engaged in, at least more or less, the same activity. In their hands, the language and conceptual tools associated with proportionality have shown an uncanny capacity to colonize and homogenize disparate legal fields and legal systems, and impose the reformulation of legal ‘problems’ and ‘solutions’ in its terms (e.g. Stone Sweet and Mathews [2008] at 162; Cohen-Eliya and Porat [2013] at 8). As a result, many of the general statements one could offer about ‘proportionality’ or ‘proportionality review’ – including, notably, about its apparent ‘reach’ or ‘success’ as a legal doctrine – will often risk further hypostatizing, or even fetishizing, something they merely purport to describe.

All this together makes ‘proportionality’ the kind of subject about which it is ‘easy to say easy things’, to use an expression that Pierre Bourdieu once invoked in relation to ‘the state’. It is the kind of topic for which extreme familiarity and a fear of cliché risk getting in the way of critical scrutiny. And one about which it often feels that we have been told more than we wanted to know, just at the time that we are only beginning to really scratch the surface. In this context, if practical and theoretical work on how to better ‘do’ proportionality review will surely remain important in many settings, there also is a great need for a more reflexive and critical study of the roles, meanings, and effects of ‘proportionality’ in the discourses and

practices that make up contemporary law and legal thought. Key attributes of much comparative legal scholarship, such as an emphasis on situatedness and context, and careful attention to both similarities and differences, should have an important role to play in this refashioning of ‘proportionality’ into an object of critical thought.

II. PROPORTIONALITY’S WORLD

Vicki Jackson and Mark Tushnet open their edited collection *‘Proportionality: New Frontiers, New Challenges’* with the claim that ‘[i]t is unusual in the world of constitutional interpretation for a single doctrine to become both widely used and widely discussed by jurists working in different legal traditions’ (Jackson and Tushnet [2017] at 1). Adopting this perspective, one way of looking at ‘proportionality’ is as a *topos* at the centre of a trans-jurisdictional community of discourse. Discussions within this community typically revolve around a number of further commonplaces. There is a received *narrative* – from supposed Prussian origins to globally successful transplant – and a canonical *form* – the routinized, multi-step review of legitimate aim, suitability, necessity and ‘proportionality-in-a-narrow-sense’. There also are important *core/periphery* distinctions at work, with scholarly analysis typically focused on a relatively limited range of jurisdictions, including Germany, Canada, Israel and South-Africa, as well as the European Court of Human Rights and the Court of Justice of the European Union. And there are the contours of a recognized *canon*, consisting of foundational cases, such as *Lith* and *Apotheken* from the German Federal Constitutional Court (respectively 15 January 1958, BVerfGE 7, 198 and 11 June 1958, BVerfGE 7, 377), and *Oakes* from the Supreme Court of Canada ([1986] 1 SCR 103), and classic scholarly analyses (e.g. Alexy [2002], Barak [2012], Jestaedt and Lepsius [2015]). In a more diffuse way, discussions of ‘proportionality’ also often seem to come with a host of familiar unstated assumptions, notably as to the desirability and effectiveness of judicial power and of the judicial protection of individual rights. And even where these ideas are made explicit and contested, as they certainly are with some frequency (e.g. Webber [2010], Urbina [2017]), the relevant discussions still tend to largely assume that ‘proportionality’ at least is where the action is – that the issues it raises are the issues that matter, and that ‘proportionality’ indeed is both a significant site and a useful lens for grappling with them. This sense of importance and centrality is reflected in Alec Stone Sweet and Jud Mathews’ depiction of ‘proportionality balancing’ as a ‘global, best-practice standard of rights protection’ and a ‘master principle of global governance’, and their forceful claim that it is ‘undeniable ... that the global diffusion of proportionality has altered the constitutional landscape’ (Stone Sweet and Mathews [2019] at 4, 7). Taking all this together, we certainly do seem to live in an ‘age of proportionality’ – one in which our juridical worlds are not just governed through, but also largely made by, proportionality (Jackson [2015]).

Legal academic writing, by constitutional lawyers and legal theorists in particular, has played a central role in consolidating and propagating proportionality review as a unified, central and broadly successful legal doctrine. Key scholarly texts, such as Robert Alexy's theory of constitutional rights, but also teaching and study manuals, such as the influential German textbook by Bernhard Schlink and Bodo Pieroth, have done much to solidify and promote the image of proportionality as a principle and doctrine at the heart of modern liberal democratic legal systems (Pieroth and Schlink [1985], Alexy [2002]). These studies tend to work with some ideal conception of proportionality built up by reference to judicial decisions, to which actual judicial practice in any particular jurisdiction will conform to a greater or lesser degree. Their main interest is in the conceptual and normative exposition and defence or critique of both this practice and the underlying model, typically in terms that are internal to legal analysis, such as, notably, traditional rule of law ideals (e.g. Barak [2012], Klatt and Meister [2012a]). Two more general ideas commonly underly this type of scholarship. The first is the notion that resort to proportionality review is not a matter of judicial choice, but is in some way inherent in the structure of modern constitutional and human rights law. The second is that, as a matter of doctrinal technique, it is difficult to see how the proportionality test, at least in its ideal form, could be bettered – even if its application in practice can, of course, always be refined. The 'age of proportionality', in other words, often appears in some ways as the end of history for legal reasoning – even if the question of whether this end state should be seen as one of legal maturity or tragic loss remains up for debate (Beatty [2004], Kennedy [2011] at 187, Schlink [2012]).

This literature, which, it is important to note, often is as much *part of* 'proportionality', understood as artifact or genre, as it is *about* 'proportionality', leaves a number of key questions unanswered. These include: (1) *Identification and Mapping*: What, exactly, is supposed to have 'spread', or migrated, in recent decades, and where, exactly, is it supposed to have spread to? (2) *Explanation*: What can we say about the legal, cultural, institutional and other forces behind this diffusion, once its object and contours have been identified as precisely as possible? (3) *Interpretation and Critique*: What does proportionality's rise – again with all relevant caveats – mean for modern law and legal theory, and for society more broadly, and how might it be evaluated?

III. IDENTIFICATION AND MAPPING: PROPORTIONALITY, OR PROPORTIONALITIES?

A first puzzle with regard to the contours of the artifact, or artifacts, of 'proportionality', concerns the extent to which proportionality should be understood as a 'single doctrine', as in the Jackson and Tushnet quote above, or whether its various invocations are so diverse as to amount to essentially different things appearing under one label. On one side of this debate, we find references to

proportionality as an element of ‘generic constitutional law’ or a ‘global model’, and as a ‘general principle of constitutional governance, the reach of which is global’ (Law [2005], Möller [2012], Stone Sweet and Mathews [2019] at 194). These affirmations are typically accompanied by caveats that if proportionality review in different settings involves ‘a single evolving template’, it is still applied with ‘many differences in style, presentation and detail’, or that it corresponds to a global ‘lingua franca’ spoken ‘with different dialects’ (Kennedy [2011] at 218-219, Stone Sweet and Mathews [2019] at 81, Grimm [2007]). On the other side are scholars who question whether ‘the same test [is] being applied around the world’ (Kenny [2018] at 539), or at different times in the same jurisdiction (Petersen [2017], Jestaedt and Lepsius [2015]). Most recently, this view has been elaborated by Afroditi Marketou in her subtle investigation of ‘local meanings of proportionality’ in French, Greek, and English law (Marketou [2021]. See also Hailbronner [2015], Bomhoff [2013]).

A second puzzle is related. Recall that the term proportionality typically refers not only to a specific doctrine but also to a substantive principle. Note also that, as an empirical matter, proportionality as doctrine tends to figure alongside other elements of contemporary constitutional law to which it is often thought to be in some way related. Think, for example, of an expansive conception of rights, the notion of ‘horizontal effect’ or a perceived right to ‘justification’; or of doctrines that are thought of as, to some extent, ‘analogues’ for proportionality review yet go by different names, such as ‘*praktische Konkordanz*’ in German law. This, again, makes it very difficult to say where ‘proportionality’ begins and ends. Neither simply taking the technical doctrine in isolation, nor assuming this technique will always necessarily be part of some broader package seems to be appropriate for all instances. And if much is unclear about proportionality’s boundaries, it is, consequently, difficult to determine in any general sense what proportionality *is about*, and to get clarity on what is significant about its invocation or use.

IV. EXPLANATION: LOOKING FOR THE DRIVERS OF ‘SUCCESS’?

If proportionality is probably best seen as – often simultaneously but in varying proportions – *both* an artifact with ‘local meanings’ responding to predominantly local concerns, *and* a common template bound up with global trends (Cohen-Eliya and Porat [2013] at 156), how do we account for its apparent ‘success’, in these interrelated guises? This question has given rise to a substantial and growing literature drawing on a wide range of factors. Some of these are predominantly *internal* to law and legal reasoning. These are the kind of disciplinary, formal, aesthetic, or functional standards that are seen as significant, in some relevant setting, to the assessment of acceptable or attractive forms of legal reasoning. Accounts invoking these factors will often look to the structural features of proportionality reasoning – such as, for example, its perceived ability to synthesize

the more formal and the more pragmatic dimensions of judicial reasoning (Hailbronner [2014], Bomhoff [2013]) – or they could highlight a specific ‘function’ for proportionality review, such as ‘legislative rationality review’, that is seen as part of a legitimate conception of the judicial role (Petersen [2017]). A range of more *external* factors also are commonly invoked. Accounts along these lines tend to focus on the institutional position of the judiciary and on connections between proportionality as a form of legal reasoning and broader political or cultural dynamics. Suggestions that proportionality facilitates ‘dialogue’ and ‘justification’ have been especially pervasive in this area. Cohen-Eliya and Porat’s influential culturalist account, for example, sees proportionality’s rise as ‘intrinsic’ to an ‘emerging global culture of justification’ (Cohen-Eliya and Porat [2013] at 155). More recently, Stone Sweet and Mathews have advanced the claim that adopting proportionality analysis ‘helps judges construct and maintain institutional arrangements that make effective constitutional governance possible’, for example by generating a ‘stable dialogic interface between trustee courts and the officials they supervise’ (Stone Sweet and Mathews [2019] at 195). Notwithstanding this already extensive literature, there are still some significant gaps in our understanding of proportionality’s ‘success’, in both its more local and its global senses. One of these is the absence of an account in terms of political economy, institutions, and culture, able to situate the legal technique of proportionality review in the broader contexts of the ordo- and neo-liberal modes of governing with which its ascent has been roughly contemporaneous. Teasing out connections between judicial uses of proportionality and broader trends described as ‘audit cultures’, or the rise of modes of techno-moral governance, could be useful starting points of the elaboration of such accounts (e.g. Loughlin [2015]; my thanks to Insa Koch for highlighting this angle).

V. INTERPRETATION AND CRITIQUE: WHAT PROPORTIONALITY DOES, MEANS, AND HIDES

To the extent that we can grant proportionality the solidity and centrality of a pervasive – perhaps even hegemonic – legal doctrine and principle, what does its rise mean for contemporary law and legal theory, and how should it be assessed? Perhaps surprisingly, much is still unclear about the ways in which, and extent to which, proportionality has remade our legal orders, legal cultures, economies, or societies. Two sets of questions, in particular, seem important, whose investigation will likely require a mix of fine-grained analyses of local uses and meanings, alongside a search for commonalities and broader trends. First, despite its reputation as a progressive, activist, ‘optimizing’, and perhaps even ‘transformative’ doctrine, we still know rather little about proportionality’s functionality and *effectiveness* - in promoting rights protection, sustaining judicial legitimacy, or facilitating inter-institutional dialogue (e.g. Tsakyrakis [2010], Khosla [2010], Klatt and Meister

[2012b]). If these questions are difficult to answer for any legal doctrine or technique, proportionality poses still further challenges. Because the doctrine is so widely invoked, and because, in many settings, its use has developed in tandem with the broader constitutional or legal order of which it is a part, there is often no easily identifiable baseline or counter-factual scenario that can be used to compare and assess its effectiveness. A second set of questions is more *interpretive*, as it asks what looking at the world through a proportionality lens reveals, hides, and distorts for those working with it. As has been emphasized throughout this entry, these questions are difficult to answer without a firm sense of the kinds of things proportionality does or can do. To give just one example: proportionality's appeal is sometimes explained – and to some degree endorsed – by way of a purported 'magnetism of moral reasoning' (Stacey [2019]). And yet, in other contexts, the language of values in the context of proportionality review appears more as a façade, hiding a much more pragmatic, technocratic, practice of efficiency or rationality review (e.g. Petersen [2017], Marzal [2017], Bomhoff, *forthcoming*). These debates again illustrate the striking range of the elements of proportionality's appeal: moral and managerial, formal and pragmatic, technical and rhetorical – and these not always in the same proportions. In this vast and varied terrain, comparative legal scholarship in coming years will have the difficult and contradictory tasks of grappling with what proportionality's hegemony has done to our legal and constitutional orders, and to our legal and constitutional imagination, while simultaneously keeping all the premises underlying these questions, and all the terms they rely on, under careful review.

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